

SPECIAL REPORT

BY THE

Commissioners Appointed to Revise the
Public General Statutes
of Canada



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Although not required by the Order in Council appointing them so to do, your Commissioners feel it incumbent on them to make a special report upon certain of the statutes, and also to make observations upon some matters which time and again have pressed themselves upon their attention, while studying the statutes for the purpose of this revision.

CRIMINAL CODE

The major portion of this report deals with the Criminal Code. This will occasion no surprise, when it is remembered that criminal law constitutes fully one-eighth of all the public law of Canada.

As the peace and welfare of every community has its firm basis, in the observance of law and order by the people, the history of criminal jurisprudence in the British Empire shows that more attention has been paid to crimes and offences and the administration of criminal law than to any other matter in which sovereign authority has been exercised, whether by the Sovereign acting alone as in the early days, or by the Sovereign legislating along with his parliament in more recent years.

It has been pointed out that every system of municipal law consists of two parts,—

1. Substantive law which comprehends the definitions of civil rights and obligations, and
2. Penal laws, the office of which is to prevent certain grave infractions of such rights and obligations, by the infliction of punishment on those who offend, in order, by example, to deter others from offending.

COMMON LAW AND STATUTORY CRIMES

Crimes are of two kinds,—

1. Those which at common law are deemed crimes, and
2. Those which have been made such by statutory enactment.

As to the first class—crimes at common law—these form the *unwritten criminal law*, and are to be extracted from the decisions of the courts, and the principles to be collected from the early text writers. The decisions are dispersed through the reports reaching back to the earliest periods of the judicial annals of England. We find, however, that contradictory principles exist in the Common Law, and this might be expected, when we remember that “the Common Law is composed of a great body of rules growing out of ancient customs and manners which have been from time to time modified and restricted by exceptions founded on different and often contrary principles, so that the old reasons of the law are neither wholly retained nor wholly abolished, and its general principles adapted to different periods of society are often at variance with each other.”

In addition to the criminal offences known and punishable at Common Law, statutes affecting the criminal law have, in all ages, been passed, much more to meet present emergencies and transitory circumstances than with a view to improve the law in general. They have been made, to use the language of Lord Bacon, “in the spur of times,” and very frequently without much consideration whether the Common Law was not sufficient without them. The consequence has been an accumulation of particular laws, without system or principle, and many of them at variance with each other and the Common Law. A proceeding which the same author characterizes as “a continual heaping up of laws without digesting them, which maketh but a chaos and confusion and turneth the laws many times to become but a snare for the people.”

HISTORY OF CODIFICATION

Under these circumstances, an agitation started in England, about one hundred years ago, to have the criminal law codified. A Royal Commission made eight reports during the years 1833, 1836 and 1837, and there was a further Commission in 1845 which made five reports. This last Commission drafted a Bill, which was introduced by Lord Brougham, in the House of Lords, but it was not proceeded with. Another Bill was introduced by Lord St. Leonards in 1852. This was referred to a Commission of Law Lords, which reported unfavourably, although much of the material was incorporated in the Imperial Legislation to be found in 24-25 V, cc. 94-100.

The main objection to these Bills was what was styled "lack of elasticity," meaning thereby that the courts were deprived of the power to adjust the law to changing circumstances by their decisions on particular cases.

The answer of the Commission was, that all the word "codification" meant was the reduction of the existing laws into an orderly system, freed from needless technical obscurities and other defects, which the experience of its administration had disclosed.

The Criminal Code of Canada had its immediate origin in the code adopted by Parliament in 1892 (55-56 V, c. 29). The Act was prepared in the Department of Justice, when Sir John Thompson was Minister of Justice. Its framework was copied from the code drafted by a Royal Commission in England which reported to Parliament in 1878, the main member of which was Sir James Fitzjames Stephen, a high authority on criminal law.

This last report of 1878 was accompanied by a draft bill, which was introduced into Parliament by the Government of the day, in 1880, but never became law owing to the powerful attack of Lord Chief Justice Cockburn, in a series of open letters to the Attorney General, published in the *London Times*. The principal criticism was against the definitions of criminal offences.

In introducing his Bill (Hansard 1892, Vol. 1, p. 1379), Sir John Thompson said:—

"I would further explain that the Bill aims at a codification of both common law and statutory law, relating to these subjects, but that it does not aim at completely superseding the common law, while it does aim at completely superseding the statutory law relating to crimes. In other words, the common law will still exist, and be referred to, and in that respect, the code, if it should be adopted, will have the *elasticity* which has been so much desired by those who are opposed to codification on general principles."

The contents of the Canadian code, however, were mainly taken from the various Acts dealing with criminal law and procedure, at that time contained in the Revised Statutes of Canada of 1886. So far as procedure was concerned, this part of the Code was based largely upon the procedure which had grown up in process of time in the old province of Upper Canada, and many of the references to the courts of justice, particularly the inferior courts, including magistrate tribunals, required familiarity with the jurisprudence in the province of Ontario to understand their

application. This difficulty has continued down to the present time, is to be found in the Criminal Code of 1906, and will be discussed later on in this report.*

NUMBERING OF PARTS AND SECTIONS

An initial matter to be determined in revising the Code of 1906, was the question of renumbering the old sections where many new sections had been added since the last revision. If all these were to be given separate numbers, it was obvious that the old numbering must disappear, and magistrates and others familiar with the old Criminal Code would be for some time at loss to find the sections where the old law has been reproduced. Again, many of the provinces in their legislation referred to sections of the Code by parts or numbers. By a new system of numbering, these would be inapplicable and tend to create much confusion, requiring in some cases legislative amendments. The importance of this was emphasized by some of the provincial law officers.¹ On the other hand, it was clear that to retain the old numbers would require incorporating the amendments into sections with which they were, more or less, cognate, but would not permit of as scientific drafting as could be obtained by making new sections. Between the two methods it was thought wiser to adopt the second system and retain the old numbers, so far as practicable; where possible insert amendments as subsections, and where necessary put two of the old sections into one, so as to permit the insertion of a new section where the amendments could not be correlated to any of the old ones. It is believed in the final result that the end desired has been fairly well attained, and that the cases where the numbers of the old sections have been changed are few and relate to matters which seldom have to be considered by magistrates and others who have to do with the administration of the criminal law.

CRIMINAL LAW IN ALBERTA

Another matter which has occasioned a great deal of correspondence and which was finally found impossible of remedy without legislation, has been the application of sections of the North West Territories Act, chapter 50 of

*In a report made in February, 1906, signed by Sir Henry Strong, formerly Chief Justice of Canada, and chairman of the Statute Revision Commission of 1902, addressed to Sir Charles Fitzpatrick, at that time Minister of Justice, the criticism made by Chief Justice Cockburn is approved and applied to many sections of the Canadian Criminal Code. See Appendix F80 hereto.

¹See Appendix A.

the revision of 1886, which forms a part of the criminal law and procedure of the province of Alberta.

The Criminal Code of 1906, by section 9, provides as follows:—

“except in so far as they are inconsistent with the North West Territories Act and amendments thereto, as the same existed immediately before the first day of September, 1905, the provisions of this Act extend to and are in force in the provinces of Saskatchewan and Alberta, the North West Territories, and except in so far as inconsistent with the Yukon Act, the Yukon Territory.”

The Alberta and Saskatchewan Acts respectively, chapter 3 and chapter 42 of the Statutes of 4-5 Edward VII, by section 16, provide that in the two new provinces, the procedure in criminal matters then obtaining in the Supreme Court of the North West Territories, should continue to apply to the new Supreme Court to be substituted therefor, and that the Governor in Council might at any time declare all or any part of such procedure to be inapplicable to such Supreme Court. By a proclamation of the Governor in Council, dated August 30, 1907, pursuant to this provision, it was declared that sections 65 to 76, both inclusive, and sections 78 to 80, both inclusive, of the North West Territories Act, chapter 50 of the Revised Statutes of 1886, as amended prior to the first day of September, 1905, were inapplicable to the Supreme Court of Saskatchewan. No such proclamation was made in respect to the province of Alberta.

A number of grave problems have arisen in Alberta, particularly in the application of Part XVIII dealing with speedy trial of indictable offences without a jury, in view of the continued existence of the above sections of the North West Territories Act. For this reason it was suggested in correspondence with Chief Justice Harvey of the Supreme Court of the province, as a solution, that the province should follow Saskatchewan in this respect, and have a proclamation of the Governor General declaring the North West Territories Act no longer applicable to that province. The Chief Justice was opposed to this saying

“notwithstanding the objection of the lack of uniformity, I think it would be a step backward to abolish our whole provisions of criminal procedure for the purpose of adopting those of the older provinces. Some modification may be desirable, but I think the simplicity of our system tends to the expeditious and cheap administration of justice to at least an equal degree of efficiency with that in any of the other provinces. I am not

anxious to see the jury system made applicable to all classes of criminal charges. It will take the sittings much longer, be much more expensive, and I think will result in more miscarriages of Justice. You suggested that you thought it would require new legislation to meet the difficulties I had pointed out, but surely the Commission has power to restore to the revised statutes an act which has been omitted, but which is still in force."

The difficulties which faced the Commission in trying to meet the conditions in Alberta by altering the language of Part XVIII are fully set out in the correspondence to be found in the Appendix B, where also will be found a copy of the sections of the North West Territories Act in question, as amended, and as it appears in Volume 4 of the Revised Statutes of Alberta, 1922.

FRENCH VERSION

Probably nothing in connection with the Revised Statutes of Canada of 1906 caused more adverse comment than the French version for use in the province of Quebec. So poorly was this work done that amendments had to be made from time to time by Parliament. In undertaking the present revision, the Commission determined to make a special effort to have the work so well performed that no reasonable criticism could be made. Two specially qualified men were first secured, but it became apparent, before a great while, that the staff would have to be largely increased if the French version was to be ready any where near the time when the English version became effective.

It was thereupon determined that the first step would be to prepare a translation of the English text of each statute by consolidating the French version of the original Act with subsequent amendments as they originally came from the King's Printer. This would form the basis of the French text, and be revised, corrected and made to conform with the new English draft by a competent member of the translation staff of the Senate and House of Commons. Each statute, when drafted in French, was then to be forwarded along with the English text to the two specialists, where it was intended and expected that the French text should receive its final form and expression, and be in a state to be handed to the King's Printer to be set up in type. This method was carried out for some months, but was found to be unsatisfactory, as the experts themselves had difficulty in agreeing upon the best language to be used in expressing the ideas contained in the English text.

In any event, it was clear that an interminable delay would arise if this system were continued, and that the French version would not be ready for some years after the statutes had been promulgated in English. In the final result it was decided that three translators should be selected from the parliamentary staff, under the presidency of Mr. Ouimet, and that the French version should be entirely in their hands. It was thought that the obligation resting upon the Commission with respect to the French version should be deemed as satisfied, if the work was entrusted to men whom Parliament found competent to translate the annual statutes. The work has gone along satisfactorily under the new system.

CRIMINAL APPEALS

Prior to the statute of 1923 (13-14 Geo. V, c. 41) which repealed sections 1012-1023 of the Criminal Code, the Crown had the same right as the prisoner to obtain a review of the judgment of the trial court on a question of law arising on the trial, or on any of the proceedings preliminary, subsequent or incidental thereto. No similar provision was contained in the substituted sections which provided for appeals.

The legislation had its origin in a motion made in the Senate by a private member in 1921, approving of the establishment in Canada of a court of criminal appeal, with jurisdiction similar to that possessed by the court of criminal appeal in England. This motion was discussed, but no action taken. In the next Session, it was followed by a bill having the same object, which was fully discussed and given a second reading, but not further proceeded with.

In 1923 a similar bill was introduced in the Senate when it was admitted the bill did not permit of an appeal by the Crown in case of an acquittal, because there was no provision for it in the English Act.* This bill received a second reading. When Bill 102 of the House of Commons to amend the criminal code came before the Senate, the provisions of the Senate Bill were added to it, and Bill 102 as so amended, was adopted by the Commons without discussion.

A Bill was introduced at the last session of the House amending the statute in this regard, but Parliament adjourned without the Bill becoming law. In view of the

* Senate Hansard, Session 1923, at page 64.

importance of the subject, correspondence received by the Commission with respect to criminal appeals will be found in Appendix C to this report.

ULTRA VIRES LEGISLATION

It will be noticed that the Commission has reproduced certain sections of the Criminal Code which have been declared *ultra vires* of the Parliament of Canada, by the Judicial Committee of the Privy Council.

This applies to section 508 (c), which makes it a criminal offence to carry on the business of insurance without a license from the Minister of Finance. This section of the statute was declared *ultra vires* in the case of the Attorney General for Ontario v. Reciprocal Insurers, the Attorney General for Canada being intervener reported in (1924) Appeal Cases, p. 328. Similarly there has been reproduced old section 1025 of the Criminal Code, which provided that "Notwithstanding any Royal prerogative, or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority, by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard." This section was declared *ultra vires* in the case of Nadan v. The King (1926) Appeal Cases, p. 482.

The statutes of 1924, chapter 65, which provides for the revision of the statutes, says: "The commissioners may make such alterations in their language as are requisite in order to preserve a uniform mode of expression and may make such minor amendments as are necessary to bring out more clearly what they deem to be the intention of Parliament, or to reconcile seemingly inconsistent enactments."

The statute, however, also provides as follows: "Whereas it has been found expedient to revise, classify and consolidate the Statutes of Canada," and after providing for the appointment of the Commission for that purpose, and the preparation of a roll embodying their report, by sections 4 and 5, declare the statutes contained in the roll shall come into force and have effect as law, by the designation of "The Revised Statutes of Canada, 192..."

In deference to the view expressed by the Department of Justice, that it is beyond the power of the Commission to eliminate from the revision any unrepealed statute, even when declared *ultra vires* by the Privy Council, these sections have been retained.

METHOD ADOPTED BY COMMISSION

In the report of the Imperial Royal Commission of 1878 on the Criminal Code, it is said that the first step taken by the Commission on its appointment was to request Her Majesty's Judges, the Chairman of the Quarter Sessions, Recorders and members of the Bar and others having practical experience in the administration of the criminal law to forward any suggestions which might occur to them on any subject within the scope of the Commission.

Following this precedent, an invitation was sent to Deputy Attorneys General, Crown Attorneys and Judges throughout Canada, requesting criticisms and suggestions regarding the existing statutes affecting the Criminal law, to which there have been numerous replies. Extensive correspondence was carried on with officers of the Crown, which has been utilized in redrafting parts of the Code, especially Part XVI, which deals with the summary trial of certain minor indictable offences. Many of their suggestions, however, could only be carried into effect by legislation. Other criticisms are directed to provisions of the Code, which are by no means clearly expressed and which have given rise to considerable differences in judicial interpretation. This can be illustrated by a few extracts from the correspondence:—

The Hon. Mr. Justice Beck of Alberta, says:—

“ I suggest that sections 773-7 of Part XVI be entirely redrafted. A mere reading of these sections and the decisions under them, some of them quite recent, attempting to reconcile and interpret them, sufficiently fortifies this suggestion.”

Chief Justice Brown, of Regina, points out:—

“ The necessity of making Part XVI clearer in indicating what offences may be tried summarily by consent and without consent.”

The late Hon. Charles A. Stuart, of Edmonton, says:—

“ I beg to say that the portion of the Criminal Code which seems to me most in need of revision is that contained in section 773 and following sections. Our court has had great difficulty in construing these sections as

will be seen by reference to *Rex v. Kramer* (1924) 1 W.W.R.; *Rex v. Harycka* (1924) 2 W.W.R., 723; *Rex v. Crawford* (1924) A.L.R., 204, 20 Can. Cr. Cas., 49; *Rex v. Babiuk* (1924) 3 W.W.R., 858."

Similar criticisms have been received from Chief Justice Harvey of Edmonton; E. Bayly, K.C., Deputy Attorney General, Toronto; Eric Armour, K.C., and other leading counsel.

As Part XVI has been the subject of the strongest adverse criticism of any portion of the code, at an early stage of the revision, this was redrafted and accompanied with an explanatory note in English and French, was sent to all the law officers of the Crown in Canada. In this pamphlet it was said:—

"The present draft is based on the theory that Part XVI is intended to make provision for the summary trial of certain indictable offences of a more or less minor character, set out in section 773, and also for the summary trial of certain indictable offences, intermediate in character between these and the more serious offences, the trial of which is especially provided for by article 583 of the Code. These offences of the intermediate type are such as normally would be tried at the sessions of the peace, but by this part are placed within the jurisdiction of certain magistrates, who are either lawyers, or persons who are supposed to have higher judicial qualifications than the ordinary justice of the peace. A clear line of demarcation is drawn in this part between a trial with the consent of the person charged and a trial without such consent.

Accordingly the offences are divided into two classes,—

1. Those which can be tried under this part only with the consent of the accused, and
2. Those which can be tried without such consent.

In the next place as regards those which can be tried only with consent these are separated into two classes,—

1. The minor offences mentioned and described in section 773;
2. The offences of a graver character which may be tried either by a police or stipendiary magistrate," etc.

The pamphlet concluded by stating that any suggestions or criticisms would be welcomed. Many replies were received which were carefully considered and reviewed by the Commission and the final result of the draftsman's work is to be found in the text. Very little criticism was

made to the first draft of Part XVI, while approval was expressed by the Attorney General's Department of some of the provinces.¹

It is proposed in Appendix F to take up the sections of the code clause by clause, and where material changes have been made in the language reproduce the old section, give the reasons for the changes, and where suggestions and criticisms have been received with respect to the old sections which the powers of the Commission are not adequate to deal with, shortly state the same and set out the correspondence in full.

For some years the Canadian Bar Association has had a committee investigating the subject of the administration of criminal justice in Canada. Its reports and the discussions thereon are to be found in the printed proceedings of the Bar Association for the years 1923, 1924, 1925, and 1926, and the subject has been also reported upon by special committees of provincial bar societies.

In one of the reports it is said:—

“Since 1892, the Code has been amended year after year, here and there, something added to one section, something taken from another, with many entirely new sections and even new statutes of a criminal nature added. One is reminded of an ancient edifice to which additions have been made, planned by many architects and carried out with little regard to the appearance of the completed structure. The so-called revision of 1906 was a consolidation rather than a revision. We therefore recommend that representations be made to the Minister of Justice urging upon him the necessity of a complete revision, and would suggest the appointment of a board of not more than three members of the bar with large experience in the actual practice of criminal law, who should be allowed at least a period of two years for the task, that they communicate with judges, magistrates, lawyers and others, and visit all parts of Canada.”

The *Canadian Bar Review* (January, 1927), referring to the Commission, says:—

“The work of the Commission therefore will not touch the many changes in the present law which have been asked for from all parts of Canada in communications with the Justice Department. The time would seem to have arrived when a new commission should be appointed with power to take evidence, etc. “If such a

¹See Appendix D.

Commission is appointed it is essential that the members should be lawyers or judges, familiar with the administration of the criminal law, so that their report would have such weight that a Bill incorporating its provisions may pass the Houses of Parliament with little or no criticism."

The members of the Commission believe that the material contained in Appendix F is well worthy of preservation, and will prove of great service if hereafter the Government deem it in the public interest to undertake the preparation of a new code, which may satisfy the law officers of the Crown in the different provinces, whose duty it is constantly to administer and apply criminal law, in the preparation of which they have had no part, and to amend which, they have no constitutional authority or power. In the opinion of your Commission, this is one of the weaknesses of our constitution, a weakness inevitable where the Dominion alone is empowered to declare what shall be the criminal law, and where its administration is relegated solely to the province.

COURTS OF GENERAL OR QUARTER SESSIONS OF THE PEACE

Section 777 of the Criminal Code in the Revised Statutes of 1906 (now 774) confers jurisdiction upon police and stipendiary magistrates over offences for which the accused might be tried at a Court of General Sessions of the Peace, but in most of the Provinces this Court does not exist, and the reference to such a tribunal in the Code has often created great difficulty.

Recently the late Mr. Justice Stuart of the Supreme Court of Alberta, in a judgment in the case of *Rex v. Babiuk* (1924, III W.W.R. 860), says:—

"Section 777 clearly must be taken to stand by itself as a special code. It does not deal merely with offences specified in section 773, it is based upon the jurisdiction of the Court of General Sessions of the Peace in Ontario. Just why the people of other provinces should have to refer to the condition of affairs in that particular province in order to ascertain the extent of the jurisdiction of their city police magistrate may be a question."

It has been thought desirable, and conducive to a better understanding of the code, to trace the origin of our Canadian courts administering criminal law, particularly the inferior courts, and that, with this historical background, the extent of their jurisdiction would be more clearly defined and understood. This has been done in Appendix G hereto.

It is apparent that a general reference in the Code to the Court of General Sessions of the Peace is quite inappropriate, as it implies that this court is part of the judicial machinery in all the provinces of Canada, whereas, except nominally, it appears to be retained only in the province of Ontario. The history of R.S.C., 1906, chapter 146, section 777, make it clear that it is the offences cognizable at sessions in the province of Ontario, which are intended to be covered by the reference in this section. Accordingly in the new section 774 the offences are specifically described by including therein all indictable offences except those set out in section 583.

POLICE AND STIPENDIARY MAGISTRATES

Appendix E contains some correspondence with the Attorney General's Department of Ontario with respect to the jurisdiction of police and stipendiary magistrates, and sets out the reason the Commission had when, in re-drafting Part XVI, it made uniform the penalties for the offences mentioned in sections 773 which could be imposed by all magistrates exercising jurisdiction under that Part.

Police or stipendiary magistrates as they are sometimes called and as the latter term implies, are paid a salary or stipend, varying in amount according to the size of the municipality over which their jurisdiction extends. The appointment is made by the provincial government. The incumbent need have no legal qualifications whatsoever. More recently police magistrates have been given jurisdiction in counties outside of the cities, and the number of them throughout Canada is somewhat startling. Ontario has over 200, Manitoba 550, of which the returns to the Statistical Bureau show that about 200 are active. Nova Scotia has 250, while the returns from New Brunswick simply show that the number of justices of the peace, police and stipendiary magistrates runs into the thousands. The returns for the other provinces of Canada no doubt would show a similar condition.

An historical review of the administration of criminal justice in Canada shows that during the last half century a revolution has slowly but surely taken place, whereby the function of the jury has been displaced and jurisdiction in all but the most serious indictable offences has been conferred on police magistrates who have been substituted for that ancient tribunal, the Court of General Sessions of the Peace, when the accused consents to be tried by the police magistrate.

The report of criminal statistics for 1925 shows that only 5 per cent of the indictable offences were tried by a jury, and that police magistrates who need not be, and generally are not lawyers, disposed of 79 per cent of the indictable offences, whereas only 16 per cent were tried by a judge without a jury. It is interesting to trace the growth of this new tribunal for administering the criminal law of Canada. It well exemplifies the old adage "Great oaks from little acorns grow."

The first step was in the year 1857, when by 20 Victoria, chapter 27, an Act was passed by the Legislative Council and Assembly of Canada intituled an Act for Diminishing Expense and Delay in the Administration of Criminal Justice in Certain cases, whereby jurisdiction was conferred upon recorders in cities and police magistrates in Upper Canada, when the accused consented thereto, in the cases of larceny, where the value of the article stolen did not exceed five shillings and attempts to commit larceny. A year later by 22 Victoria, chapter 27, an act was passed to extend the previous act, and which recited that it had been attended with great benefit. It now was made to cover assaults and vagrancy offences and the cases now found substantially in section 773 of the Code. The consent of the accused was required except in the vagrancy section, where jurisdiction was absolute without consent.

After Confederation, it was deemed advisable to make uniform provisions for these minor offences, in all the provinces, and the Act 32-33, chapter 32 was passed in 1869. By this Act, the powers conferred upon recorders of cities in the old province of Canada were extended in the provinces of Ontario and Quebec, under the interpretation of the word "magistrate" to include a judge of the county court, a justice of the peace, a commissioner of police, a judge of the sessions of the peace, a police magistrate, a district magistrate or any other functionary or tribunal invested with the power of a recorder and any functionary having power alone to do such acts as are usually required to be done by two or more justices of the peace, while as regards the provinces of Nova Scotia and New Brunswick, it was provided that the expression "magistrate" should include a commissioner of police or any functionary tribunal or person invested with power to do alone such acts which are usually required to be done by two or more justices of the peace.

In 1875 by 38 Victoria, chapter 47, jurisdiction was given in Ontario to police or stipendiary magistrates to try with the consent of the accused, and impose the punishment provided by statute, *all* offences ordinarily triable at

General Sessions. In other words, they were given the jurisdiction over all the offences which otherwise were within the jurisdiction of the county court judge sitting as chairman of the General or Quarter Sessions of the Peace.

In 1900 by 63-64 Victoria, chapter 46, the same power is given to police and stipendiary magistrates and recorders in *all* cities and towns throughout Canada.

By the Revised Statutes of 1906, jurisdiction over the offences referred to in section 773, except in the two cases above mentioned, could be exercised only *with the consent of the accused* in the provinces of Ontario, Quebec, Nova Scotia, New Brunswick and Manitoba, while in British Columbia, Prince Edward Island, Saskatchewan, Alberta, the Northwest Territories and the Yukon Territory (subject to the qualifications set out in section 776) the jurisdiction could be exercised *without* the consent of the accused.

Finally in 1909 by chapter 9, the jurisdiction of police magistrates in cities having a population of not less than 25,000 was made absolute without consent of the accused, in cases of a person charged with theft, or obtaining property by false pretences or unlawful receiving stolen property where the value of the property did not exceed \$10.

It is worthy of note that a committee of the Canadian Bar Association has reported against the extensive jurisdiction conferred on police and stipendiary magistrates. In the volume of proceedings of 1923, it is said at page 400 the following amendments to the criminal code and other statutes and new laws are recommended:—

“TRIALS BY JUDGES OR MAGISTRATES TRAINED IN LAW

“An amendment to section 777 of the Criminal Code should be made, providing that all indictable offences should be tried only by a judge or magistrate who has been at least five years a barrister at law; the power now vested upon consent, in magistrates untrained in the law appears to be too great.”

The result of this transfer of jurisdiction from the old Court of General or Quarter Sessions of the Peace to police or stipendiary magistrates, has been to deprive county court judges of the work which formerly devolved upon them as chairmen of the Court of Sessions. The demand which has been made on the one hand, to have the number of county court judges reduced, and on the other hand, to increase their salaries, may possibly be met by reinstating this venerable tribunal so that all indictable offences over which the session has jurisdiction, many of

them of a serious nature and involving often many years imprisonment, would be tried by judges who know something of legal principles, legal procedure and the rules respecting the admissibility of evidence in courts of justice. This would still leave jurisdiction in police magistrates over the one hundred and fifty thousand non-indictable offences which the returns to the Dominion Bureau of Statistics show were disposed of in the year 1925.

The rapidity with which this change in the administration of criminal law has come about has been owing no doubt largely to the celerity with which offences have been tried and disposed of, and any transfer of jurisdiction would require to be accompanied by some new legislation which would provide for a continuous sitting of the county court judge as a Court of General Sessions of the Peace wherever required.

SUPERVISION OF LEGISLATION

The Commission, in the course of its labours, has frequently had its attention called to the lack of skill or even care disclosed in the drafting of legislation, owing to the fact that the language of the Bills introduced into Parliament have not, before they were crystalized into statutory form, been submitted for revision to a person skilled in drafting legislation and having power to make such changes in the language used as might be necessary to carry out with clearness and precision, the intention of the members responsible for their introduction.

The Commission would recommend that provision be made by Parliament requiring that all legislation be subject to the supervision in this regard of a Counsel on Legislation attached to the Department of Justice.

DEPARTMENTAL ACTS

Your commissioners invited the Departments of the Government to send representatives to meet them when statutes in which they were interested and where they could give assistance, were under consideration. From this source valuable information was received, although much of it could only be utilized through legislation by Parliament.

Special mention also should be made of representations contained in a memorandum furnished by the Canadian Merchants Service Guild of British Columbia, and letters from the Canadian National Railways and the Coile Towing Co. Ltd., respecting amendments that should be made

to the Canada Shipping Act. We find that a new Act would be welcomed by the Department of Marine and Fisheries, and would recommend the same.

John D. Falconbridge, K.C., Dean of the Osgoode Law School, has favoured the Commission with suggestions for changes in the Bills of Exchange Act and the Bankruptcy Act, which have received due consideration, and in cases where they were approved and were within the powers of the Commission, they have been adopted.

WORK OF THE COMMISSION

In concluding this special report your Commissioners desire to point out that the Commission has completed its labour in less than four years from the date of the Order in Council bringing it into existence; that at no time has it consisted of more than six members; that the statutes revised consisted of the revised statutes of 1906 and twenty-one annual statutes, 1907-1927, both inclusive, and that the new revised statutes covered by their report will require considerably more than four thousand printed pages.

For the purpose of comparison it may also be said that the revision of 1906 occupied over four years; the Commission consisted of eight members; it revised the revised statutes of 1886 and twenty annual statutes, and the completed work was contained in less than three thousand printed pages.

C. FITZPATRICK, *President*.
E. R. CAMERON, *Vice-President*.
F. R. McD. RUSSELL.
L. A. RIVET.
ALEX. MACGREGOR.
E. J. DALY.

To the Honourable
ERNEST LAPOINTE,
Minister of Justice of Canada.

APPENDIX A

A 1

DEPARTMENT OF THE ATTORNEY GENERAL
TORONTO, February 11, 1924.

My DEAR MR. NEWCOMBE,—Referring to your letter of the 8th of February to me, in connection with the revision of the Statutes that is now going on, I should like to call your attention to the Criminal Code. Part XVI of the Code from a practical standpoint is in a confused and unsatisfactory condition, and I shall be very glad to write to you or to the Chairman of the Statute Revision Commission giving what I think would be a practical "ironing out" of that part.

I would also suggest that the Commission abstain from pulling the Code to pieces as was done in the Revision of 1906. The arrangement of the Code prior to 1906 was, taking it altogether, rather better than it is now and no real improvement was effected by the rearrangement.

When one has the Code fairly well up it is a great, and should be an unnecessary undertaking to get it up again, when the parts have been dislocated and then rejoined in another way. I have spoken to several officers in the different Provincial Attorney General's Departments, and also to a number of the Crown Attorneys who held office at the time, and they all complained bitterly of the useless disarrangement of the Code in the 1906 revision. I am putting this rather strongly because of what happened then and of the tremendous amount of useless work and confusion caused by the attempt of the 1906 Commission to improve the arrangement of this statute.

I shall be glad at any time to give other suggestions as to other changes which should be made in other parts of the Code.

Yours faithfully,

(Sgd.) E. BAYLY,

Deputy Attorney General.

E. L. NEWCOMBE, Esq., K.C.,
Deputy Minister of Justice,
Ottawa, Ont.

ATTORNEY GENERAL OF NOVA SCOTIA

A 2

HALIFAX, N.S., February 16, 1924.

E. L. NEWCOMBE, Esq., K.C.,
Deputy Minister of Justice,
Ottawa, Ont.

DEAR SIR,—I understand that the Deputy Attorney General of Ontario has addressed to you a protest against the Commission for revising the Dominion Statutes materially changing the arrangement of the Criminal Code. In 1906 when the Statutes were last revised the Criminal Code was rearranged in such a

way that in my opinion it was no improvement on the old arrangement, but quite the reverse; I had some knowledge of the Criminal Code as it was prior to 1906 but after it was rearranged in the Revised Statutes I found it most confusing to me and I sincerely trust that we will not have to go through the same experience again.

Yours faithfully,
(Sgd.) FRED. F. MATHERS,
Deputy Attorney General.

A 3

DEPARTMENT OF ATTORNEY GENERAL, ALBERTA

EDMONTON, ALBERTA, February 19, 1924.

SIR,—I understand that a Commission is now sitting for the purpose of revising the Dominion Statutes.

You will probably recollect that when the Code was revised in 1906 the revision involved a renumbering of the sections.

It is highly desirable that the present numbering of the sections be retained in the revision as any alterations will lead to great confusion on the part of country Justices and will also involve the reprinting of a large amount of the forms under the Criminal Code used by justices of the peace.

I trust that you will use your influence with the commissioners with the object of securing the retention of the present numbering of the sections.

I have the honour to be,
Very truly yours,
(Sgd.) R. ANDREW SMITH,
Deputy Attorney General.

E. L. NEWCOMBE, Esq., K.C.,
Deputy Minister of Justice,
Ottawa, Ont.

GOVERNMENT OF THE PROVINCE OF
SASKATCHEWAN

A 4

DEPARTMENT OF THE ATTORNEY GENERAL
REGINA, February 27, 1924

SIR,—I am informed that a Commission is now sitting to revise the Dominion Statutes. As under clause 14 of section 92 of the British North America Act, 1867, the administration of justice in the province is dealt with by this department, I am interested in the revision of the Criminal Code of Canada. As

you are aware the Commission which revised the Dominion Statutes in 1906 made a considerable rearrangement of the sections of the Criminal Code of 1892. I may state that I am strongly in favour of the present arrangement of the parts and sections of the Criminal Code being retained in the revision thereof. A rearrangement of the parts and sections of the Criminal Code is bound to be very confusing and inconvenient in the matter of reference to the reported decisions of the courts in which the present sections of the Criminal Code are referred to. The numbers of the parts and sections of the Criminal Code, in addition, are to a large extent well known to the judges, counsel, magistrates and police and I think for this reason also that the present arrangement therefore should be adhered to.

I may state further that for the enforcement of provincial penal laws of this province by section 8 of the Magistrates Act, being chapter 64 of the Revised Statutes of Saskatchewan, 1920, parts XV and XXII of the Criminal Code are made to apply. Section 8 above referred to provides as follows:

"8. Except it is otherwise specially provided all the provisions of part XV and part XXII of the Criminal Code shall apply to all proceedings before justices of the peace under or by virtue of any law in force in Saskatchewan or municipal bylaws and to appeals from convictions or orders made thereunder."

I would be glad if you would inform me if it is at all contemplated that any rearrangement of the parts and sections of the Criminal Code will be made by the Commission revising the Dominion Statutes.

I have the honour to be, sir, your obedient servant,

(Sgd.) A. L. GEDDES,

Deputy Attorney General.

E. L. NEWCOMBE, Esq., C.M.G., L.L.D., K.C.,
Deputy Minister of Justice, Department of Justice,
Ottawa, Ont.

PROVINCE OF MANITOBA

A 5

ATTORNEY GENERAL

WINNIPEG, March 10, 1924

E. L. NEWCOMBE, Esq., K.C.,
Deputy Minister of Justice,
Ottawa, Canada.

Re Revision of Dominion Statutes.
Re Revision of the Criminal Code.

SIR,—I understand a Commission is now revising the Dominion Statutes, which of course include the Criminal Code.

May I suggest that there be no rearrangement of the sections of the Criminal Code in the revision?

You will I am sure recognize how confusing a change will be for those who have for some years been accustomed to the numbering of the 1906 revision?

You have for many years taken part in important constitutional arguments which involved, for example, sections 91 and 92 of the British North America Act, 1867, and the various sub heads of these two sections. It would I submit be most confusing to you if these sub heads were rearranged every twenty or thirty years. You have become accustomed to the present arrangement and have your authorities gathered together under the present order or arrangement.

Similarly it will be very confusing for us in the various provinces if any change is made in the present arrangement of the Criminal Code.

Hence I suggest that no change be made in the arrangement of the Criminal Code when your Commission revises the same.

Yours very truly,

(Sgd.) JOHN ALLEN,

Deputy Attorney General.

ONTARIO

A 6

DEPARTMENT OF THE ATTORNEY GENERAL,
TORONTO, January 15, 1925.

SIR,—I wrote to the Department of Justice some time ago with regard to the revision of the Criminal Code.

The Criminal Code is a statute which is fairly familiar to the various Attorney General's Departments in the provinces, to Crown Attorneys and to sundry Crown Prosecutors. It is also known more or less to a few members of the Bench.

Outside of these the Bench and Bar know very little of the Code at all.

Under these circumstances whatever benefit from an artistic or draftsmen's standpoint would accrue from a renumbering and revision of the Code would in my opinion be very much more than offset by the confusion and lack of detail knowledge which would result amongst those persons who alone at present are familiar with the criminal law.

I beg to request, therefore, that the precedent of 1906 be *not* followed and that the Code be left in its present shape except in so far as certain anomalies, contradictions or improvements render changes absolutely necessary. The Criminal Code is the only statute in force in Canada that I am aware of which is of great length and which has to be referred to constantly and frequently in the course of trials, etc., in a hurry; confusion, therefore, is much more likely to result in the case of the Criminal Code than of most other Statutes by altering the numbering and rearranging the sections. In the opinion of every-one to whom I have spoken, however admirable the revision of

1906 may have been in other respects, much harm was done by the complete rearrangement of the whole Act. The only justification for such procedure was that it is stated, probably with truth, that the present arrangement is extremely good. If so, why change it again?

Should the Statute Revision Commission desire my views upon procedure or upon the general scheme of the Criminal Code I shall be glad to give what assistance I can. Parts XVI and XVIII require recasting and a number of sections of the Code dealing with procedure need attention.

I have the honour to be, sir,

Your obedient servant,

(Sgd.) E. BAYLY,

Deputy Attorney General.

The Right Hon. Sir CHARLES FITZPATRICK, P.C., G.C.M.G.,
Chairman, Statute Revision Commission,
Hunter Building, Ottawa, Ont.

A 7

WINNIPEG, August 10, 1925.

E. R. CAMERON, Esq., K.C.,
Vice-President, Statute Revision Commission,
Ottawa.

Re Criminal Code Revision

DEAR SIR,—Answering yours of June 4, received by me July 27, I beg to suggest that the Commission consider the advisability and possibility of re-enacting the Code under the same section numbering as appeared in chapter 146 of the Revised Statutes of Canada, 1906. This because courts, police and officials have become accustomed to the present numbering and because many provincial statutes, e.g., "The Manitoba Summary Convictions Act," "The Petty Trespasses Act," contain references to the Code by the numbering of sections. I have found in my work upon provincial statutes that by running in a section recently enacted as a subsection of a preceding section, retaining the letters A, B, etc., of new sections, or by splitting a section with two to fill in a repealed section, this can often be worked out. You no doubt know this was done in the late revision of "The Bank Act".

(Sgd.) W. R. COTTINGHAM,

Legislative Counsel.

APPENDIX B

B 1

NORTH WEST TERRITORIES ACT (R.S. (1886), c. 50) AS AMENDED UP TO SEPTEMBER 1, 1905

(Extracted from R.S. Alberta, 1922, Vol. IV, p. 2849)

65. The procedure in criminal cases in the court shall, subject to any Act of the Parliament of Canada, conform as nearly as may be to the procedure existing in like cases in England on the fifteenth day of July in the year one thousand eight hundred and seventy; but no grand jury shall be summoned or sit in the Territories.

Every justice of the peace or other magistrate holding a preliminary investigation into any criminal offence which may not be tried under the provisions of the Summary Convictions Act, shall immediately after the conclusion of such investigation transmit to the clerk of the court for the judicial district in which the charge was made all informations, examinations, depositions, recognizances, inquisitions and papers connected with such charge; and the clerk of the court shall notify the judge thereof.

(2) Whenever any person charged is committed to gaol for trial the sheriff or other person in charge of such gaol shall within twenty-four hours notify the judge exercising jurisdiction at the time in the judicial district, in writing, that such prisoner is so confined, stating his name and the nature of the charge preferred against him; whereupon with as little delay as possible the judge shall cause the prisoner to be brought before him for trial either with or without a jury as the case requires. (54-55 Vic., c. 22, s. 12.)

In lieu of indictments and forms of indictments as provided by the Criminal Procedure Act the trial of any person charged with a criminal offence shall be commenced by a formal charge in writing setting forth as in an indictment the offence wherewith he is charged. (54-55 Vic., c. 22, s. 11.)

66. Every judge of the Supreme Court shall have and exercise the powers of a justice of the peace or of any two justices of the peace under any laws or ordinances in force in the Territories, and may also hear and determine any charge against any person for any criminal offence alleged to have been committed in the Territories or (subject to the provisions of section fourteen of the Act passed by the Parliament of Canada in the forty-seventh year of Her Majesty's reign, and chaptered six) in any territory eastward of the Rocky Mountains wherein the boundary between the province of British Columbia and the Territories has not been officially ascertained, when the accused is charged,

(a) with having committed or attempted to commit theft, embezzlement, or obtaining money or property by false pretenses, or receiving stolen property, in any case in

which the value of the whole property alleged to have been stolen, embezzled, obtained or received does not in the opinion of such judge exceed two hundred dollars;

or,

- (b) with having committed an aggravated assault by unlawfully and maliciously inflicting upon any other person either with or without a weapon or instrument any grievous bodily harm or by unlawfully and maliciously wounding any other person; or,
- (c) with having committed an assault upon any female whomsoever or upon any male child whose age does not in the opinion of the judge exceed fourteen years; and when such assault, if upon a female, does not in his opinion amount to an assault with intent to commit a rape; or,
- (d) with having escaped from lawful custody or committed prison breach, or assaulted, obstructed, molested or hindered any judge, justice of the peace, commissioned officer of police, constable, bailiff or other peace officer or officer of customs or excise or other officer in the lawful performance of his duty or with intent to prevent the performance thereof.

(2) The charge shall be tried in a summary way and without the intervention of a jury. (60-61 Vic., c. 28, s. 14).

67. When the person is charged with any other 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. (54-55 Vic. C. 22, S. 9.)

68. Whenever upon a trial before a judge in a summary way under either section sixty-six or section sixty-seven of this Act such judge is not satisfied that the accused is guilty of the offence with which he stands charged but the circumstances are such that upon a trial before a jury under the Criminal Procedure Act for the like offence the jury might find the accused guilty of some other offence, the judge shall have the same power as to findings as a jury would have in the like circumstances under the said last mentioned Act, and may convict the accused of such other offence, notwithstanding that such offence is one for which under section sixty-seven aforesaid the accused could not without his own consent have been tried in a summary way; and the person so convicted shall be liable to the punishment by the said last mentioned Act or otherwise by law prescribed for the offence of which he is so found guilty. (54-55 Vic. c. 22, s. 10.)

69. The judge shall upon every such trial take or cause to be taken down in writing full notes of the evidence and other proceedings thereat; and all persons tried as aforesaid shall be admitted after the close of the case for the prosecution to make full answer and defence by counsel, attorney or agent.

70. When any person is convicted of a capital offence and is sentenced to death the judge shall forward to the Minister of Justice full notes of the evidence with his report upon the case; and the execution shall be postponed from time to time by the judge if found necessary until such report is received and the pleasure of the Governor General thereon is communicated to the Lieutenant-Governor. (Sections 69 and 70 of the Act repealed 1913, 3-4 Geo. V., c. 13, s. 31.)

71. Persons required as jurors for a trial shall be summoned by a judge from among such male persons as he thinks suitable in that behalf; and the jury required on such trial shall be called from among the persons so summoned as such jurors and shall be sworn by the judge who presides at the trial.

(2) The Governor in Council may at any time by proclamation declare that this section shall be repealed from and after the date named in such proclamation. (57-58 Vic. c. 17, s. 8 (Section 71 of the Act repealed by Statutes of Alberta, 1921, c. 8, s. 48.)

72. Any one arraigned for treason or an offence punishable with death or an offence for which he may be sentenced to imprisonment for more than five years, may challenge peremptorily, and without cause, any number of jurors not exceeding six; and every peremptory challenge beyond that number shall be void. (57-58 Vic. c. 17, s. 9.)

(2) The Crown may peremptorily challenge any number of jurors not exceeding four.

(3) Challenges for cause shall be the same as are provided for under The Act respecting Procedure in Criminal Cases.

73. If, by reason of challenges or otherwise, the number of jurors summoned for the trial is exhausted, the judge shall direct some constable or other person to summon, by word of mouth, from among the bystanders or from the neighbourhood, such number of persons as are necessary to make up a jury, the persons so summoned being subject to challenge as those summoned by the judge in the first instance; and the like proceedings shall be repeated, if necessary, until a jury is obtained, competent to try the case; and any person summoned, as hereby provided, to serve as a juror, who makes default or refuses to serve as such juror, without lawful excuse to the satisfaction of the judge, may be fined by him a sum not exceeding ten dollars, and committed to prison until such fine is paid.

74. Any person duly summoned, whether on behalf of the prisoner or against him, to attend and give evidence on any such trial, shall be bound to attend on the day appointed for the same, and shall remain in attendance throughout the whole trial; and if he fails so to attend, he shall be deemed guilty of contempt of court, and may be proceeded against therefor.

75. Upon proof, to the satisfaction of the judge, of the summoning of any witness who fails to attend, and upon such judge being satisfied that the presence of such witness before him is indispensable to the ends of justice, he may, by his warrant, cause the said witness to be apprehended and forthwith

brought before him to give evidence and to answer for his contempt; and such witness may be detained on such warrant, with a view to secure his presence as a witness, or may be released on recognizance, with or without sureties, conditioned for his appearance to give evidence as therein mentioned, and to answer for his contempt; or the judge may, in a summary manner, examine and dispose of the charge of contempt against the said witness, who, if found guilty thereof, may be fined or imprisoned, or both, such fine not to exceed one hundred dollars, and such imprisonment to be with or without hard labour, and not to exceed the term of ninety days.

76. Returns of all trials and proceedings, civil and criminal, shall be made to the Lieutenant-Governor in such form and to such times as he directs.

77. The Governor in Council may, from time to time, by proclamation, declare that the ten sections next preceding, or any of them, shall be repealed from and after the date named in such proclamation.

78. If imprisonment for any term not less than two years is awarded in any case, the convict may be ordered to be imprisoned in any gaol or penitentiary in the Territories or to be conveyed to the penitentiary in the Province of Manitoba, on the warrant of the judge; and whenever any convict or accused person is ordered to be conveyed to the penitentiary in Manitoba, any constable or other person in whose charge he is to be so conveyed, may hold and convey him, or re-take him in case of an escape; and the warden of the penitentiary in Manitoba may detain and deal with him, in the said province, as if such penitentiary was within the Territories, or as if the said convict or accused person had been ordered to be conveyed to such penitentiary by some competent court or authority in the said province.

79. If it is impossible or inconvenient, in the absence or remoteness of any gaol or other place of confinement, to carry out any sentence of imprisonment, any judge or justice of the peace may sentence any person convicted before him of an offence, other than the breach of a municipal by-law, to be placed and kept in the custody of the Northwest Mounted Police force, with or without hard labour; and any police guard-house or guard-room in the Territories shall be a penitentiary, gaol or place of confinement for all purposes, except the confinement of any person sentenced to imprisonment for breach of a municipal by-law; but if any municipality makes arrangements with the Commissioner of the Northwest Mounted Police for the maintenance of persons convicted of a breach of any by-law of such municipality during the period of their sentence, the provisions of this section shall thereafter apply to such persons in like manner as to other offenders. (54-55 Vic. c. 22, s. 13.)

80. The Governor in Council may, from time to time, direct that any building or buildings, or any part thereof, or any enclosure or enclosures, in any part or parts of the Territories,

shall be a gaol or lock-up for the confinement of prisoners charged with the commission of any offence or sentenced to any punishment or confinement therein; and confinement therein shall thereupon be held lawful and valid whether such prisoners are being detained for trial or are under sentence of imprisonment in a penitentiary, gaol or other place of confinement; and the Governor in Council may at any time direct that any building or any part thereof, or any enclosure, shall cease to be a gaol or lockup, and thereupon such building or part thereof, or such enclosure shall cease to be a gaol or lock-up.

(2) The Governor in Council shall have power to make rules and regulations for the management, discipline and policy of such gaols or lock-ups and for fixing and prescribing the duties and conduct of the gaoler and every other officer or servant employed therein and for the diet, bedding, maintenance, employment, classification, instruction, discipline, correction, punishment and reward of persons confined therein, and to annul, alter and amend the same from time to time; and all gaolers, officers, prisoners and other persons shall be bound to obey such rules and regulations.

(3) The Governor in Council shall also have power from time to time to prescribe the terms and conditions upon which persons convicted or accused of any offence under any Ordinance of the Northwest Territories or any municipal by-law or regulation, or sentenced to confinement under any such Ordinance, by-law or regulation, or arrested under any civil process, shall be received and kept in any gaol or lock-up created under the authority of this section; and he may from time to time specify what gaols and lock-ups shall be available for the confinement of such persons. (54-55 Vic. c. 22, s. 14.)

B 2

EDMONTON, June 19, 1925

DEAR SIR,—On the 16th March last you enclosed a copy of a letter from Mr. Cameron asking for suggestions in connection with the revision of the Criminal Code. Mr. Justice Stuart and I discussed certain matters upon which I believe he wrote a letter at the time and in consequence of which I did not then write.

There are one or two other matters, however, to which I may call attention in case they should have escaped the notice of the Revision Commission. Section 65 and a number of the following sections of the old Northwest Territories' Act, which do not appear in the last revision, are still in force in this province as Dominion Law and subject only to be repealed by Dominion action. There may be other provisions of the same Act which are in the same position but which I have not considered as I have been only looking at the matter from the point of view of the Criminal Law. It appears to me that these

provisions ought to appear in the Dominion Statutes so long as they remain effective as part of the Dominion Law. In view of the fact that there is another Northwest Territories' Act dealing with the present Northwest Territories, and of the fact that as far as my understanding goes these provisions apply to Alberta alone, this Act might be designated as the Northwest Territories (Alberta) Act, or in some other way to indicate its application.

Section 66, which is a section we have to refer to very frequently, still stands in much the same condition as it was originally passed. It should, I think, be considered with the view of making the designation of the offences correspond as much as possible with the terms of the Code. For example, the terms "aggravated assault," and "embezzlement" and so forth are used although they have long since disappeared from the Criminal Statutes. The case of *Rex vs. Hostetter*, 5 T.L.R. 363, might be looked at in connection with the consideration of this section.

Yours truly,
(Sgd.) HORACE HARVEY

R. ANDREW SMITH, Esq.,
Deputy Attorney General,
Parliament Buildings,
City.

SUPREME COURT, ALBERTA

B 3

OCTOBER 5, 1926

E. R. CAMERON, Esq.,
Vice-President,
Statute Revision Commission,
Supreme Court,
Ottawa.

MY DEAR MR. CAMERON,—I beg to thank you for your letter of the 30th ultimo referring to a letter of mine, June 19, 1925, respecting the provisions of section 66 of the old Northwest Territories Act and I note that you say that in the consolidation of this statute appearing as chapter 62, of the revision of 1906, the suggested alterations had been made.

I would point out that Chapter 62 R.S.C. 1906 applies only to the present Northwest Territories from which this province is excluded. When I wrote you I perhaps did not sufficiently go into the situation of the provisions applicable to Alberta or even perhaps then quite understand them. Ever since the province was formed our court has, of course, gone along on the understanding that many of the provisions of the old Northwest Territories Act are part of the constituent law of this province without looking exactly into the details of the case.

It will be observed that chapter 27 of the Statutes of 1905, which was brought into force on the same day as the Alberta Act, amended the definition of the North West Territories so that from thenceforth none of the provisions of the North West Territories Act, as such, applied to Alberta, but by section 16 of the Alberta Act, Chapter 3 of the same session, all the existing laws were continued until altered by parliament or legislature as the case might be. The result was, of course, that from that time forward those provisions of the North West Territories Act in force in Alberta were so in force by Section 16 of the Alberta Act and not by any provisions of the North West Territories Act itself, and the consequence is perhaps somewhat anomalous that they do not appear in the consolidation of 1906 at all.

The Act with amendments is to be found in the fourth volume of the Alberta Consolidation of 1922, and a reference to that shows that still a great many of those provisions are in force in Alberta, some of which are capable of change by the Provincial Legislature as for example subsection 26, *et seq.*, while others as for example Criminal Procedure, subsection 65 *et seq.*, are essentially matters for the Dominion Parliament.

Only a few months ago the Appellate Division had to deal with the provisions of section 72 and of course the provisions of section 66 have to be considered at every criminal sitting. If these provisions are to continue and the difference between the Alberta and the older Provinces to remain it would seem that the provisions ought to appear somewhere in the Statutes of Canada and not be simply dropped out of sight and that if not repealed they should be amended where necessary.

Yours sincerely,
(Sgd.) HORACE HARVEY

B 3 (a)

COURT HOUSE,
EDMONTON, December 22, 1926.

E. R. CAMERON, Esq.,
Vice-President,
Statute Revision Commission,
Supreme Court,
Ottawa, Ont.

My DEAR MR. CAMERON,—Last week we had before us in Calgary a criminal case under Part 18 and our attention was thereby directed to a number of provisions which it appears to us should be very substantially changed. The judgment was given yesterday and was unanimous and for your information I enclose a copy of the reasons herewith. As will be seen, our actual decision did not go very far, but our suggestions may be sufficient to justify the Commission in making certain alterations which might in some aspects appear to require amendment by Parliament.

Just to run through the sections, 825 (5) is dealt with in the reasons; 826 (2) also is not very appropriate to our conditions. We have no counties here and we have only two regular jails. The result is that the prisoner is in a good many cases confined in a jail which is not in the judicial district where the judge resides and he may, of course, have been committed in that or some other district. Ordinarily, of course, he will be committed at the place nearest to where the offence takes place, which will be in the district of the judge who would have jurisdiction to take his election and try him.

I understand from our District Court Judges that it is a practice of the Edmonton Judges to take elections for prisoners confined in Fort Saskatchewan, though the offences may have been committed and they may have been committed in other judicial districts, where the trial will in the ordinary course take place. I have suggested that in such cases it would be desirable to avoid any question that the judge of the district court in which the trial takes place should himself take the election again when the prisoner appears before him for trial. Except for the word "county," I don't know that there is any particular way in which the commission could change this section to any special advantage.

Then we come to 828 (1). 827 (1) shows that the prisoner is given the option of being tried before the district court judge without a jury or to be tried in the ordinary way by the court having criminal jurisdiction. These two methods are exhaustive. Why 828 (1) should be changed even if they meant exactly the same thing I fail to understand, but they clearly must be intended to mean the same thing and it seems to me therefore, apart altogether from the question of 828 (1) not being appropriate to our conditions, it would be better draftsmanship to have 828 (1) expressed in the same form of words as 827. The prisoner of course does not demand anything. He is given the opportunity of consenting to be tried by the district court judge. If he does not do that, then he simply remains to be tried by the court having criminal jurisdiction. Subsection 2 also requires the same consideration. Subsection 3 uses the term "prosecuting officer." Now, it seems quite clear that in that subsection in two or three places and again in sections 833 and 834, this term means the counsel or agent of the Attorney General, but the definition of prosecuting officer, while including the county crown attorney in the provinces where there is such an officer, in Saskatchewan and Alberta is limited to a clerk who cannot be a prosecuting officer in this sense under any conditions, although he might be a prosecuting officer for the purpose of taking an election as authorized by section 826. 829 and 830 both have the same objectionable features regarding election to be tried by a jury.

It appears to me that 833 would be more consistent with the other provisions and with principle, if it read "If the prisoner consents as aforesaid and upon being arraigned pleads

'not guilty'." It seems quite clear that until he has given his consent there is no jurisdiction and there can therefore be no arraignment and that seems to be entirely in accord with section 827.

Section 835 limits the right of the judge under this Part to render any verdict which might be rendered by a jury. This raises the same question, of course, as far as Alberta is concerned that many of the cases cannot be tried by a jury and yet no doubt the intention is to give the judge on the summary trial the same jurisdiction that would exist if the prisoner were being tried in the usual manner. It uses the term "verdict" as to his finding and therefore probably if the words "judge or" were inserted before the word "jury," in the next to the last line, it might meet the requirements.

837 also has reference to trial by jury, meaning trial by the Court having ordinary jurisdiction.

It may be that this same question will arise in part 17. I have not looked over its provisions but I have somewhat hurriedly run through your proposed draft of part 16 and I find that section 785 still preserves this feature.

I hope that this letter will be in time to enable you to have these provisions made clear, if you have not already had these points called to your attention.

Wishing you the compliments of the season, believe me,

Yours sincerely,

(Sgd.) HORACE HARVEY.

B 4

DECEMBER 28, 1926

The Honourable the Chief Justice HARVEY,
Edmonton, Alta.

MY DEAR CHIEF JUSTICE,—I am much obliged for your letter of the 22nd, and the copy of the judgment in *The King v. Relf*. I have carefully considered these, and have great difficulty in arriving at a conclusion with respect to how the anomalous position of Alberta and Saskatchewan is to be satisfactorily dealt with.

Part XVIII, dealing with speedy trials of indictable offences when placed on the Statute Book in 1892, 55-56 B.C. 29, being part LIV is expressly declared not to be applicable to the Northwest Territories, and the reason for this would seem pretty obvious because the North West Territories Act conferred more extensive powers on the Judges to try cases without juries than was to be found elsewhere in Canada. When the Statutes were revised in 1906, the same provision was continued by Section 822 which declared that Part XVIII should not apply to Saskatchewan or Alberta.

A few months later by 6 and 7 Edward VII, chapter 45, section 822 was repealed and the substituted section only

excepted from its operation the Northwest Territories. On the same day, by chapter 44, the Revised Statutes were amended, and schedule A was altered by withdrawing the provinces of Saskatchewan and Alberta from repeal in the various Northwest Territories Acts.

When writing you a few days ago, I overlooked this statute. As you have pointed out, there are many sections in this Part which are not properly framed for application in Alberta and Saskatchewan, and probably a careful investigation would show that other parts of the Code might well be altered to comply with your exceptional conditions. I shall bring the whole matter before the Commission later on, but my present feeling is that they may well be a matter to be taken up in my special report on the whole Code. The powers of the Commission are very limited. A new Commission with broader powers to deal with the whole criminal code is no doubt desirable.

Yours sincerely,

(Sgd.) E. R. CAMERON,
Vice-President, Statute Revision Commission

DEPARTMENT OF THE ATTORNEY GENERAL,
ALBERTA

B 5

EDMONTON, ALBERTA, January 3, 1927.

DEAR SIR,—With further reference to my letter to you of the 29th ultimo, with reference to the applicability of The North West Territories Act to this province, I am enclosing herewith copy of a letter I have received from the Honourable Mr. Chief Justice Harvey in which he goes into the matter very fully and says what can be said in favour of the contention that certain portions of the North West Territories Act are still in force in this province.

Yours truly,

(Sgd.) R. ANDREW SMITH,
Deputy Attorney General.

E. R. CAMERON, Esq., K.C.,
Vice-president,
Statute Revision Commission,
Ottawa, Canada.

SUPREME COURT OF ALBERTA

B 6

COURT HOUSE, EDMONTON, December 29, 1926.

R. ANDREW SMITH, Esq.,
Deputy Attorney General,
Governmental Bldgs.,
City.

My DEAR MR. SMITH,—Mr. Cameron has forwarded me a copy of his letter to you of the 24th instant, respecting certain

provisions of the old North West Territories Act and as he suggests that he should hear from you as soon as possible, rather than wait until you have an opportunity of speaking to me about the matter as he suggests I am writing you this letter expressing my view upon the question on which Mr. Cameron appears to have some doubt.

By the Alberta Act which was assented to on the 20th July, 1905, under section No. 16, all the laws then existing are continued in force. By an amendment to the N.W.T. Act assented to on the same day, the definition of North West Territories Act under that Act was altered so as to exclude Alberta. The consequence was that from that time forward the North West Territories Act as such had no application to and was not in force in Alberta, but its provisions were still in force under section No. 16 of the Alberta Act, its legislative foundation having been transferred from the one Act to the other. The consequence was that the repeal of the North West Territories Act by the Revised Statutes of the following year in no way changed the law of this Province, the old provisions continuing under section No. 16 until as provided in that section they were altered or repealed by Parliament or the Provincial Legislature. Certain of those provisions, for instance those respecting wills and married women, are subject to the control of the Legislature and are still in force at least in part, subject only to our provincial legislation on this subject. It was having this in mind that the old Act was included in Volume 4 of our Consolidated Statutes of 1922, though the Act as so printed contains much that is obsolete and contains provisions such as sections 66 and 67, which are not subject to the province's legislative authority. It will be seen by reference to subsection 2 of section 16 of the Alberta Act that by Order in Council criminal procedure of the North West Territories Act may be declared to be inapplicable in whole or in part to our court. I believe that under this provision the procedure in Saskatchewan has been made in most respects that provided by the Code and that the provisions of the old North West Territories Act are in fact now chiefly, if not wholly applicable to this province.

Whether the authority of the Governor in Council is sufficient under that section now to repeal sections 66 and 67 if it were deemed advisable is in my mind not entirely free from doubt, especially having regard to section 9 of the Criminal Code to which Mr. Cameron refers in his letter, but it may be under section 77 of the North West Territories Act. However, that is not of any special consequence at the present moment.

It appears to me clear, however, for the reasons I have mentioned, that the provisions of the old North West Territories Act which come within the jurisdiction of that Dominion are still in force here, no attempt having been made to repeal them by specific legislation or Order in Council.

Very sincerely yours,
(Sgd.) HORACE HARVEY.

B 7

January 3, 1297.

R. A. SMITH, Esq.,
Deputy Attorney General,
Edmonton, Alta.

DEAR SIR,—I to-day received a reply from the Deputy Attorney General of Saskatchewan, which called my attention to the fact that in the Province of Saskatchewan they have not since 1907 been administering the criminal law under any of the provisions of the North West Territories Act.

When writing to you, I overlooked the provisions of 1907, 6-7 Edward VII, chapter 44, which repealed the repealing clause of the Revised Statutes of Canada as regards the North West Territories Act in the following language: "Schedule A of the Revised Statutes of 1906 is hereby amended by inserting in the third column thereof headed 'extent of repeal', the words 'except as regards the provinces of Saskatchewan and Alberta,' opposite each of the following items."

Then follows the list of Acts dealing with the North West Territories, the first being chapter 50, Revised Statutes 1886. In view of this, it would seem to me now clear that we must consider the North West Territories Act and amendments as still in force. That was undoubtedly the view of the Justice Department when amending the North West Territories Act in 1913, 3-4 George V, chapter 13, where they repealed sections 69 and 70. It is not clear to me why it should be construed that the legislature of Alberta had the power to repeal section 71 by the Statutes of 1921, chapter 8, section 48, if the jurisdiction over the two preceding sections was vested in the Dominion. I presume it was supposed to exist under the power given by the Alberta Act, 4 and 5 Edward VII, chapter 3, section 16, which provides that the provisions of the North West Territories Act was to be in force in the new province subject "to be repealed, abolished or altered by the Parliament of Canada, or by the legislature of the said province, according to the authority of the Parliament or of the said legislature."

The Supreme Court of Alberta, Statutes of 1907, chapter 3, section 38, expressly provides that the Act should not affect procedure in criminal matters and this provision is continued in your present revision of 1920 as chapter 72, section 58.

When writing you also I was unaware that as regards the Saskatchewan Act, which in this respect is similar to the Alberta Act, chapter 42, section 16, subsection 2, in providing that the Governor in Council "may at any time and from time to time declare all or any part of such procedure (in criminal matters) to be inapplicable to such Superior Court," that an Order in Council was passed in August, 1907, pursuant to this provision which declared that section 65-76, both inclusive of the North West Territories Act, should thereafter be deemed inapplicable to the Supreme Court of Saskatchewan." Since that date in

that province, the Criminal Code contains the only procedure, and they have adopted the jury system of twelve jurymen which obtains elsewhere in Canada except Alberta.

I have thought it well to state these additional facts to you, while you have under consideration the suggestion that special provision as to criminal procedure for your province alone should appear in the Criminal Code.

Yours sincerely,

(Sgd.) E. R. CAMERON,

Vice-President Statute Revision Commission

B 8

OTTAWA, Ont., Jan. 12, 1927.

Re North West Territories Act, R.S.C. 1886, c. 50.

MY DEAR CHIEF JUSTICE,—I have been confined to my house with a cold for some days, and have occupied my time in considering the statute respecting the Northwest Territories, being R.S.C. 1886, c. 50, and amendments thereto. The statute as printed in Vol. IV of the Revised Statutes of Alberta appears to contain a reference to all the amendments.

Two problems have presented themselves to me for consideration.

First: The extent to which Part XVIII of the Criminal Code can be amended by the Statute Revision Commission so as to be made applicable to the special conditions of Alberta.

Second: The consideration of adding an additional Part to the Criminal Code by the Commission, so as to show the extent to which the North West Territories Act supersedes the Criminal Code.

These two questions have necessitated a review of the law as contained in the North West Territories Act and as modified by Dominion and provincial legislation. As I understand the facts they are as follows:

When the statute 43 Victoria (Dominion) was passed, later the North West Territories Act, R.S.C. 1886, chapter 50, there were on the statute book provisions for the summary trial of indictable offences and speedy trial of indictable offences, later contained in the Criminal Code of 1892 as Parts 56 and 55, which statutes were expressly excluded from the Northwest Territories. They were apparently considered inapplicable to the conditions of this new country and were not reproduced.

The Alberta Act came into force in 1905. It provided that the North West Territories Act should remain in force until altered by the Dominion and the province according to their respective jurisdiction (section 16).

The Revised Statutes of Canada 1906 came into force January, 1907, and the Criminal Code, by section 9, excepts Alberta from its operation where inconsistent with the North West Territories Act. In 1907, also, the Alberta legislature

passed the District Courts Act, giving these judges the jurisdiction over offences triable at the sessions of the peace under the Criminal Code, as being within the jurisdiction of the general or quarter sessions of the peace, and for which the person committed consented to be tried by such judge without a jury, and the court so constituted to have the powers and duties mentioned in Part XVIII of the Code, so far as the legislature of the province could confer the same. In 1907, also, the Dominion, by chapter 45, gave the District Court Judges jurisdiction under Part XVIII. At this time in most of the provinces of Canada there were in existence, taken from the English system, Courts of General and Quarter Sessions of the Peace, presided over by county court judges, and these tribunals tried criminal cases with a jury. The provincial legislation establishing Courts of the Sessions of the Peace constituted the court when the only justice sitting was the County Court Judge, who was chairman of the sessions. This fact has to be borne in mind in considering Part XVIII, because this provision for the speedy trial of indictable offences was drafted to apply to the conditions then prevailing in Ontario and other provinces.

At first Alberta was excepted from the operation of Part XVIII of the Criminal Code, but by the Statute of 1907, chapter 45, passed in April of that year, this exception was removed and jurisdiction given to District Court judges to act in all offences cognizable at the sessions. When this was made it apparently was not perceived that as to Alberta many provisions implying the existence of a jury system were inapplicable. This raises the question to what extent these sections are to be treated as being altered "*mutatis mutandis*."

To comply with the special conditions which obtain in your province, and to make specific changes in the statute so as to do away with the necessity of implying the intent of Parliament, would entail not only a great deal of care and consideration, but extensive amendments to the present language of the statute.

The difficulties with respect to subsection 5 of 825 I will refer to later on.

826: Insert "or district" after "county" in the first line of subsection two.

827: This whole section implies that the accused has a right of trial by jury, and this was the case in Canada in most of the provinces when this section was originally introduced. At the same time, it seems to me, the language does not raise any practical difficulty in Alberta; it does provide for a speedy trial.

828, as you point out, is not well expressed in using the words "demands a trial by jury." It might better be expressed "elects to be tried by jury." At present it seems to me that some clauses should be inserted after "aforesaid," such as "and having the right so to do."

829: After the word "offence" there might be inserted "and having the right so to do, elects to be tried by jury," instead of "demands a trial by jury."

830: After the words "any person" in the first line, some words such as "having the right so to do, has been asked to elect whether," etc., might be inserted instead of the words "has been asked to elect."

835: There might be inserted after the word "way" in the fifth line, some such expression "or as he would have were the person being tried before him at the regular sittings of the court," and by inserting after the word "by" in the sixth line, the words "himself or."

837: After the word "prisoner" in the first line there might be inserted the words "having the right so to do," or "who has the right so to do."

I only make these observations to show the difficulty which necessarily arises in attempting to alter Part XVIII, so as to meet the special conditions which obtain in your province. If anything is to be done by the Commission in this regard it is very desirable that you or the Attorney General's Department prepare and send me a draft which in your judgment would be satisfactory.

As to the second problem which I have referred to, namely, the contents which it is proposed to place in a special part of the Code applicable solely to Alberta, I am writing this as I said from my house and I am not, therefore, able in dictating this letter to refer to the decisions of your court, but I would gather that the construction placed upon section 66 of the North West Territories Act is that all the offences therein set out are to be tried whether in the Supreme Court or in the District Court, by a judge without a jury. At the time the statute was passed there were no district courts. It seems to me that subsection two has application only to the offences when tried by a judge of the Supreme Court, and not by a District Court judge. The latter's powers, no doubt are limited to trial without a jury, and also require consent of prisoner under the District Courts Act, section 53. This question is brought to my mind by the judgment which you were good enough to send me of the *King v. Relf*, where you were dealing with section 825, subsection 5. It is very probable when 825, subsection 5, was passed, the draftsman thought he was dealing with conditions where the prisoner and Crown both had right of trial by jury. Yet, I doubt if the Statute Revision Commission would be justified in assuming that Parliament did not intend in this case to make *special* provision at the instance of the Attorney General for a trial by jury; although without this clause neither party would in your province have had such right.

Again, section 68 of the North West Territories Act refers to the Criminal Procedure Act. This Act, of course, has long since been repealed. Have we the right to substitute for this the corresponding provisions of the Criminal Code? These provisions were carried into the Criminal Code of 1892 and are now scattered in the present Criminal Code in Parts XI, XIII, XIV, XIX and XXIV.

Then coming to sections 69 and 70, North West Territories Act: These have been repealed by 1913 (Can.), chapter 13, section 31, and no doubt Parliament had power so to do, but 71, although subsection 2 provides that it may be repealed by the Governor in Council, has been repealed, or attempted to be repealed, by an Alberta Act 1921, chapter 8, section 48.

Section 72, North West Territories Act: What are we to do with the reference here to the Criminal Procedure Act of 1886?

What is to be done with 78, which provides that convicts may be imprisoned in a Manitoba penitentiary; and 79, which provides that the prisoner may be kept in the custody of the Royal Northwest Mounted Police?

Again 102, North West Territories Act, provides for appeals from justices to the Supreme Court of the province, but by the Criminal Code, 749, an appeal is given to the District Court.

Again, how about section 50 of the North West Territories Act, which makes a similar provision to what was contained in section 1014 of the Criminal Code for reserving a question of law for the Court of Appeal open to both the prisoner and the Crown? The Code has been repealed in 1923, chapter 41. What effect has this had, if any, upon the power to reserve a case given by the North West Territories Act?

I might write much more on the subject, but I think I have said sufficient to indicate the many difficulties which present themselves. The second problem I have discussed dealing with the North West Territories Act would, of course, disappear if the Attorney General's Department were disposed to take advantage of the provision for the repeal of the North West Territories Act by the Governor General in Council by section 77 of the North West Territories Act.

Yours very sincerely,

(Sgd.) E. R. CAMERON,

Vice-President, Statute Revision Commission.

Hon. Chief Justice HARVEY,
Supreme Court of Alberta,
Edmonton, Alberta.

SUPREME COURT, ALBERTA

B 9

COURT HOUSE, EDMONTON,

January 22, 1927

E. R. CAMERON, Esq.,
Vice-President,
Statute Revision Commission,
Supreme Court, Ottawa.

MY DEAR MR. CAMERON,—I have your letter of the 12th instant but have not yet had an opportunity of discussing the matter with the Attorney General and as our courts start next

week and I may not perhaps be able to see him for several days I think I had better write you now the result of my consideration of the matters mentioned in your letter.

In going over Part 18 to consider the difficulties you raise I have come across what I think is a way out of the difficulty that has always been in my mind in accepting for Alberta the general provisions of the Code. The criminal sittings of our Supreme Court began here this week and the trial judge tells me that about 40 per cent of the prisoners who were entitled to be tried with a jury elected to be tried by a judge summarily. Such a thing as that could not happen in Ontario and the result here is that these trials will in themselves be much shorter and the jurors can all be allowed to go home as soon as the jury trials are finished, with a considerable saving of expense and inconvenience. I observe, however, that under the definition of a judge in the speedy trials part, a Supreme Court judge in the western provinces is included so that if he could try the cases at the sittings under that part the same procedure could be followed as is followed at present. In every case, of course, the prisoner would be entitled to a jury if he desired it instead of in only a proportion of them as at the present date. The practice has been so long established here of non-jury trials in the Supreme Court that I feel little doubt that counsel would continue to advise the election to be tried summarily in a very large proportion of the cases although they might not advise that such trial should take place before a District Court judge.

It appears to me that it will only require two amendments to the provisions of this Part to accomplish the result suggested, namely, the elimination of the provision which says the trials must be out of sessions and of the provisions that require a re-election a definite time before the regular sittings. I may say that I see no advantage in these provisions for any purpose or any place and as regards the latter they are made not to apply in the county of York in Ontario so that the amendment which is suggested is only to extend that exemption to Alberta.

If these views meet with the approval of the Attorney General arrangements of course will have to be made with the Department of Justice for the repeal of the provisions of the North West Territories Act, upon the amendments being made to Part 18, either by Order in Council or by statute. If this result is desired it gets away from a good many of the other matters of difficulty as well and I have therefore not referred to them in the meantime.

I enclose a copy of the suggested amendments above referred to for the purpose of meeting the other difficulties we have had under consideration, which, with the notes attached I think sufficiently explain themselves.

As soon as I have an opportunity of discussing the matter with the Attorney General I will write further.

Yours sincerely,

(Sgd.) HORACE HARVEY.

B 10**SUPREME COURT, ALBERTA**

COURT HOUSE, EDMONTON,
March 17, 1927.

E. R. CAMERON, Esq.,
Vice-President, Statute Revision Commission,
Ottawa.

MY DEAR MR. CAMERON,—In a case that came before us this week my attention was drawn to another section of Part 18, which seems to call for some consideration and which I overlooked when writing before, that is section 824.

It will be observed at once, as I have no doubt you have already noticed, that paragraph A of subsection 1 and subsection 2 are almost the same and that one alone ought to be sufficient. It appears to me that the way the matter came about is that the original section under the old revision of 1906 of course had no regard to Alberta and Saskatchewan, which did not then exist as regards courts, and as the provisions of the North West Territories Act amply covered the ground for the Territories it need not be considered. Then when the courts of Alberta and Saskatchewan were established in 1907 and an additional criminal jurisdiction given to the District Court Judge, the amendment became necessary which was made in 1907 by chapter 45. It happened that while in Saskatchewan the judge given jurisdiction was called "District Court Judge's Criminal Court" in the Alberta Act he was designated as the "District Judge's Criminal Court", and subsection 2 conformed to the two provisions.

In 1910 the Alberta provision was amended to read the same as in the Saskatchewan Act and I assume that that was done by arrangement with the Department of Justice at Ottawa, made some time previously because the present subsection 1, including the present paragraph A was enacted in the session of 1909 and it will be seen that paragraph A adopts that name for both provinces and the reason that subsection 2 was not repealed was probably because it was necessary to leave it until the province made the change. At any rate, subsection 2 appears now to be absolutely useless. This, however, is largely a matter of form, but there is something more which appears to me to be of substance and which perhaps may require amending legislation. As I have already mentioned in previous correspondence, in Manitoba, British Columbia, Saskatchewan and Alberta a superior court judge as well as a county court judge, is a judge within this part, yet section 824 designates the judge acting under this part as the District Court Judge's Criminal Court for Alberta and Saskatchewan and the County Court Judge's Criminal Court for the other two provinces. This seems somewhat anomalous, to use no stronger term and one wonders why it is necessary to give any name to the court. The District Courts Act confers the jurisdiction not on a court but on a

judge, who when acting is designated as a criminal court. Part 18 seems likewise to deal with the procedure on the basis of the jurisdiction being in the judge and not in the court.

If the suggestions I have made about adopting this part in lieu of our present provisions for Alberta are adopted, as the provision at present stands, a judge of the Supreme Court upon taking an election and holding a trial would be designated as the "District Court Judge's Criminal Court."

Personally I cannot see that the section would not be quite as useful if all of it were eliminated except the first three lines. but if it thought advisable to continue it there could be inserted after the exception in the province of Quebec an exception also where the judge is a judge of a superior court, but these mere exceptions without making some provision for them show the lack of necessity of all of the rest of the section.

It appears to me, however, that something should be done with this section to make it a little more suitable.

Yours truly,
(Sgd.) HORACE HARVEY.

ATTORNEY GENERAL, ALBERTA

B 11

EDMONTON, Alberta, March 31, 1927

Re Criminal Code

DEAR SIR,—I am enclosing herewith draft amendments which have been prepared in this Department to the Criminal Code.

The Amendments to sections Nos. 9, 12, 927 and 932 are for the purpose of:

- (1) Excluding Alberta from the operation of any of the provisions of the North West Territories Act relating to criminal matters; and
- (2) Supplying the necessary special provisions for the Province of Alberta which are at present contained in the North West Territories Act.

The amendments to sections Nos. 824, 825, 826, 828, 829, 830, 831, 834, 835 and 837 are for the purpose of removing doubts and difficulties which are now experienced in Part No. 18 of the Criminal Code.

It is possible that certain of the last mentioned difficulties might be cleared up by means of a revision, but it is probable that positive legislative action will be requisite in many cases and, consequently, there can be no harm in including all the suggested provisions in an amended Bill.

The amendment of section 962 is suggested for the purpose of doing away with a difficulty in construction due to the peculiar method of preferring a charge followed in Manitoba, Saskatchewan and Alberta.

With reference to the amendment to section 824, it should be observed that the expression "Judge" includes a judge of the Supreme Court as well as a judge of the District Court. (Section 823A, 6.)

If the suggested amendment is made then a Supreme Court judge presiding at a Criminal Court can, if he thinks fit, proceed to try an accused person without a jury if the accused consents and the case is one which can be so tried.

All the above-mentioned amendments have been discussed with the Hon. Chief Justice Harvey and are approved by him.

I shall be obliged if this matter can receive immediate attention, with a view to having the same incorporated in a Bill to be presented to Parliament at the present session thereof.

I am sending a similar letter to the Deputy Minister of Justice, Ottawa.

Yours truly,
(Sgd.) J. R. LYMBURN,
Attorney General.

E. R. CAMERON, Esq., K.C.,
Vice-President Statute Revision Commission,
Ottawa.

CRIMINAL CODE

Section 9 is amended by repealing the same and by substituting therefor the following new section:—

9. Except in so far as they are inconsistent with the North West Territories Act, the provisions of this Act extend to and are in force in the Northwest Territories, and except in so far as inconsistent with the Yukon Act the Yukon Territory.

The following new section is added immediately after section 12, as section 12a:—

12a. The Criminal Law of England as it existed on the 15th day of July, one thousand eight hundred and seventy, in so far as it is applicable to the provinces of Alberta and Saskatchewan, and in so far as it has not been repealed as to the said Provinces, or either of them, by any Act of the Parliament of the United Kingdom, or by this Act, or by any other Act of the Parliament of Canada, and as altered, varied, modified or affected as to the said Provinces, or either of them, by any such Act shall be the Criminal Law of each of the provinces of Alberta and Saskatchewan.

Section 824 of this Act is hereby amended by striking out all the words following the word "Record" where the same first occurs.

Subsection 3 of Section 825 is amended by striking out the same and by substituting therefor the following:—

3. Such trial shall be had under and according to the provisions of this Part, and may be held out of sessions and out of the regular term or sittings of the court, and whether the court before which, but for such consent, the said person would be triable for the offence charged or the grand jury (if any) thereof is or is not then in session.

Section 826 is amended by striking out the same and by substituting therefor the following new section:—

1. Where any prisoner charged, as aforesaid, has been committed to jail for trial, and has been received into a jail, the sheriff of the county or judicial district, as the case may be, in which such jail is situated shall within twenty-four hours of the time when such prisoner shall have been received into such jail, notify a judge having jurisdiction in such county or judicial district in writing that such prisoner is so confined, stating his name and the nature of the charge preferred against him, whereupon with as little delay as possible, such judge shall cause the prisoner to be brought before him.

2. If at any time there shall be in the said county or judicial district no judge having jurisdiction, any judge having jurisdiction after he has received the notification from the sheriff, and having obtained the depositions on which the prisoner was committed, if any, may forward them to the prosecuting officer with instructions to cause the prisoner to be brought before him instead of the judge, naming as early a day as possible for the trial in case the prisoner shall elect to be tried by the judge without a jury, and the prosecuting officer shall in such case, with as little delay as possible, cause the prisoner to be brought before him.

Section 828 is amended by striking out subsections 1 and 2 thereof and by substituting therefor the following:—

1. If the prisoner on being brought before the prosecuting officer, or before the judge, as aforesaid, elects not to be tried forthwith before a judge without the intervention of a jury, he shall be remanded to jail.

2. Any prisoner who has elected not to be tried forthwith without the intervention of a jury, may notwithstanding such election, at any time before such trial has commenced and whether an indictment has been preferred against him or not, notify the sheriff that he desires to re-elect, and it shall thereupon be the duty of the sheriff and judge or prosecuting officer to proceed as directed by section eight hundred and twenty-six.

Section 829 is amended by striking out the same and by substituting therefor the following:—

If one or two or more prisoners charged jointly with the same offence does not elect and the other or others do elect to be tried by a judge without the intervention of a jury the judge in his discretion may remand all the said prisoners to jail to await trial by a jury.

Section 830 is amended by striking out subsections 1 and 2 thereof and by substituting therefor the following:—

1. If under Part XVI or Part XVII any person has been asked to elect whether he would be tried by the magistrate or justice, as the case may be, and has elected not to be so tried, and if such election is stated in the warrant of committal for trial, the sheriff, prosecuting officer or judge shall not be required to take the proceedings directed by this Part.

2. If such person after electing not to be so tried, has been committed for trial, he may at any time before the regular time or sittings of the court at which he would ordinarily be tried, notify the sheriff that he desires to re-elect.

Section 831 is amended by striking out the same and by substituting therefor the following:—

Proceedings under this Part commenced before any judge may where such judge is for any reason unable to act, be continued before any judge having jurisdiction where such proceedings are conducted and such last-mentioned judge shall have the same powers with respect to such proceedings as if such proceedings had been commenced before him, and may cause such portion of the proceedings to be repeated before him as he shall deem necessary.

Section 833 is amended by striking out subsection 1 thereof and by substituting therefor the following:—

If the prisoner elects to be tried by the Judge, as aforesaid, and upon arraignment pleads not guilty, the judge shall appoint an early day, or the same day, for his trial, and the prosecuting officer shall subpoena the witnesses named in the depositions, or such of them and such other witnesses as he thinks requisite to prove the charge, to attend at the time appointed for such trial, and the judge may proceed to try such prisoner, and if he be found guilty, sentence as aforesaid shall be passed upon him.

Section 834 is amended by striking out the same and by substituting therefor the following:—

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

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

Section 835 is amended by striking out the same and by substituting therefor the following:—

The judge shall, in any case tried before him, have the same power as to acquitting or convicting, or convicting of any other offence than that charged as the court would have in case the prisoner were tried by a court having jurisdiction to try the offence in the ordinary way, and may render any verdict which might be rendered upon a trial at a sitting of any such court.

Section 837 is amended by striking out the same, and by substituting therefor the following:—

If the prisoner elects not to be tried forthwith, without the intervention of a jury, the judge may instead of remanding him to gaol, admit to bail to appear for trial at such time and place and before such court as is determined upon, and such bail may be entered into and perfected before the clerk of the court.

Section 927 is amended by adding at the end thereof the following new subsection:—

(6) In the province of Alberta for all the purposes of this Act a full jury shall consist of six jurors or such other number of jurors as the Legislature of the said province may from time to time determine.

Section 932 is amended by adding at the end thereof the following new subsection:—

(4) In the province of Alberta everyone charged with treason or with an offence punishable with imprisonment for a term of more than five years is entitled to challenge peremptorily any number of jurors not exceeding six, and every one charged with any other offence is entitled to challenge peremptorily any number of jurors not exceeding three.

Section 962 is hereby amended by adding at the end thereof the following subsection:—

In the provinces of Manitoba, Saskatchewan and Alberta the power conferred by this section may be exercised at any time after a formal charge in writing has been lodged with the proper officer of the court having jurisdiction to try the same and before judgment is given thereon.

B 12

April 6, 1927.

The Hon. J. H. LYMBURN,
Attorney General of Alberta,
Edmonton, Alta.

DEAR SIR,—I duly received your letter of the 31st March, but as there had been a public announcement of the intention of Parliament to close the present session within a week or ten days, I felt convinced that there was no chance of any special legislation such as you suggested being passed.

In view of this, for the last few days I have been attempting to draft clauses in the Criminal Code which would meet some of your difficulties, and might be within the powers conferred upon the Commission. I had decided to redraft 9 to read as follows:—

“9: The provisions of Part I to Part XXV, both inclusive, of this Act shall extend to and be in force throughout Canada except

- “(a) in the Northwest Territories in so far as they are inconsistent with the Northwest Territories Act;
- “(b) in the Yukon Territory in so far as they are inconsistent with the Yukon Act;
- “(c) in the province of Alberta in so far as they are inconsistent with Part XXVI of this Act.”

The difficulties however seemed insurmountable as soon as I attempted to draft the provisions of Part XXVI, retaining for Alberta the special provisions contained in the old North West Territories Act of 1886, dealing with procedure. It was necessary of course that if we were to deal with the matter at all that this Part should contain all the procedure sections of the old Act as amended. This would have required a reproduction of old section 65, 66; 67 as amended by 54-55 Victoria, chapter 22; 68 as amended by 54-55 Victoria, chapter 22. As to 69 and 70, I thought the provisions of your Act contained in the latter part of section 16, subsection 2, “until otherwise provided by competent authority would justify treating these sections as repealed by 1913, chapter 13, section 31.

Seventy-one would apparently require to go in with the amendment by 57-58 Victoria, chapter 17, section 8, as at present I would not consider the legislation of your province in 1921, chapter 8, section 48, as competent which attempted to repeal this section.

As to 72, it would read as amended by 57-58 Victoria, chapter 17, except that subsection 3 would necessitate a change in the reference. 73, 74, 75, 76 and 77 would have to be reproduced. But what was to be done with 78, 79 and 80 which are inapplicable to the present conditions.

You will remember that all these difficulties were disposed of in Saskatchewan by the proclamation made pursuant to the order of the Governor in Council contained in the *Canada Gazette*, August 31, 1907, where all these provisions, treated as matters of procedure, were declared to be inapplicable to the Supreme Court of Saskatchewan.

On the whole, therefore, I regret to say that it seems to me to be impossible for the present to do much to solve your difficulties. I do not see any difficulty later on, if the matter is taken up early enough, in finding your redress in an amendment which will remove from your law the provisions contained in the old Northwest Territories Act, but reserving still to you not only your present jury system, but also the provision by which certain offences which elsewhere in Canada the prisoner has the right to demand a jury, should still remain as at present within the jurisdiction solely of the trial judge without the intervention of the jury, and any other special provisions which are deemed important in your province and which differ from those which obtain elsewhere in Canada.

I would suggest that any amendments you ask for from Parliament be limited in their application to the province of Alberta. The legislation which you propose, and which you sent

me is general in its nature and would be applicable all over Canada. I can well understand in such a case the Justice Department would probably require that the other provinces be consulted.

In conclusion let me say I am greatly indebted for the assistance obtained from your Department and the Chief Justice in my effort to improve the Criminal Code. Some of the suggestions received will be incorporated, others however, I am afraid they constitute the great majority, would require legislation. I am preparing a special report on the Code pointing out inconsistencies, and the inapplicability of certain sections to certain provinces, and the necessity for amendments so that if deemed desirable, the Justice Department can at a later date introduce legislation with respect to the same.

Yours very sincerely,
(Sgd.) E. R. CAMERON,
Vice-President, Statute Revision Commission.

APPENDIX C

C 1

ONTARIO

DEPARTMENT OF THE ATTORNEY GENERAL

TORONTO, December 1, 1923.

DEAR SIR,—Ever since the passing of the Criminal Code there has always been a right in the Crown to appeal on points of law.

By the amendments of last year Crown Appeals were abolished, and in cases where the law is at all complex such as in the cases which arise under the various betting provisions of the Criminal Code, the decision of a police magistrate, if the accused elects trial before him, determines the whole matter, and where a case is dismissed the law may thus be left in an unsettled state as the next magistrate may take a different view. In a recent case Mr. Justice Orde made use of the following words:—

“It is to be regretted that in cases like this the right of the Crown to test the ruling of the trial judge upon a question of law by an appeal has been taken away by the recent amendments to the Criminal Code”.

In this province at least I do not think the Crown has ever abused its right to appeal, and in most cases the Crown when successful has not proceeded against the defendants, but has been satisfied with obtaining a judgement which made the law clear. A case recently arose here in which an old race track charter was obtained by a company and racing carried on at Niagara Falls. This matter had already been the subject of correspondence between the Department of State and the Attorney General for Ontario. Prosecutions were launched against the defendant and the police magistrate last Saturday dismissed the charges. Widespread interest is taken by the public, by the press, and by the race tracks themselves in a prosecution of this kind, which is used as an illustration.

It is clearly advisable to have an appeal by the Crown upon legal questions and this is now denied. An unsatisfactory condition exists the Crown being bound by the interpretation placed upon (sometimes difficult) statutes by the tribunal before which the case is tried. I understand that the amendments of last year were made without consultation with the Department of Justice and that you will agree with my general contention. I should like to suggest having an amendment passed next session permitting Crown appeals on points of law.

Yours sincerely,

(Sgd.) W. F. NICKLE,
Attorney General for Ontario.

E. L. NEWCOMBE, Esq., K.C.,
Deputy Minister of Justice,
Ottawa, Ont.

DEPARTMENT OF JUSTICE, CANADA

C 2

OTTAWA, Ont., December 10, 1923

DEAR SIR,—I received your letter of 1st instant suggesting that the right of the Crown to appeal on points of law in criminal cases should be restored and with this I am in perfect agreement. I mentioned the matter to the minister also and he is willing to introduce the necessary amendment at the ensuing session. Perhaps you would send me down the frame of a clause which in your view would be satisfactory, having regard to the radical amendments which the House was persuaded to enact at the last session.

Yours very truly,

(Sgd.) E. L. NEWCOMBE,

Deputy Minister of Justice

The Hon. W. F. NICKLE,
Attorney General,
Toronto, Ont.

ONTARIO

C 3

DEPARTMENT OF THE ATTORNEY GENERAL

TORONTO, December 12, 1923

MY DEAR SIR,—I beg on behalf of the Attorney General of Ontario to acknowledge the receipt of your letter to him of the 10th of December and to express his appreciation of the view held by the Minister of Justice and yourself. A clause will be drafted and forwarded to you within a short time.

Yours faithfully,

(Sgd.) E. BAYLY,

Deputy Attorney General

E. L. NEWCOMBE, Esq., K.C.,
Deputy Minister of Justice,
Ottawa, Ont.

ONTARIO

C 4

DEPARTMENT OF THE ATTORNEY GENERAL

TORONTO, February 4, 1924

Re Crown Appeals

MY DEAR MR. NEWCOMBE,—With reference to your letter of the 10th December addressed to the Honourable the Attorney General, I have been considering several draft Acts of which I am enclosing two marked respectively A and B.

Owing to the form and contents of sections 1012 to 1021C inclusive, as enacted by the Statutes of 1923, chapter 41, it

would be practically impossible to put in a provision allowing appeals on behalf of the Crown without necessitating the alteration of practically every one of these sections, which would be a monumental undertaking and would mean a redrafting of the criminal appeal provisions. The only alternative appears to be to provide for the appeal and make the other provisions apply *mutatis mutandis* so far as they would be applicable to appeals of this sort. I have drawn the enclosed draft sections with this in mind.

In draft A I have merely proposed the addition of two new subsections of section 1013. This is probably the more satisfactory one.

In draft B I have added a whole new section (1013A) which if passed makes an amendment to section 1012 necessary: this amendment should be as indicated in section I of my draft.

Yours faithfully,

(Sgd.) E. BAYLY,

Deputy Attorney General

E. L. NEWCOMBE, Esq., K.C.,
Deputy Minister of Justice,
Ottawa, Ont.

“ A ”

An Act to Amend The Criminal Code

1. Section 1013 of the Criminal Code as enacted by section 9 of chapter 41 of the Statutes of 1923 is hereby amended by adding thereto the following subsections:—

“ 1013 (6) Notwithstanding anything in this Act contained, the Attorney General shall have the right to appeal to the Court of Appeal against any judgment or verdict of acquittal of a Trial Court in respect of an indictable offence on any ground of appeal which involves a question of law alone.

“(7) The procedure upon such an appeal and the powers of the Court of Appeal including the power to grant a new trial shall *mutatis mutandis* and so far as the same are applicable to appeals upon a question of law alone, be similar to the procedure prescribed and the powers given by sections 1012 to 1021C of this Act inclusive and the Rules of Court passed pursuant thereto and to section 576 of this Act.”

“ B ”

An Act to Amend The Criminal Code

1. Section 1012 of the Criminal Code as enacted by section 9 of chapter 41 of the Statutes of 1923 is hereby amended by striking out the words “ in this section and in the sixteen next following section ” in the first and second lines thereof and by inserting in lieu thereof the following words, “ In sections 1012 to 1025 both inclusive ”.

2. The said Act is hereby further amended by inserting immediately after section 1013 thereof the following section:—

“ 1013A (1) Notwithstanding anything in this Act contained, the Attorney General shall have the right to appeal to the Court of Appeal against any judgment or verdict of acquittal of a Trial Court in respect of an indictable offence on any ground of appeal which involves a question of law alone.

“(2) The procedure upon such an appeal and the powers of the Court of Appeal including the power to grant a new trial shall *mutatis mutandis* and so far as the same are applicable to appeals upon a question of law alone, be similar to the procedure prescribed and the powers given by sections 1012 to 1021C of this Act and the Rules of Court passed pursuant thereto and to section 576 of this Act.”

DEPARTMENT OF JUSTICE, CANADA

C 5

OTTAWA, ONT., February 8, 1924.

DEAR MR. BAYLY,—I have received your letter of 4th instant, enclosing draft amendments to the Criminal Code, and I propose to adopt the one which you have marked “ A ”. This will answer for present purposes, and in connection with the revision of the statutes which is now going on we will, I hope, be able to make such rearrangement and disposition or explanation of the sections as will bring out clearly the Attorney General's right of appeal and the procedure therefor. Meantime I think your draft may be adopted as a working expedient.

Yours faithfully,

(Sgd.) E. L. NEWCOMBE,

Deputy Minister of Justice.

APPENDIX D

OFFICE OF THE ATTORNEY GENERAL

D 1

ST. JOHN, N.B., October 30, 1926.

E. R. CAMERON, Esq., K.C.,
 Supreme Court,
 Ottawa.

DEAR MR. CAMERON,—Yours of 28th instant received.
 I spoke to the Chief Justice a few days ago, and, while he has not yet written you, he approves of the draft which you sent him through me.

Yours very truly,
 (Signed) JOHN B. M. BAXTER,
Premier and Attorney General.

ATTORNEY GENERAL, PROVINCE OF BRITISH
COLUMBIA

D 2

VICTORIA, December 4, 1926.

F. R. McD. RUSSELL, Esq., K.C.,
 Barrister-at-Law,
 Credit Foncier Building,
 Vancouver, B.C.

DEAR SIR,—I have carefully considered Mr. Cameron's draft revision of Part 16 of the Criminal Code, and I think that without materially changing the Part as it now stands the draft makes its meaning much clearer. I would, however, call your attention to the word "person" in the third last line of subsection 1 of section 777, which is evidently a mistake, and intended to mean "magistrate." It appears to me further that the word "crime" in the second last line of said subsection should be changed to "criminal offence."

Why were the words "or if the power of the magistrate to try it does not depend on the consent of the accused" omitted from subsection 3 of section 781? It may be that this alternative is provided for in another section. If so, I have overlooked it.

Yours truly,
 (Signed) WM. D. CARTER,
Deputy Attorney General.

ATTORNEY GENERAL OF NOVA SCOTIA

D 3

HALIFAX, August 19, 1926.

E. R. CAMERON, Esq., K.C.,
Registrar Supreme Court of Canada,
Ottawa.

DEAR MR. CAMERON,—I have received a print of your draft of Part XVI of the Criminal Code, Summary Trial of Indictable Offences, and think that your draft will simplify and clarify a part of the Criminal Code that bristles with difficulties and inconsistencies; I do hope that you will have the redrafting of the speedy trials part of the Code, which is in just as bad shape as the summary trials part is at present.

(Signed) FRED F. MATHERS,
Deputy Attorney General.

APPENDIX E

E 1

TORONTO 5, August 20, 1926.

MY DEAR MR. CAMERON,—I have been away for some time and on my return have taken up your redraft of Part XVI of the Criminal Code. You have evidently put a great deal of careful work upon the draft and the result, with one exception to which I refer, seems excellent.

This exception is that in the province of Ontario sections 777 and 778 completely cover all offences referred to in section 773 and this partial duplication or overlapping causes great confusion in the minds of magistrates and even Crown Attorneys. The Magistrates' Association at one of its meetings sent a representative to me to discuss the overlapping and a request was made that section 773 be dropped. This would of course be easier if 777 and 778 applied generally to all Canada. My suggestion is that a provision be inserted that 773 shall not apply to the province of Ontario, leaving the "absolute jurisdiction" sections and the rest of the provisions as you drafted them. There would remain to be considered sections 774 and 775 (in the numbering of your draft), these could be made inapplicable to Ontario. This would make neat drafting and I can see no practical objection. The only other suggestion which I would make (and it is not perhaps an important one) is that the source of each *subsection* be placed at the end of that subsection rather than "lumped" at the end of the *section* and that the section of the 1906 Code be added to the present reference.

Your draft seems to be so thorough that I hesitate to make even these suggestions, but so far as this province is concerned, I think the principal ones would clarify procedure. Your draft is enclosed.

Trusting you are well and with kind regards, I remain,

Yours faithfully,

(Sgd.) E. BAYLY,
Deputy Attorney General.

E 2

OTTAWA, September 21, 1926.

EDWARD BAYLY, Esq., K.C.,
Deputy Attorney General,
Toronto, Ont.

DEAR MR. BAYLY,—I duly received your letter of August 20 and thank you for the words of appreciation it contains.

I have at length been able to carefully consider your criticism of the manner in which I have dealt with sections 773, 777, 780 and 781 of the present Code. I frankly admit I found the sections very troublesome, and I am still of the

opinion that my treatment of them is the only one possible if the old sections with their inconsistencies are not to be reproduced verbatim.

I shall give you my reasons at length. If we look at Part LV of the Canadian Criminal Code of 1892 (55-56 Victoria, chapter 29), we find in 783 a list of minor offences which Parliament thought could with advantage to the public be selected from the great body of indictable offences, and provided for them, a lighter penalty either by fine, or shortened imprisonment, or both, than was by the terms of the earlier sections of the Act provided for such crimes. The effect of section 783 was to preclude the magistrates amongst other things, from inflicting a longer imprisonment in cases of these minor offences than six months.

Section 785 of the old Code, however, made a special provision for the province of Ontario, whereby police or stipendiary magistrates who are included amongst the magistrates given jurisdiction in respect to the offences mentioned in 783, were given an extended jurisdiction with the consent of the prisoner, covering any offence for which a person might be tried at a court of General Sessions of the Peace, and if found guilty, could sentence the prisoner to the same punishment as he would have been liable if he had been tried before a court of the said General Sessions. Accordingly, if a person who had stolen \$5 from another and were tried in Ontario before a police or stipendiary magistrate, he could be sentenced to many years of imprisonment for the same offence for which if he had been tried before any of the other magistrates mentioned in 783, he could not have been sentenced to more than six months' imprisonment.

Later on the same enlarged jurisdiction given to police and stipendiary magistrates was extended so that today it applies also to all district magistrates and judges of sessions in Quebec, to police and stipendiary magistrates in all cities and incorporated towns in Canada having a population of not less than 2,500, and to recorders of such cities or towns if they exercise judicial functions.

If no means of harmonizing these sections can be found, the result would be that all over Canada the penalty provided for the crime would depend upon the jurisdiction of the magistrate before whom the charge was laid, and the *same offence* might vary as regards the penalty of imprisonment between a maximum of six months, and in some cases a maximum of fourteen years, dependent solely upon whether the magistrate was, or was not, one of those included in section 777 (old section 785).

This boldly stated, somewhat shocks even a lawyer, and by the man on the street would be repugnant to his conception of elemental justice.

Under the circumstances, one is not surprised that there has been no uniformity as regards the construction placed upon

these sections of the statute by Courts of Justice. Note the following amongst many other cases:—

Queen v. Conlin, 1 Can. Crim. Cas. p. 41 (1897):

In this case the prisoner was convicted by the police magistrate of Hamilton of stealing \$3.48, and was sentenced to three years' imprisonment in the penitentiary. The above sections were discussed and a Divisional Court of the High Court of Justice in Ontario upheld the conviction.

The Queen v. Archibald, 4 Can. Crim. Cas. 159 (198):

In this case the prisoner was convicted by a police magistrate of an aggravated assault, an offence included in section 783, for which the maximum imprisonment by (788) was six months. Nevertheless, he was sentenced to twelve months' imprisonment and by virtue of section 785, the conviction was upheld.

The Queen v. Randolph, 4 Can. Crim. Cas. 165:

In this case the prisoner was convicted of stealing \$5 by a police magistrate at Toronto and sentenced to imprisonment at hard labour for one year and three hundred and sixty-four days. The conviction was quashed, the Court (Ferguson J.) holding that the offence fell within 783 and the limit of imprisonment was six months.

The King v. Hayward, 6 Can. Crim. Cas. 399 (1902):

Here the prisoner was convicted by a police magistrate in Ontario of stealing 80 cents, and sentenced to two years' imprisonment. On a return to a writ of habeas corpus, Chancellor Boyd quashed the conviction and discharged the prisoner. In the course of his judgment he says,

“The offence charged was stealing a small sum of money which was less than \$10, and so it falls to be dealt with in section 783 of the Code.”

It was argued that it might be regarded as coming under section 785, and so the sentence of two years' imprisonment be justified, but I think the correct reading of that section is suggested by the gloss in the margin, that it is intended to comprehend summary trial “in certain other cases” than those enunciated specifically in section 783. Where the offence is charged and in reality falls under section 783 (2), it is to be treated as a comparatively petty offence, with the extreme limit of incarceration fixed at six months.

Ex parte McDonald, 9 Can. Crim. Cas. 368 (1904):

In this case the stipendiary magistrate of Halifax convicted a person of theft of a piece of meat, and sentenced him to three years in the Dorchester penitentiary, which is located in the province of New Brunswick. The prisoner, having served a year, obtained a writ of habeas corpus, and his conviction was quashed by the Supreme Court of New Brunswick because his penalty was greater than six months.

The King v. Shing, 17 Can. Crim. Cas. 463 (1910), Court of Appeal, Manitoba:

Here the prisoner was convicted of keeping a disorderly house, and sentenced to a fine of \$200. At this time, the maximum fine under the Code was \$100. After quoting the sections in question, Mr. Justice Cameron, speaking for the full Court says,

“The object of section 773 is to provide the summary method of disposing of these offences which were not thought to be of too serious a nature to be entrusted to the judgment of the selected officials named in section 771.”

After quoting section 781, he says,

“Unless there are other controlling provisions, the penalty inflicted was beyond the power of the magistrate to impose. It is argued that section 777 (old section 785) enlarges this jurisdiction, but it is plain that that section refers to a class of officials other than that designated by section 771, and includes other and different offences, viz., all those that can be tried at a Court of General Sessions of the Peace; but such offences can be summarily tried under section 777 only with the consent of the accused and not otherwise. It follows that the exclusion of section 781 from the application of section 777 has no bearing on this case. It remains, therefore, that a fine of \$200 was beyond the power of the magistrate to impose.”

The King v. Crawford, 20 Can. Crim. Cas. 49:

This was a judgment of the Supreme Court of Alberta. The court, after reviewing the cases above mentioned, and pointing out the difference of opinion between the courts of Ontario and Manitoba, held that in the case being dealt with it was not necessary to decide which view was correct.

Rex v. Kramer (1924), 1 W.W.R. Supreme Court of Alberta. Appellate Division, at p. 725, per Beck, J.:

“The offences listed in section 773 being all included in the offences triable at a Court of General Sessions, and the magistrates specially mentioned in section 777 being included in the definition of magistrates in section 772 who are given jurisdiction over the offences listed in section 773, the necessary conclusion seems to be that section 777 is intended to apply to offences triable at General Sessions other than those listed in section 773.”

The above references indicate that the weight of judicial decision is now in accord with the view expressed by Chancellor Boyd, and I have accordingly felt justified in adopting it in my draft. Your suggestion is that in Ontario, sections of the present Code, 773, 780 and 781, which create a large number of minor offences for which the maximum penalty is comparatively light, should be dropped. The result would be that in Ontario you would repeal the distinction recognized since the

old Code of 1892 that for certain minor offences there should be a light sentence, and hereafter the sentence in all cases would be governed solely by the discretion of the magistrates, and also there would be hereafter a lack of uniformity between Ontario and the rest of Canada with respect to these offences. Certainly to do this would require legislation as it would be far beyond the authority of the Statute Revision Commission.

After all, is not the making of the Statute abundantly clear the main thing to be desired? By subsection 2 of section 777 of my draft, can any police or stipendiary magistrate doubt that when he deals with offences mentioned in 773 he has no greater power in affixing the penalty than have the other magistrates mentioned in 771?

I value your opinion very highly and attach great weight to your views, and sincerely trust that under all circumstances you will see your way clear to accept my draft. Any difference of opinion amongst the Deputy Attorneys General may lead to the draft being dropped altogether and the present unsatisfactory sections retained.

Yours very sincerely,
(Sgd.) E. R. CAMERON,
Vice-President, Statute Revision Commission.

E 3

TORONTO 5, March 31, 1927.

MY DEAR MR. CAMERON,—Between illness in the office, pressure of Court and Departmental business and the Session, I regret to say that I overlooked answering your letter of December 9 as I should have done long ago.

We got a little at cross-purposes because I was referring to the sections of the present Code and you were referring to the sections of your draft. In effect my criticism is a practical, not theoretical one. I was at a meeting of magistrates not long ago and none of them understood the relationship between the present section 773 and the present sections 777-778. Leaving out the cases in which absolute jurisdiction is given to the magistrate to try summarily without consent and dealing with the other cases covered by section 773, there is no reason, so far as the province of Ontario is concerned, why the whole of 773 should not be repealed as it is amply covered by 777 and 778, and that would be my method of dealing with the question if I had authority. The limited punishments provided by sections 780 and 781 when the accused is tried under section 773 have to be considered. As I said to you in my letter of December 6 last, I think the magistrate, the Crown Attorney and the accused will still as in the past be somewhat "at large" as to which section is being used and what is the maximum punishment.

In conclusion I may say that if it is too late to make any alteration or if I have not expressed myself with sufficient clearness, we have managed to live to our present ages with the law a great part of the time being as it is now, and I assume that no greater evil will happen if it is continued.

Trusting that you are well, I remain,

Yours sincerely,

(Sgd.) E. BAYLY.

E 4

OTTAWA, June 9, 1927.

EDWARD BAYLY, Esq., K.C.,
Deputy Attorney General,
Toronto, Ont.

DEAR MR. BAYLY,—I am sending you under another cover my draft of the Code which will be considered by the Commission in the course of ten days. I have been looking over our correspondence, and find that the question of the relationship between section 773 and sections 777-8 to which you refer in your letter of March last, was discussed in my letter to you of September 21, 1926. Let me supplement this by saying that there has been more difficulty with these sections than I have found in any part of the Code, not only in your province, but throughout the rest of Canada.

The following question arises: Is a police magistrate having the powers conferred by 777 when trying one of the cases set out in 773 limited in imposing punishment to the terms provided by 780 and 781, or can he award the maximum penalty affixed to the crime by another section of the Code?

At first blush, when we looked at subsection 3, of section 777, it would seem that he is not limited by 773, but when you attempt to work out this section along with 775 and 776, there is room for a different construction. In addition to the cases mentioned in your previous letter, see re Wurrell 8 W.W.R. 230 and 478, the weight of authority appears to me to hold that a police magistrate acting under 777 dealing with an offence covered by 773, is limited in the punishment to that provided for by 780 and 781. What Parliament intended to do when passing the original of these sections 63-64 V.C. 46 was to extend the power of police magistrates to other offences not already provided for by 773, and not to repeal sections 773, 780 and 781 as respects these functionaries. What I propose is to limit the jurisdiction of police magistrates in the case of offences covered at 773 to the penalty provided by 780 and 781. In other words, to make this punishment uniform throughout Canada to all magistrates acting under Part XVI.

The only objection I can see to this is that in certain cases the penalty provided at 780 and 781 may be deemed inadequate by some special case, but where this arises surely a complete

remedy is found in 784 by which the magistrate can always refuse to proceed summarily and require proceedings to be taken by indictment. In what I have written, I am dealing with the sections by their present numbers in the Code.

You will see I propose to carry out my views by adding a subsection which is to be found in the draft which you will receive as 774, subsection 2. I may say that the draft of Part XVI is satisfactory in New Brunswick and Nova Scotia, where some difficulties arise as in your province.

Yours sincerely,
(Sgd.) E. R. CAMERON,

Vice-President, Statute Revision Commission.

P.S.—I should also call your attention to the manner in which I have dealt with old section 782 and 783, and which now appear in my draft as 776. You will see I am limiting its operation to magistrates other than the police magistrates, etc., described in old section 777, now in the draft 774. These sections are very old in origin, and are found substantially in the same language in 32, 33 Victoria, chapter 32, sections 10 and 11, 1869, but at this time their limited powers were vested in the magistrates, and if the accused consented to be tried if he pleaded guilty, he could be sentenced to twelve months' imprisonment, if he pleaded not guilty, he was committed for trial in the ordinary way.

In 1875 by 38 Victoria, chapter 47, much larger powers were conferred upon these magistrates in Ontario, and in this and all cases ordinarily tried at the sessions, the accused, if he consented to be tried and sentenced to whatever punishment was imposed by law, the old section therefore became inapplicable to magistrates of this class and I have therefore limited it. Where the offence comes before police magistrates, etc., their powers are now to be found in 774 of the draft.

APPENDIX F

The references are to sections of the Criminal Code R.S. (1906), c. 146, as amended before the present revision. The figures within brackets represent the section number in the present Revised Statutes R.S. (1927), chapter 36.

F 1

30 (30). Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is justified in arresting such person without warrant, whether such person is guilty or not. 55-56 V, c. 29, s. 22.

Suggested amendment by Eric N. Armour, Crown Attorney for the city of Toronto and county of York. (Letters to the Minister of Justice, 21st May, 1923.) See Appendix F, 78 (a), 78 (j).

F 2

113 (113). Every one who wilfully,—

- (a) does any act with intent to cause by an explosive substance, or conspires to cause by an explosive substance, an explosion of a nature likely to endanger life, or to cause serious injury to property; or,
- (b) makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life or to cause serious injury to property, or to enable any other person by means thereof to endanger life or to cause serious injury to property;

is guilty of an indictable offence and liable to fourteen years' imprisonment, whether an explosion takes place or not, and whether an injury to person or property is actually caused or not. 55-56 V, c. 29, s. 100.

*Letter of C. S. A. Rogers, Crown Prosecutor, Dauphin, Man.,
27th July, 1925*

The sections regarding explosive substances should be enlarged so as to make it an offence for any one to cause an explosion with intent to frighten, annoy or excite any other person.

F 3

122 (122). Every one who, without lawful excuse, points at another person any firearm or airgun, whether loaded or unloaded is guilty of an offence and liable, on summary conviction before two justices, to a penalty not exceeding one hundred dollars and not less than ten dollars, or to imprisonment for any term not exceeding thirty days, with or without hard labour. 55-56 V, c. 29, s. 109.

*Letter of C. S. A. Rogers, Crown Prosecutor, Dauphin, Man.,
27th July, 1925*

Apparently no charge exists where a man discharges firearms not near a public highway, with intent to frighten any other person, and without pointing such firearms at any person. I am aware that a person pointing a gun at another is guilty of an offence. Also that discharging firearms in a public place or near a highway is an offence, but the circumstances outlined above, apparently is not.

F 4

157 (157). Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who,—

- (a) being a police commissioner or being a justice, peace officer, or public officer, employed in any capacity for the prosecution or detection or punishment of offenders, or being an officer of a Juvenile Court, corruptly accepts or obtains, or agrees to accept or attempts to obtain for himself, or for any other person, any money or valuable consideration, office, place or employment, with the intent to interfere corruptly with the due administration of justice, or to procure or facilitate the commission of any crime, or to protect from detection or punishment any person having committed or intending to commit any crime; (Am. 1919, c. 46; 1922, c. 16) or,
- (b) corruptly gives or offers to any officer aforesaid any such bribe as aforesaid with any such intent. 55-56 V, c. 29, s. 132.

Amendment made in 1922, 12-13 George V, c. 16, s. 1:—

“1. Paragraph (a) of section 157 of the Criminal Code, Revised Statutes of Canada, 1906, chapter 146, as amended by chapter 46 of the statutes of 1919, is amended by inserting the words ‘being a Police Commissioner or’ at the beginning thereof.”

Memo. of suggested amendments—Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (k)

F 5

Misleading Justice

170 (170). Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury or person holding the proceeding.

2. Subornation of perjury is counselling or procuring a person to commit any perjury which is actually committed.

3. Evidence in this section includes evidence given on the *voir dire* and evidence given before a grand jury. 55-56 V, c. 29, s. 145.

*Letter of R. B. Graham, Crown Prosecutor, City of Winnipeg,
10th September, 1925*

Definition of perjury given in section 170 of the code should be amended by striking out the words "upon oath or affirmation", and that any other sections of the code that would require amendments to make them coincide with this should be amended.

The administering of the oath in Court has ceased to have any effect and the only result of the practice is that people some times escape punishment for perjury on the ground that they were not properly sworn. If this appears to the Commission too radical a change, at least a section should be added similar to sections 175 and 176, making it an offence for any person to sign and use a document purporting to be an affidavit or statutory declaration and containing a false statement, whether the oath was actually administered or the declaration properly taken or not.

You are probably aware in many cases a commissioner will sign an affidavit or statutory declaration without even seeing the deponent or declarant.

I had a case here in which a solvent merchant was forced into bankruptcy through a false affidavit and in a prosecution for perjury in respect to the affidavit, it transpired that the oath had never been administered and the only remedy at that time was the cancellation of the commissioner's commission. At that time I took the matter up with the Department of Justice and after some years of correspondence the Legislature passed section 179A, which does not meet the case at all and is an absolutely useless section. Under section 179A one cannot possibly secure a conviction except on a plea of guilty, inasmuch as the only persons who know whether the oath was administered or not are the commissioner and the deponent, both of whom are the offenders, and both of whom can, possibly truthfully, say they have forgotten. Whether the section I asked for is passed or not, 179A should be repealed, as it is an insult to the intelligence of the profession throughout Canada.

F 6

172 (172). Every one is guilty of perjury, who,—

- (a) having taken or made any oath, affirmation, solemn declaration or affidavit where, by any Act or law in force in Canada, or in any province of Canada, it is required or permitted that facts, matters or things be verified, or otherwise assured or ascertained by or upon the oath, affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing; or,
- (b) knowingly, wilfully and corruptly, upon oath, affirmation or solemn declaration, affirms, declares or deposes to the truth of any statement for so verifying, assuring or ascertaining any such fact, matter or thing, or purporting so to do, or knowingly, wilfully and corruptly takes, makes, signs or subscribes any such affirmation, declaration or affidavit as to any such fact, matter or thing, if such statement, affidavit, affirmation or declaration is untrue in whole or in part. 55-56 V, c. 29, s. 148.

173 (173). Every person who wilfully and corruptly makes any false affidavit, affirmation or solemn declaration, out of the

province in which it is to be used but within Canada, before any person authorized to take the same, for the purpose of being used in any province of Canada, is guilty of perjury in like manner as if such false affidavit, affirmation or declaration were made before a competent authority in the province in which it is used or intended to be used. 55-56 V, c. 29, s. 149.

174 (174). Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who commits perjury or subornation of perjury.

2. If the crime is committed in order to procure the conviction of a person for any crime punishable by death, or imprisonment for seven years or more, the punishment may be imprisonment for life. 55-56 V, c. 29, s. 146.

175 (175). Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being required or authorized by law to make any statement on oath, affirmation or solemn declaration, thereupon makes a statement which would amount to perjury if made in a judicial proceeding. 55-56 V, c. 29, s. 147.

176 (176). Every one is guilty of an indictable offence and liable to two years' imprisonment who, upon any occasion on which he is permitted by law to make any statement or declaration before any officer authorized by law to permit it to be made before him, or before any notary public to be certified by him as such notary, makes a statement which would amount to perjury if made on oath in a judicial proceeding. 55-56 V, c. 29, s. 150.

On Sections 172-176:—

Suggested amendments Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (l).

*Letter of Fred F. Mathers, Deputy Attorney General, Halifax,
21st July, 1925*

I wrote you on the 13th March last suggesting that the perjury sections in the Code should be made consistent. It seems to me that it is important that the law on the subject should be clear. If you will refer to the judgment of Graham C. J. in *The King versus Angus B. Morrison*, 49 Nova Scotia Reports, page 446, you will see that he refers to the matter.

Copied from Nova Scotia reports 1916, page 447

I say that, but I think s. 175 covers the same thing, namely false swearing in an extra-judicial oath. The sections possibly overlap. Section 172 is taken from older statutes of Canada, R.S.C. 1886, chapter 154, and these words are not in the English Draft Code, hence we find such words as "wilful" and "corruptly", while s. 175 of the code is taken from the English Draft Code s. 122.

These two sections in the Canada Criminal Code probably mean the same thing. One had the words "wilfully and corruptly"; the other, by reference to s. 170, has the words "such assertion being known to the witness to be false."

Letter of His Honour J. A. Jackson, 9th May, 1925

The case of *R vs. Skelton* (1898), 4 C.C.C., 467, tends to give this section a broader application than might appear from the first reading. There are many cases where statutory declarations are taken apparently neither with the permission or otherwise of the law, and it seems to me that the section should be made plain enough to cover these cases. For instance, in dealings between private parties a statutory declaration may well be taken as to the truth of certain matters. In connection with amateur sports statutory declarations are required as to the amateur status of players, and it might be that even the decision of *Rex vs. Skelton* should not be sufficiently broad to warrant criminal action against a player who takes a false declaration. This strikes at the root of the whole question of amateurism in sport, and I would respectively suggest that this clause be made sufficiently broad to cover cases of this kind.

F 7

179a (179 (2)). Any person who,—

- (a) signs any documents purporting to be an affidavit or statutory declaration as having been sworn or declared before him when such document was not so sworn or declared, or when he knows that he had no authority to administer such oath or declaration; or,
- (b) signs, uses or offers for use any document purporting to be an affidavit or statutory declaration which he knows is not or was not sworn or declared to; or was not sworn or declared to before a proper officer in that behalf;

shall be guilty of an offence and liable, upon summary conviction, to a penalty not exceeding five hundred dollars, or to imprisonment for any term not exceeding six months, or to both fine and imprisonment. (1920, c. 43.)

Letter of R. B. Graham, Crown Prosecutor, Winnipeg, 10th September, 1925

You are probably aware in many cases a commissioner will sign an affidavit or statutory declaration without even seeing the deponent or declarant.

I had a case here in which a solvent merchant was forced into bankruptcy through a false affidavit and in a prosecution for perjury in respect to the affidavit, it transpired, that the oath had never been administered and the only remedy at that time was the cancellation of the commissioner's commission. At that time I took the matter up with the Department of Justice and after some years of correspondence the Legislature passed section 179A, which does not meet the case at all and is an absolutely useless section. Under section 179A one cannot possibly secure a conviction except on a plea of guilty, inasmuch as the only persons who know whether the oath was administered or not are the commissioner and the deponent, both of whom are the offenders, and both of whom can, possibly truthfully, say they have forgotten. Whether the section I asked for is passed or not, 179A should be repealed, as it is an insult to the intelligence of the profession throughout Canada.

Memo suggested amendments by Eric Armour, Crown Attorney, Toronto. See Appendix 78 (h) and 78 (m)

F 8

180 (180). Every one is guilty of an indictable offence and liable to two years' imprisonment who,—

- (a) dissuades or attempts to dissuade any person by threats, bribes, or other corrupt means from giving evidence in any cause or matter, civil or criminal; or,
- (b) influences or attempts to influence, by threats or bribes or other corrupt means, any juryman in his conduct as such, whether such person has been sworn as a juryman or not; or,
- (c) accepts any bribe or other corrupt consideration to abstain from giving evidence, or on account of his conduct as a juryman; or,
- (d) wilfully attempts in any other way to obstruct, pervert or defeat the course of justice. 55-56 V, c. 29, s. 154.

Suggested amendments by Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (n)

157. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who,—

- (a) being a police commissioner or being a justice, peace officer, or public officer, employed in any capacity for the prosecution or detection or punishment of offenders, or being an officer of a Juvenile Court, corruptly accepts or obtains, or agrees to accept or attempts to obtain for himself, or for any other person, any money or valuable consideration, office, place or employment, with the intent to interfere corruptly with the due administration of justice, or to procure or facilitate the commission of any crime, or to protect from detection or punishment any person having committed or intending to commit any crime; (Am. 1919, c. 46; 1922, c. 16) or,
- (b) corruptly gives or offers to any officer aforesaid any such bribe as aforesaid with any such intent. 55-56 V, c. 29, s. 132.

F 9

181 (181). Every one is guilty of an indictable offence and liable to a fine not exceeding the penalty compounded for who, having brought, or under colour of bringing an action against any person under any penal statute in order to obtain from him any penalty, compounds the said action without order or consent of the court, whether any offence has in fact been committed or not. 55-56 V, c. 29, s. 155.

Letter of His Honour J. A. Jackson

Re section 181, compounding penal actions. Is it the intention of Parliament that this should apply to penal actions and only where a fine is exacted?

Escapes and Rescues

F 10

185 (185). Every one is guilty of an indictable offence and liable to two years' imprisonment who, having been sentenced to imprisonment, is afterwards, and before the expiration of the term for which he was sentenced, at large within Canada without some lawful cause, the proof whereof shall lie on him. 55-56 V, c. 29, s. 159.

Letter of J. M. Kearns, County Crown Attorney, Guelph, Ontario, 16th July, 1925

We have the Ontario Reformatory here and from time to time the prisoners endeavour to escape and sometimes get away for a day or two, but are generally returned.

There are no armed guards and no stone walls here and about the only punishment we can give an escaped prisoner is to send him to Kingston Penitentiary.

It has often occurred to me that in a great many of the cases a two year term in Kingston is pretty severe but yet on the other hand we think it would soon ruin the discipline and morale at the Reformatory, to simply return them there.

My suggestion for your consideration is that where prisoners are convicted of escaping from a Reformatory or gaol that it would be possible to give them a shorter term than two years in Kingston Penitentiary.

Offences Against Morality

F 11

202 (202). Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature. 55-56 V, c. 29, s. 174.

203 (203). Every one is guilty of an indictable offence and liable to ten years' imprisonment who attempts to commit the offence mentioned in the last preceding section. 55-56 V, c. 29, s. 175.

Letter of Arthur Leighton, Nanaimo, B.C., 26th August, 1925

There is another group of sections dealing with sexual offences, 201 to 220-A. The person charged under 202 might be convicted under 293, and it would seem to me that 202, 203 and 293 should follow one another. In fact all these assaults of a sexual nature should be grouped together, and not mixed up with assaults involving mere violence. The former come under rules of evidence peculiarly their own, and much time and many mistakes would be saved if offences closely related to one another were properly grouped.

F 12

211 (211). Every one over the age of eighteen years is guilty of an indictable offence and liable to two years' imprisonment who seduces any girl of previously chaste character of or above the age of sixteen years and under the age of eighteen years. Proof that a girl has on previous occasions had illicit

connection with the accused shall not be deemed to be evidence that she was not of previously chaste character. (1920, c. 43.) 55-56 V, c. 29, s. 181; 56 V, c. 32, s. 1.

NOTE:—By section 17, chapter 43, of the statutes of 1920, it is provided that:—

“On the trial of any offence against sections four, five or eight of this Act, the trial judge may instruct the jury that if in their view the evidence does not show that the accused is wholly or chiefly to blame for the commission of said offence, they may find a verdict of acquittal.”

Letter of T. Carleton Allen, Deputy Attorney-General, Fredericton, N.B., 6th April, 1925

I also think section 17 of Chapter 43 of the Acts of 1920, amending the Criminal Code, should be repealed, for, with that section, it is almost impossible to get a jury in the province to convict a man charged with offences under Sections 4, 5 and 8.

(Section 4 of c. 43, enacts the present section 211 of the Code.)

Memorandum as to Amendment to the Criminal Code, enclosed with letter of William H. Carter, Deputy Attorney General, Victoria, B.C., April 21st, 1925. See Appendix F, 79, (g).

F 13

212 (212). Every one, above the age of twenty-one years, is guilty of an indictable offence and liable to two years' imprisonment who, under promise of marriage, seduces and has illicit connection with any unmarried female of previously chaste character and under twenty-one years of age. 55-56 V, c. 29, s. 182.

Letter of C. S. A. Rogers, Crown Prosecutor, Dauphin, Manitoba, 27th July, 1925

If you will turn to Section 212 of the Criminal Code of Canada, “seduction under promise of marriage” and then to sub-section 2 of Section 214 of the same Code, you will see that when a person is charged with the offence set out in Section 212 subsequent marriage of the seducer and the seduced, except in the case mentioned, is a complete answer to the charge. In these cases there is frequently considerable expense attached to the apprehension of the person charged and apparently the Code provides no means of collecting same from him.

In a case recently occurring here, the seducer was apprehended in British Columbia and brought to this Province for trial, but between the apprehension and the trial he married the girl, thus establishing, a complete answer to the charge but leaving the Crown saddled with about \$200 costs, which could not be collected from him.

I respectfully submit that these sections should be so altered, as to render marriage and payment of costs incurred, a complete answer to the charge.

Subsection 2 of Section 214 of the Code referred to by Mr. Rogers, reads as follows:—

The subsequent intermarriage of the seducer and the seduced is, if pleaded, a good defence to any indictment for any offence against this or either of the two last preceding sections, except in the case of a guardian seducing his ward.

55-56 V, c. 29, s. 184.

F 14**Section 213 (Subsection (b)) (213):**

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

- (b) who seduces or has illicit connection with any girl previously chaste and under the age of twenty-one years who is in his employment, or who, being in a common, but not necessarily similar, employment with him is, in respect of her employment or work, under or in any way subject to his control or direction, or receives her wages or salary directly or indirectly from him. Proof that a girl has on previous occasions had illicit connection with the accused shall not be deemed to be evidence that she was not previously chaste. 63-64 V, c. 46, s. 3. (1920, c. 43.)

NOTE:—By section 17, chapter 43, of the statutes of 1920, it is provided that:—

“On the trial of any offence against sections four, five or eight of this Act, the trial judge may instruct the jury that if in their view the evidence does not show that the accused is wholly or chiefly to blame for the commission of said offence, they may find a verdict of acquittal.”

*Letter of T. Carleton Allen, Deputy Attorney-General,
Fredericton, N.B., 6th April, 1925*

I also think that Section 17 of Chapter 43 of the Acts of 1920, amending the Criminal Code, should be repealed, for, with that section, it is almost impossible to get a jury in the province to convict a man charged with offences under Sections 4, 5 and 8.

(Section 5 of the Amendment of 1920 referred to above, enacts the present paragraph (b) of Section 213 of the Code, as shown above.)

Section 17 of the Amendment of 1920 above referred to, reads as follows:—

On the trial of any offence against sections four, five and eight of this Act, the trial judge may instruct the jury that if in their view the evidence does not show that the accused is wholly or chiefly to blame for the commission of said offence, they may find a verdict of acquittal.

F 15

214 (214). Every one is guilty of an indictable offence and liable to a fine of four hundred dollars or to one year's imprisonment, who, being the master or other officer or a seaman or other person employed on board of any vessel, while such vessel is in any water within the jurisdiction of the Parliament of Canada, under promise of marriage, or by threats, or by the exercise of his authority, or by solicitation, or the making of gifts or presents, seduces and has illicit connection with any female passenger.

2. The subsequent intermarriage of the seducer and the seduced is, if pleaded, a good defence to any indictment for any offence against this or either of the two last preceding sections, except in the case of a guardian seducing his ward. 55-56 PV, c. 29, s. 184.

*Letter of C. S. A. Rogers, Crown Prosecutor, Dauphin,
Manitoba, 27th July, 1925*

If you will turn to Section 212 of the Criminal Code of Canada, "seduction under promise of marriage" and then to sub-section 2 of section 214 of the same Code, you will see that when a person is charged with the offence set out in Section 212, subsequent marriage of the seducer and the seduced, except in the case mentioned, is a complete answer to the charge. In these cases there is frequently considerable expense attached to the apprehension of the person charged and apparently the Code provides no means of collecting same from him.

In a case recently occurring here, the seducer was apprehended in British Columbia and brought to this Province for trial, but between the apprehension and the trial he married the girl, thus establishing a complete answer to the charge but leaving the Crown saddled with about \$200 costs, which could not be collected from him.

I respectfully submit that these sections should be so altered as to render marriage and payment of costs incurred a complete answer to the charge.

F 16

220a (215). (1) Any person who, in the home of a child, by indulgence in sexual immorality, in habitual drunkenness or in any other form of vice, causes such child to be in danger of being or becoming immoral, dissolute or criminal, or the morals of such child to be injuriously affected, or renders the home of such child an unfit place for such child to be in, shall be liable, on summary conviction, to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding one year or to both fine and imprisonment.

(2) For the purposes of this section, "child" means a boy or girl apparently or actually under the age of sixteen years.

(3) It shall not be a valid defence to a prosecution under this section that the child is of too tender years to understand or appreciate the nature of the act complained of or to be immediately affected thereby.

(4) No prosecution shall be instituted under this section unless it be at the instance of some recognized society for the protection of children or an officer of a juvenile court, without the authorization of the Attorney General of the province in which the offence is alleged to have been committed, nor shall any such prosecution be commenced after the expiration of six months from the time of the commission of the alleged offence (1918, c. 16.)

*Letter of W. R. Cottingham, Legislative Counsel, Winnipeg,
10th August, 1926*

Section 220 A. relates to contributing to juvenile delinquency and defines "child" as "a boy or girl apparently or actually under 16 years." The Juvenile Delinquents' Act has recently (Canada Gazette, July 11th), been made applicable in Manitoba to children under 18. Should not the definition in 220 A (2) be revised correspondingly? I assume that the Commission's authority is limited to a clearer expression where possible of the law as intended by Parliament and not with theoretic improvements. Hence such revision may not be within the scope of the Commission's power.

F 17

227a. An opium joint is a house, room or place to which persons resort for the purpose of smoking or inhaling opium. (1909, c. 9.)

Repealed.—Section 1 of 13-14 George V (1923), Chapter 41.
NOTE.—See sections 641, 642 post.

F 18

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

* * * * *

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

Memo of suggested amendments—Eric N. Armour, Crown Attorney, Toronto. See Appendix F 78 (o)

F 19

236 (236).

4. (1) Subsection one of section two hundred and thirty-six of the said Act, as amended by chapter sixteen of the statutes of 1922, is amended by adding thereto the following proviso:—

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

(2) Subsection 6 of the said section is hereby amended by adding the following as paragraphs (f) and (g):—

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

(g) bonds, debentures, debenture stock or other securities callable by drawing of lots and redeemable with interest and providing for payment of premiums upon redemption or otherwise.”

Suggested amendments Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (p)

F 20

Vagrancy

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

* * * * *

- (f) causes a disturbance in or near any street, road, highway or public place, by screaming, swearing or singing, or by being drunk, or by impeding or incommoding peaceable passengers.

Letter of A. B. Harvey, Crown Prosecutor, Edmonton

One section of the Code which has often appeared to me to be unsatisfactory is Subsection (f) of Section 238 referring to creating a disturbance in a public place, and the word "screaming" which is used here is probably meant to include "loud talk" or "shouting," but it would seem that "shouting" would be a more suitable word, as the implication of "screaming" seems to be different from what is really intended by the section.

There is further no adequate provision in the Code for the case of persons fighting in a public place, which frequently creates a considerable disturbance. The only section which appears to cover this is section 100, which after all is intended to cover more serious matters. This could easily be remedied by the insertion of the word "fighting" in section 238 (f) referred to above. These are points both of which have arisen frequently since I have been at the Police Court, and I think that my views on the subject will be shared by Police Officers.

Section 100 referred to above reads as follows:—

Affrays and Duels

100. An affray is the act of fighting in any public street or highway, or fighting to the alarm of the public in any other place to which the public have access.

2. Every one who takes part in an affray is guilty of an indictable offence and liable to one year's imprisonment with hard labour. 55-56 V, c. 29, s. 90.

F 21

274 (274). Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument. 55-56 V, c. 29, s. 242.

Letter of His Honour J. A. Jackson, 9th May, 1925

Re Sections 274 and 295 grievous bodily harm and actual bodily harm. By Section 773 (c) the first can be tried summarily. It seems to me that this gives rise to a good deal of juggling. The sections are at least more or less inconsistent as to the method of trial.

Sections 295 and 773 (c) referred to above are as follows:—

295. Every one who commits any assault which occasions actual bodily harm is guilty of an indictable offence and liable to three years' imprisonment. 55-56 V., c. 29, s. 262.

Jurisdiction

773. Whenever any person is charged before a magistrate,—

- * * * * *
- (c) with unlawfully wounding or inflicting grievous bodily harm upon any other person, either with or without a weapon or instrument; or,
- * * * * *

the magistrate may, subject to the consequent provisions of this Part, hear and determine the charge in a summary way. 55-56 V, c. 29, s. 783.

Letter of Chief Justice Harvey, dated, Edmonton, 19th June, 1925

Some of the provisions respecting personal injuries in the Code seem to overlap. For instance, Sections 274 and 295, for which the same penalty exists, cover much the same ground and we occasionally find that a charge is laid partly in the terms of one and partly in the terms of the other Section, which causes trouble. There seems no good reason why the two Sections should not be incorporated into one.

F 22

Letter of Arthur Leighton, LL.B., Nanaimo, B.C., 26th August, 1925. See Appendix F 79 (h)

F 23

281 (281).

2. Every one who knowingly and wilfully permits any such spring-gun, man-trap or other engine which has been set or placed by some other person, in any place which is in, or afterwards comes into, his possession or occupation, to continue so set or placed shall be deemed to have set or placed such gun, trap or engine with such intent as aforesaid.

Letter of W. E. Kelly, K.C., Crown Attorney, Simcoe, Ontario, 24th July, 1925

In Criminal Code section 281 and sub-section 2 thereof the following words, as defined in the code, should also appear in the list set forth: 'loaded arms, explosive substance, weapon, offensive weapon'—in addition to the weapons described in said section and sub-section and also that section 281 should protect any person whether trespasser or not.

F 24

284 (284). Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person. 55-56 V, c. 29, s. 252.

Memorandum of E. Bayly, K.C., Deputy Attorney General, Ontario

Provision should be made, at the election of the Crown, for trying cases of criminal negligence which have resulted in death before a Superior Court Judge without a Jury. Provision should also be made that where death follows criminal negligence that this charge as an alternative to manslaughter can be laid. At present there is uncertainty about this. See *Rex vs. Forseille*, 55 D.L.R. 262 and *Rex vs. Taylor* 51, L.R. 392.

F 25

285b (285 (3)). Every one who takes or causes to be taken from a garage, stable, stand, or other building or place, any automobile or motor car with intent to operate or drive or

use or cause or permit the same to be operated or driven or used without the consent of the owner shall be liable, on summary conviction, to a fine not exceeding five hundred dollars and costs or to imprisonment for any term not exceeding twelve months or to both fine and imprisonment. (1910, c. 11; 1918, c. 16.)

*Letter of R. M. Matheson, Crown Attorney, Brandon,
28th July, 1925*

That for motor car thieves and young or first offenders the law be amended to permit of the imposition of a short term of imprisonment and also corporal punishment with a strap not more than 10 strokes in any one month.

See also F 78 (i), and F 79 (e).

F 26

291 (291). Every one who commits a common assault is guilty of an indictable offence and liable, if convicted upon an indictment, to one year's imprisonment, or to a fine not exceeding one hundred dollars, and on summary conviction to a fine not exceeding twenty dollars and costs, or to two months' imprisonment, with or without hard labour. 55-56 V, c. 29, s. 265.

292 (292). Every one is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped who,—

- (a) indecently assaults any female; or,
- (b) does anything to any female by her consent which but for such consent would be an indecent assault, if such consent is obtained by false and fraudulent representations as to the nature and quality of the act. 55-56 V, c. 29, s. 259.
- (c) assaults and beats his wife or any other female and thereby occasions her actual bodily harm. (1909, c. 9.)

293 (293). Every one is guilty of an indictable offence and liable to ten years' imprisonment, and to be whipped, who assaults any person with intent to commit sodomy or who, being a male, indecently assaults any other male person. 55-56 V, c. 29, s. 260; 56 V, c. 32, s. 1.

294 (294). It is no defence to a charge or indictment for any indecent assault on a young person under the age of fourteen years to prove that he or she consented to the act of indecency. 55-56 V, c. 29, s. 261.

295. Every one who commits any assault which occasions actual bodily harm is guilty of an indictable offence and liable to three years' imprisonment. 55-56 V, c. 29, s. 262.

See note to section 773 post.

297 (297). Every one is guilty of an indictable offence and liable to twenty-five years' imprisonment who, without lawful authority,—

- (a) kidnaps any other person with intent
 - (i) to cause such other person to be secretly confined or imprisoned in Canada against his will, or
 - (ii) to cause such other person to be unlawfully sent or transported out of Canada against his will, or
 - (iii) to cause such other person to be sold or captured as a slave, or in any way held to service against his will; or,
- (b) forcibly seizes or confines or imprisons any other person within Canada.

2. Upon the trial of any offence under this section the non-resistance of a person so unlawfully kidnapped or confined shall not be a defence unless it appears that it was not caused by threats, duress or force, or exhibition of force. 63-64 V, c. 46, s. 3. (Am. 1909, c. 9.)

Unlawful Carnal Knowledge

298 (298). Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act.

2. No one under the age of fourteen years can commit this offence. 55-56 V, c. 29, s. 266.

299 (299). Every one who commits rape is guilty of an indictable offence and liable to suffer death or to imprisonment for life, and to be whipped. 55-56 V, c. 29, s. 267. (Am. 1921, c. 25.)

Letter of Arthur Leighton, Nanaimo, B.C., 26th August, 1925
See Appendix F 79 (h).

F 27

292 (292). Every one is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped, who,—

- (a) indecently assaults any female; or,
- (b) does anything to any female by her consent which but for such consent would be an indecent assault, if such consent is obtained by false and fraudulent representations as to the nature and quality of the act. 55-56 V, c. 29, s. 259.
- (c) assaults and beats his wife or any other female and thereby occasions her actual bodily harm. (1909, c. 9.)

295 (295). Every one who commits any assault which occasions actual bodily harm is guilty of an indictable offence and liable to three years' imprisonment. 55-56 V, c. 29, s. 262.

*Letter of C. F. P. Conybeare, K.C., Lethbridge, Alberta,
1st August, 1925*

There is one question arising out of Sections 292 and 295 of the Code to which I would call your attention.

Under 295 everyone who commits an assault which occasions actual bodily harm is guilty of an indictable offence and liable to three years' imprisonment. The term 'everyone' would appear to be wide enough in the absence of any other statutory provision to cover an assault on a wife or any other female and the offender would thereby be liable to three years' imprisonment.

But Section 292 contains special provision: 'everyone is guilty of an indictable offence and liable to two years' imprisonment and to be whipped who 'C' assaults and beats his wife or any other female and thereby occasions her actual bodily harm.' In this case the maximum penalty is two years plus whipping which might or might not be adjudged. In the other case the maximum penalty is three years.

It seems to me that it would be only rational that if an assault on a wife or any other female is to be prosecuted under 292C that the term of imprisonment should be the same as under 295 plus the whipping which the judge could direct in proper cases.

Presumably Section 292 which is headed 'Indecent assault on female' is intended to apply only to cases in which some element of indecency enters. Surely in such cases the punishment should be more severe than in cases where there is no such element.

Then again is there not room for question as to whether if a man was charged under Section 295 with an assault occasioning actual bodily harm to a woman where no element of indecency entered that it might be contended that there was special provision to cover such assault under 292C and that the charge should have been laid under that Section and not 295.

F 28

Letter of His Honour J. A. Jackson, 9th May, 1925

Re Sections 274 and 295 grievous bodily harm and actual bodily harm. By Section 773 (c) the first can be tried summarily. It seems to me that this gives rise to a good deal of juggling. The sections are at least more or less inconsistent as to the method of trial.

For Sections 274 and 773 (c) see comment on Section 274.

*Letter of C. F. P. Conybeare, K.C., Lethbridge, Alberta,
1st August, 1925*

(For Mr. Conybeare's remarks see under Section 292.)

*Letter of Chief Justice Harvey dated, Edmonton,
19th June, 1925*

Some of the provisions respecting personal injuries in the Code seem to overlap. For instance, Sections 274 and 295, for which the same penalty exists, cover much the same ground and we occasionally find that a charge is laid partly in the terms of one and partly in the terms of the other Section, which causes trouble. There seems no good reason why the two Sections should not be incorporated into one.

*Letter of Arthur Leighton, LL.D., Nanaimo, B.C., 26th August,
1295. See Appendix F 79 (h)*

F 29**301 (2) (301 (2)) :**

2. Every one is guilty of an indictable offence and liable to imprisonment for five years who carnally knows any girl of previous chaste character under the age of sixteen and above the age of fourteen, not being his wife, and whether he believes her to be above the age of sixteen years or not. No person accused of any offence under this subsection shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused. (1920, c. 43.)

NOTE: By section 17, chapter 43, of the Statutes of 1920, it is provided that:—

17. On the trial of any offence against sections four, five or eight of this Act, the trial judge may instruct the jury that if in their view the evidence does not show that the accused is wholly or chiefly to blame for the commission of said offence, they may find a verdict of acquittal.

Letter of T. Carleton Allen, Deputy Attorney General, Fredericton, N.B., 6th April, 1925

I also think that section 17 of Chapter 43 of the Acts of 1920, amending the Criminal Code, should be repealed, for with that section, it is almost impossible to get a jury in this province to convict a man charged with offences under sections 4, 5 and 8.

(Section 8 of Chapter 43, of the Statutes of 1920, adds to Section 301 of the Criminal Code, the Subsection 2 shown above.)

F 30

377a (377). Every one who is found guilty of stealing any automobile or motor car shall be sentenced to not less than one year's imprisonment. The provisions of subsection one of section one thousand and thirty-five shall not apply or extend to any such person, and sentence in any such case shall not be suspended without the concurrence of the Attorney General or his agent, or of the counsel acting for the Crown in the prosecution of the offender. (1921, c. 25.)

2. The maximum penalty for stealing any automobile or motor car shall be the penalties prescribed by section three hundred and eighty-six of this Act. (1922, c. 16.)

Memo. by E. Bayley, K.C., Deputy Attorney General, Ontario

Section 377A provides a minimum penalty of one year for theft of a motor car. Sentence may be suspended with the concurrence of certain persons. The practical result is a sentence of one year or nothing which makes the situation an absurd one. My opinion is that minimum sentences generally have proven a mistake.

F 31

400 (400). Every one is guilty of an indictable offence and liable to five years' imprisonment who receives or retains in his possession, any post letter or post letter bag, or any chattel, money or valuable security, parcel or other thing, the stealing whereof is hereby declared to be an indictable offence, knowing the same to have been stolen. 55-56 V, c. 29, s. 315.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (q)

F 32

405 (405). Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud, by any false pretense, either directly or through the medium of any contract obtained by such false pretense, obtains anything capable of being stolen, or procures anything capable of being stolen to be delivered to any other person than himself. 55-56 V, c. 29, s. 359.

405a (405 (2)). Every one is guilty of an indictable offence and liable to one year's imprisonment who, in incurring any debt or liability, obtains credit under false pretenses, or by means of any fraud. (1908, c. 18.)

406 (406). Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud or injure any person by any false pretense, causes or induces any person to execute, make, accept, endorse or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal on any paper or parchment in order that it may afterwards be made or converted into or used or dealt with as a valuable security. 55-56 V, c. 29, s. 360.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (r)

F 33

409 (409). Every one is guilty of an indictable offence and liable on indictment or summary conviction, to one year's imprisonment, or to a fine of one hundred dollars, who falsely, with intent to gain some advantage for himself or some other person, personates a candidate at any competitive or qualifying examination, held under the authority of any law or statute, or in connection with any university or college, or who procures himself or any other person to be personated at any such examination, or who knowingly avails himself of the results of such personation. 55-56 V, c. 29, s. 457.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (s)

F 34

417 (417). Every one is guilty of an indictable offence and liable to a fine of eight hundred dollars and to one year's imprisonment who,—

- (a) with intent to defraud his creditors, or any of them,
 - (i) makes, or causes to be made any gift, conveyance, assignment, sale, transfer or delivery of his property, or,
 - (ii) removes, conceals or disposes of any of his property; or,
- (b) with the intent that any one shall so defraud his creditors, or any one of them, receives any such property; or,
- (c) being a trader and indebted to an amount exceeding one thousand dollars, is unable to pay his creditors in full and has not kept books of account as, according to the usual course of trade or business in which he may have been engaged, are necessary to exhibit or explain his transactions, unless he be able to account for his losses to the satisfaction of the court or judge and to show that the absence of such books was not intended to defraud his creditors, but no person shall be prosecuted under the provisions of this paragraph by reason only of his having failed to keep such books of account at a period of more than five years before the date of such inability to pay his creditors. (1917, c. 14.)

55-56 V, c. 29, s. 368; 4 E. VII, c. 7, s. 1.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (u)

F 35

421 (421). Every one is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding two thousand dollars, who, knowing the existence of any unregistered prior sale, grant, mortgage, hypothec, privilege or encumbrance of or upon any real property, fraudulently makes any subsequent sale of the same, or of any part thereof. 55-56 V, c. 29, s. 372.

422 (422). Every one who pretends to hypothecate, mortgage, or otherwise charge any real property to which he knows he has no legal or equitable title is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding one hundred dollars.

2. The proof of the ownership of the real estate rests with the person so pretending to deal with the same. 55-56 V, c. 29, s. 373.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (v)

F 36

438 (439). Every one who,—

- (a) buys, exchanges or detains, or otherwise receives from any soldier, militiaman or deserter any arms, clothing or furniture belonging to His Majesty, or any such articles belonging to any soldier, militiaman or deserter as are generally deemed regimental necessaries according to the custom of the army; or,
- (b) causes the colour of such clothing or articles to be changed; or,
- (c) exchanges, buys or receives from any soldier or militiaman, any provisions, without leave in writing from the officer commanding the regiment or detachment to which such soldier belongs;

is guilty of an offence punishable on the indictment or on summary conviction, and liable on conviction on indictment to five years' imprisonment, and on summary conviction before two justices to a penalty not exceeding forty dollars, and not less than twenty dollars and costs, and, in default of payment, to six months' imprisonment with or without hard labour. 55-56 V, c. 29, s. 390.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (w)

F 37

460 (460). See Appendix F 78 (x).

464 (464). Every one is guilty of an indictable offence and liable to five years' imprisonment who is found,—

- (a) having in his possession by night, without lawful excuse, the proof of which shall lie upon him, any instrument of housebreaking; or,

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (y)

F 38

479 (479). See Appendix F 78 (z).

488 (488). Every one is guilty of an indictable offence who, with intent to defraud,—

- (a) forges any trade mark; or,
- (b) falsely applies to any goods any trade mark, or any mark so nearly resembling a trade mark as to be calculated to deceive; or,
- (c) makes any die, block, machine or other instrument, for the purpose of forging, or being used for forging, a trade mark; or,

- (d) applies any false trade description to goods; or,
- (e) disposes of, or has in his possession, any die, block, machine, or other instrument, for the purpose of forging a trade mark, or,
- (f) causes any of such things to be done.

2. On any prosecution for forging a trade mark the burden of proof of the assent of the proprietor shall lie on the defendant. 55-56 V., c. 29, ss. 447 and 710.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (aa)

F 39

Arson

511 (511). Every one is guilty of the indictable offence of arson and liable to imprisonment for life 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 or building or repairing or fitting out any ship or to any of His Majesty's stores or munitions of war.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (bb)

F 40

561 (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. 55-56 V., c. 29, s. 471.

563 (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; or,
- (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; or,
- (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. 55-56 V, c. 29, s. 473.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (cc)

PART X

ATTEMPTS—CONSPIRACIES—ACCESSORIES

F 41

570 (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. 55-56 V, c. 29, s. 528.

571 (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. 55-56 V, c. 29, s. 529.

572 (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. 55-56 V, c. 29, s. 530.

573 (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. 55-56 V, c. 29, s. 527.

574 (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. 55-56 V, c. 29, s. 531.

575 (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. 55-56 V, c. 29, s. 532.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (dd)

F 42

Special Jurisdiction

584 (584). For the purposes 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 person, 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. 55-56 V, c. 29, s. 553; 63-64 V, c. 46, s. 3.

*Letter of William D. Carter, Deputy Attorney General,
Victoria, 21st April, 1925*

It occurs to me that possibly a provision could be inserted in the Code whereby the territorial jurisdiction of a Magistrate in a summary conviction case shall be presumed unless proof is offered to the contrary. For instance, a Magistrate in and for the County of Vancouver tries summarily a case of common assault. It is proved that the assault took place at Squamish but there is no evidence that Squamish is in the

County of Vancouver. Habeas Corpus or Certiorari is taken and the conviction is quashed because the assault is not proved to have taken place within the Magistrate's jurisdiction. There are more convictions quashed in this Province on that ground than for any other cause, and even the most careful Counsel sometimes forget to offer the necessary proof. I would suggest the amendment above indicated.

Note.—Suggestion is reasonable but would require legislation.

623 (623). See Appendix F 78 (*ee*).

F 43

641 (641). If a constable or other peace officer of any city, town, incorporated village or other municipality or district, organized or unorganized, or place, reports in writing to the mayor or chief magistrate, or to the police, stipendiary or district magistrate of such city, town, incorporated village or other municipality, district, or place, or to any police or stipendiary magistrate having jurisdiction there, or, if there be no such mayor or chief magistrate, or police, stipendiary or district magistrate, to any justice having such jurisdiction, that there are good grounds for believing, and that he does believe, that any house, room or place within the said city or town, incorporated village or other municipality, district or place is kept or used as a disorderly house as defined by section two hundred and twenty-eight; or for betting, wagering or pool selling contrary to the provisions of section two hundred and thirty-five, or for the purpose of carrying on a lottery or for the sale of lottery tickets, or for the purpose of conducting or carrying on of any scheme, contrivance or operation for the purpose of determining the winners in any lottery contrary to the provisions of section two hundred and thirty-six, whether admission thereto is limited to those possessed of entrance keys or otherwise; such mayor, chief magistrate, police, stipendiary or district magistrate or justice, may, by order in writing, authorize the constable or other peace officer to enter and search any such house, room or place with such other constables or peace officers as are deemed requisite by him, and such peace officer or peace officers may thereupon enter and search all parts of such house, room or place and if necessary may use force for the purpose of effecting such entry, whether by breaking open doors, or otherwise, and may take into custody all persons who are found therein, and may seize all tables and instruments of gaming, wagering or betting and all moneys and securities for money and all instruments or devices for the carrying on of a lottery, or of any scheme, contrivance or operation for determining the winners in any lottery, and all lottery tickets and all intoxicating liquors and all opium and devices, pipes or apparatus for preparing or for smoking or inhaling opium and all circulars, advertisements, printed matter, stationery and things which may be found in such house or premises which appear to have been used or to be intended for use for any

illegal purpose or business, and shall bring the same before the person issuing such order or any justice, to be by him dealt with according to law.

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

Section 641 was amended by 15-16 George V, c. 38, s. 17, as follows:—

17. Section six hundred and forty-one of the said Act, as enacted by section twenty-one, chapter thirteen, of the statutes of 1913, is amended by striking out the words "and all opium and devices, pipes or apparatus for preparing or for smoking or inhaling opium" where they occur in the thirty-eighth, thirty-ninth and fortieth lines thereof.

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

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

and proof of such certificate, and upon summary application to the court in which such action, indictment or proceeding is pending, or any judge thereof, or any judge of any of the superior courts of any province. R.S., c. 158, ss. 9 and 10.

641, 642 of the Revised Statutes of Canada, 1906, was limited to gaming houses, but in 1913, 641 was repealed and the provisions were extended to cover bawdy houses and opium joints, but no corresponding change was made in 642, so that in the latter cases there was no provision for examining on oath the persons found in the building. This was no doubt an oversight but legislation would appear to be necessary to correct it.

F 44

670 (670), 679 (679).

Remands.—See memo. from Eric Armour, K.C., Appendix F 78 (d).

F 45

681 (681). If the accused is remanded as aforesaid, the justice may discharge him, upon his entering into a recognizance in form 18, with or without sureties in the discretion of the justice, conditioned for his appearance at the time and place appointed for the continuance of the examination. 55-56 V, c. 29, s. 587.

Letter of H. S. Wood, Crown Prosecutor, Vancouver, B.C., forwarded by W. D. Carter, Deputy Attorney General, Victoria, 30th November, 1925

This section and the Form No. 18 seem to contemplate that the recognizance will be entered into before the Magistrate before whom the accused appears.

If this is the law, it means a tremendous amount of inconvenience in the Vancouver City Police Court, as well as in other Police courts. It would mean that the Police Magistrates would be compelled to take all the recognizances. For this reason His Honour Judge Cayley has declined to hand out reasons for judgment, and as the matter stands now, the recognizance is simply set aside without reasons being reported.

x x x x . x x x x x x x x x

*Re Rex vs. Young Quey Hing.
Re Estreat of the Bail Bond.*

The accused was arrested in North Vancouver and charged with an offence against the 'Drug Act'. He was brought before N. F. Archibald, J. P., who was presiding in the absence and at the request of the Police Magistrate. When the matter came up Mr. Archibald adjourned the hearing and fixed the bail at \$3,000. The bail bond was executed before Mr. J. W. Prescott, J. P., at Vancouver. The accused did not appear and the Magistrate, Mr. Sargent, before whom the matter then came, made the usual endorsement on the recognizance and forwarded it to the Court. I then issued a writ of fi fa, and on the return of this writ Mr. J. A. Russell appearing on behalf of the bondsmen, contended

that the recognizance was a nullity, for reasons set out in the enclosed memorandum. The recognizance was also attacked on other grounds. It contained many defects, for instance the condition was that the accused should appear before Mr. Prescott for trial.

His Honour Judge Cayley delivered a long oral judgment, in which he agreed with Mr. Russell's contention that Mr. Prescott had no jurisdiction. He had received no request.

NOTE.—Form has been amended.

F 46

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

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

See memorandum accompanying letter of William D. Carter, Deputy Attorney General, Victoria, B.C., 21st April, 1925. Appendix 79 (g)

F 47

Adjudication and subsequent steps and Bail

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

2. In such case any recognizances taken in respect of the charge shall become void, unless some person is bound over to prosecute under the provisions of the next following section. 55-56 V, c. 29, s. 594.

688 (688). If the justice discharges the accused, and the person preferring the charge desires to prefer an indictment respecting the said charge, he may require the justice to bind him over to prefer and prosecute such an indictment, and thereupon the justice shall take his recognizance to prefer and prosecute an indictment against the accused before the court by which such accused would be tried if such justice had committed him, and the justice shall deal with the recognizance, information and depositions in the same way as if he had committed the accused for trial.

2. Such recognizance may be in form 21, or to the like effect. 55-56 V, c. 29, s. 595.

689 (689). If the prosecutor so bound over at his own request does not prefer and prosecute such an indictment, or if the grand jury does not find a true bill, or if the accused is not convicted upon the indictment so preferred, the prosecutor shall, if the court so direct, pay to the accused person his costs, including the costs of his appearance on the preliminary inquiry.

2. The court before which the indictment is to be tried or a judge thereof may in its or his discretion order that the prosecutor shall not be permitted to prefer any such indictment until he has given security for such costs to the satisfaction of such court or judge. 55-56 V, c. 29, s. 595.

690 (690). If a justice holding a preliminary inquiry thinks that the evidence is sufficient to put the accused on his trial, he shall commit him for trial by a warrant of commitment, which may be in form 22, or to the like effect. 55-56 V, c. 29, s. 596.

691 (691). Every one who has been committed for trial, whether he is bailed out or not, shall be entitled at any time before the trial to have copies of the depositions, and of his own statement, if any, from the officer who has custody thereof, on payment of a reasonable sum not exceeding five cents for each folio of one hundred words.

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

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

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

4. Every such recognizance shall bind the person entering into it to prosecute or give evidence (both or either as the case may be), before the court by which the accused shall be tried. 55-56 V, c. 29, s. 598.

5. If it is made to appear to the justice that any person to be so bound over as a witness is without means or without sufficient means, or if other reasons therefor satisfactory to him are shown, the justice may require that a surety or sureties be procured and produced and join in the recognizance, or that

a sum of money be deposited with the justice, sufficient in his opinion to insure the appearance of such person at the trial and the giving of his evidence. (1909, c. 9.)

693 (693). Whenever any person is bound by recognizance to give evidence before a justice, or any criminal court, in respect of any offence under this Act, any justice, if he sees fit, upon information being made in writing and on oath, that such person is about to abscond, or has absconded, may issue his warrant for the arrest of such person.

2. If such person is arrested, any justice, upon being satisfied that the ends of justice would otherwise be defeated, may commit such person to prison until the time at which he is bound by such recognizance to give evidence, unless in the meantime he produces sufficient sureties.

3. Any person so arrested shall be entitled on demand to receive a copy of the information upon which the warrant for his arrest was issued. 55-56 V, c. 29, s. 598.

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

2. If the accused is afterwards discharged any justice having such jurisdiction may order any such witness to be discharged by an order which be in form 27, or to the like effect. 55-56 V, c. 29, s. 599.

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

2. When any order changing the place of trial is made the person obtaining it shall serve it, or an office copy of it, upon the person then in possession of the said documents, who shall thereupon transmit them and the indictment, if found, to the officer of the court before which the trial is to take place. 55-56 V, c. 29, s. 600.

696 (696). When any person appears before any justice charged with an indictable offence punishable by imprisonment for more than five years, other than treason or an offence punishable with death or an offence under any of the sections, seventy-six to eighty-six inclusive, and the evidence adduced is, in the opinion of such justice, sufficient to put the accused on his trial, but does not furnish such a strong presumption of guilt as to warrant his committal for trial, the justice, jointly

with some other justice, may admit the accused to bail upon his procuring and producing such surety or sureties as, in the opinion of the two justices, will be sufficient to ensure his appearance at the time and place when and where he ought to be tried for the offence; and thereupon the two justices shall take the recognizances of the accused and his sureties, conditioned for his appearance at the time and place of trial, and that he will then surrender and take his trial and not depart the court without leave.

2. In any case in which the offence committed or suspected to have been committed is an offence punishable by imprisonment for a term less than five years any one justice before whom the accused appears may admit to bail in manner aforesaid, and such justice or justices may, in his or their discretion, require such bail to justify upon oath before him or them as to their sufficiency.

3. In default of such person procuring sufficient bail, such justice or justices may commit him to prison, there to be kept until delivered according to law.

4. The recognizance mentioned in this section shall be in form 28. 55-56 V, c. 29, s. 601.

Letter of Arthur Leighton, Nanaimo, B.C., 26th August, 1925

Sections 687 to 696 need rearranging. 696 should be immediately after 691. 691 should follow 695.

On Section 696:—

*Letter of Harrison Arrell, K.C., Caledonia, Ontario,
18th July, 1925*

There might well be provision in, that, after a prisoner is committed for trial the Police Magistrate or Justice of the Peace can admit them to bail. I believe it is the practice for some Magistrates to do this. The opinion of our Attorney General's Department is that after a prisoner is committed for trial the Magistrate has no power to admit him to bail.

This is a great inconvenience to the accused. In many cases he is a great many miles from the County Town and it is necessary then for him and his Counsel to go to the County Town and apply to the County Judge for bail.

*Letter of W. E. Kelly, K.C., Crown Attorney, Simcoe, Ontario,
24th July, 1925*

Section 696 as regards bail, besides the magistrates mentioned therein a Police Magistrate should also be authorized to admit to bail even if the accused be committed for trial.

*Letter of Arthur Leighton, Nanaimo, B.C., 26th August, 1925.
See Appendix F 79 (h)*

*Letter of Eric N. Armour, Crown Attorney, Toronto, 15th June,
1925. See Appendix F 78 (f)*

*Memorandum accompanying letter of W. D. Carter, Deputy
Attorney General, Victoria, B.C., 21st April, 1925.
See Appendix F 79 (g)*

F 48

Information and Complaint

710 (710). It shall not be necessary that any complaint upon which a justice may make an order for the payment of money or otherwise shall be in writing, unless it is so required by the particular Act or law upon which such complaint is founded.

2. Every complaint upon which a justice is authorized by law to make an order, and every information for any offence or act punishable on summary conviction, may, unless it is by this Part or by some particular Act or law otherwise provided, be made or had without any oath or affirmation as to the truth thereof.

3. Every complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every information shall be for one offence only, and not for two or more offences.

4. Every complaint or information may be laid or made by the complainant or informant in person, or by his counsel or attorney or other person authorized in that behalf. 55-56 V, c. 29, s. 845.

*Letter of W. S. Morphy, Crown Attorney, Brampton, Ontario,
24th July, 1925*

In the majority of cases now, in this country, and I presume in other countries, in indictable offences, the prisoner elects to be tried before the Police Magistrate.

Under Sub-section 3 of Section 710, an information shall be for one offence only. In a case I have today, I do not know whether to charge the defendant with stealing or receiving stolen goods (founded on the same occurrence), and I am laying two informations, one for theft and the other receiving. This, in similar matters, often arises. If the matter were before the County Judge, I would insert two counts in the indictment, one for theft and one for receiving, under Sections 854 and 856.

Could not the General Provisions as to counts, Section 852 and following Sections, be made to apply to cases where the accused elects, in indictable offences, to be tried by the Police Magistrate?

I am aware that Section 710 is under part 15 of the Code referring to summary convictions only, but no other provision in the Code gives the same power to frame an Information in the Wording of Sections 853 and 856.

See also, Appendix F 79 (e).

720 (720). If both parties appear, either personally or by their respective counsel, solicitors, or agents, before the justice who is to hear and determine the complaint or information such justice shall proceed to hear and determine the same. 55-56 V, c. 29, s. 855.

*Memo. of amendments accompanying letter of William D. Carter, Deputy Attorney-General, Victoria, B.C.,
21st April, 1925. See Appendix F 79 (g)*

F 50

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

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

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

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

5. Whenever any defendant who is discharged upon recognizance, or allowed to go at large, does not appear at the time mentioned in the recognizance or to which the hearing or further hearing is adjourned the justice may issue his warrant for his apprehension. 55-56 V, c. 29, s. 857.

*Letter of Eric N. Armour, Crown Attorney, Toronto,
30th May, 1925. See Appendix F 78 (d)*

*Letter of W. S. Morphy, County Crown Attorney, Brampton,
Ontario, 24th July, 1925*

Then under Section 679 (722 S. S. 1) of the Criminal Code, as to powers of remand. Why should the remand be limited to eight days, why not give Justices of the Peace power to remand for any length of time? In a case recently before Police Magistrate Crawford, the prisoner and four bondsmen had to come three or four times from Streetsville to Brampton, a distance of 12 miles, and were annoyed at this.

F 51

Sureties to Keep the Peace

748 (748). Whenever any person is charged before a justice with any offence triable under this Part which, in the opinion of such justice, is directly against the peace, and the justice after hearing the case is satisfied of the guilt of the accused, and that the offence was committed under circumstances which

render it probable that the person convicted will be again guilty of the same or some other offence against the peace unless he is bound over to good behaviour, such justice may, in addition to, or in lieu of, any other sentence which may be imposed upon the accused, require him forthwith to enter into his own recognizance, or to give security to keep the peace and be of good behaviour for any term not exceeding twelve months.

2. Upon complaint by or on behalf of any person that on account of threats made by some other person or on any other account, he, the complainant, is afraid that such other person will do him, his wife or child some personal injury, or will burn or set fire to his property, the justice before whom such complaint is made, may, if he is satisfied that the complainant has reasonable grounds for his fears, require such other person to enter into his own recognizance, or to give security, to keep the peace, and to be of good behaviour, for a term not exceeding twelve months.

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

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

5. The forms 48, 49, and 50, with such variations and additions as the circumstances may require, may be used in proceedings under this section. 55-56 V, c. 29, s. 959; 56 V, c. 32, s. 1.

Letter of R. M. Matheson, K.C., Crown Attorney, Brandon, Manitoba, 28th July, 1925

Suggest an amendment to Sec. 748 of the Criminal Code, providing that on breach of a bond to keep the peace, the offender may be brought back for fine or imprisonment as in the case of a suspended sentence.

F 52

Appeal

749 (749). Unless it is otherwise provided in any special Act under which a conviction takes place or an order is made by a justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant, as well as the defendant, may appeal,—

(a) in the province of Ontario, when the conviction adjudges imprisonment only, to the Court of General Sessions of the Peace; and in all other cases to the Division Court of the division of the county in which the cause of the information or complaint arose;

- (b) in the province of Quebec, to the Court of King's Bench, Crown side;
- (c) in the provinces of Nova Scotia, New Brunswick and Manitoba, to the county court of the district or county where the cause of the information or complaint arose;
- (d) in the province of British Columbia, to the county court, at the sitting thereof which shall be held nearest to the place where the cause of the information or complaint arose;
- (e) in the province of Prince Edward Island, to the Supreme Court;
- (f) in the province of Saskatchewan or the province of Alberta, to the District Court of the district in which the cause of the information or complaint arose, at the judicial centre of the district or sub-judicial district or at the sittings thereof which shall be held nearest to the place where cause of the information or complaint arose; provided that the district Court Judge of such judicial district shall have power to appoint the place for the hearing of such appeal on the application of any party to it. (1920, c. 43.)
- (g) in the Northwest Territories, to a stipendiary magistrate; and,
- (h) in the Yukon Territory, to a judge of the Territorial Court.

2. (Repealed, 1908, c. 18.)

3. In the case of the provinces of Saskatchewan and Alberta, and of the Northwest Territories and the Yukon Territory, the judge or stipendiary magistrate hearing any such appeal shall sit without a jury at the place where the cause of the information or complaint arose, or at the nearest place thereto where a court is appointed to be held. 55-56 V, c. 29, s. 879; 4-5 E. VII, c. 3, s. 16; c. 10, ss. 1 and 2; c. 27, s. 8; c. 42, s. 16.

Letter of His Honour J. A. Jackson, 9th May, 1925

The first paragraph of this section should be reworded so that it will convey the meaning evidently intended by Parliament as the construction of this paragraph would suggest that only convictions under special Acts are considered. The words 'under which' after the words 'Special Act' would tend to bear out this interpretation.

Subsection 'f' of Section 749 and Subsection 3 of Section 749 are inconsistent. If the words 'of the Provinces of Saskatchewan and Alberta, and' were cut out of Section 3 the amendments of subsection 'f' could be given effect to. It might also be necessary to state definitely that these appeals are heard without a Jury.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (ff)

F 53

750 (750). Unless it is otherwise provided in the special Act,—

- (a) if a conviction or order is made more than fourteen days before a sittings of the court to which an appeal is given, such appeal shall be made to that sittings; but if the conviction or order is made within fourteen days of a sittings the appeal shall be made to the second sittings next after such conviction or order: Provided that in the province of Nova Scotia the appeal shall be to a sittings of the court in the county where the cause of the information or complaint arose; in the one case to the sittings next after and in the other to the second sittings after the conviction or order. (1909, c. 9.)
- (b) the appellant shall give notice of his intention to appeal by filing in the office of the clerk of the court appealed to a notice in writing setting forth with reasonable certainty the conviction or order appealed against and the court appealed to, and the notice shall be served upon the respondent and the justice who tried the case, or, in the alternative, upon such person or persons as a judge of the court appealed to shall direct, and such service shall be within ten days of the making of the conviction or order complained of, or within such further time, not exceeding an additional twenty days, as a judge of the court appealed to may see fit to fix either before or after the expiration of the said ten days. (1919, c. 46.)
- (c) the appellant, if the appeal is from a conviction or order adjudging imprisonment, shall either remain in custody until the holding of the court to which the appeal is given, or shall within the time limited for filing a notice of intention to appeal, enter into a recognizance in form 51 with two sufficient sureties before a county judge, clerk of the peace or justice for the county in which such conviction or order has been made, conditioned personally to appear at the said court and try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as are awarded by the court; or if the appeal is from a conviction or order whereby a penalty or sum of money is adjudged to be paid, the appellant shall within the time limited for filing the notice of intention to appeal, in cases in which imprisonment upon default of payment is directed either remain in custody until the holding of the court to which the appeal is given, or enter into a recognizance in form 51 with two sufficient sureties as hereinbefore set out, or deposit with the justice making the conviction or order an amount sufficient to cover the

sum so adjudged to be paid, together with such further amount as such justice deems sufficient to cover the costs of the appeal; and, in cases in which imprisonment in default of payment is not directed, deposit with such justice an amount sufficient to cover the sum so adjudged to be paid, together with such further amount as such justice deems sufficient to cover the costs of the appeal; and upon such recognizance being entered into or deposit made the justice before whom such recognizance is entered into or deposit made shall liberate such person if in custody. (1909, c. 9.)

- (d) in case of an appeal from the order of a justice pursuant to section six hundred and thirty-seven for the restoration of gold or gold-bearing quartz, or silver or silver ore, the appellant shall give security by recognizance to the value of the said property to prosecute his appeal at the proper sittings of the court, and to pay such costs as are awarded against him. (1909, c. 9.)
- (e) the service of any notice under this section may be proven by the affidavit of the officer or person serving the same. (1920, c. 43.)

Amended by 15-16 George V, Chapter 38 (1925) as follows:—

19. Paragraph (b) of section seven hundred and fifty of the said Act is repealed and the following is substituted therefor:—

“(b) the appellant shall give notice of his intention to appeal by filing in the office of the clerk of the court appealed to a notice in writing setting forth with reasonable certainty the conviction or order appealed against and the notice shall be served upon the respondent and the justice who tried the case, or, in the alternative, upon such person or persons as a judge of the court appealed to shall direct, and such service and filing shall be within ten days of the making of the conviction or order complained of, or within such further time, not exceeding an additional twenty days, as a judge of the court appealed to may see fit to fix either before or after the expiration of the said ten days.”

Letter of Charles A. Stuart, Appellate Division, Supreme Court, Edmonton, Alberta, 27th March, 1925

I would also direct attention to *Rex vs. Barilko* (1924) 3 W.W.R. 424, which deals with some peculiarities existing in Section 750 with regard to the time for filing a notice of appeal to a District Judge and for filing the cognizance. As will be seen from a perusal of the case the provisions of Section 750 are strangely drafted. I think the result, viz., that the cognizance may be filed at any time up to the hearing of the appeal is a reasonable and proper one, but it ought to be made clear by a re-drafting of the section.

NOTE.—See amendment of 1925, c. 38, s. 19.
See also Appendix F 79 (e).

F 54

751 (751). The court to which such appeal is made shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs to either party, including costs of the court below, as seems meet to the court, and, in case of the dismissal of an appeal by the defendant and the affirmance of the conviction or order, shall order and adjudge the appellant to be punished according to the conviction or to pay the amount adjudged by the order, and to pay such costs as are awarded, and shall, if necessary, issue process for enforcing the judgment of the court.

2. In any case where a deposit has been made as provided in paragraph (c) of section seven hundred and fifty if the conviction or order is affirmed, the court may order that the sum thereby adjudged to be paid, together with the costs of the conviction or order, and the costs of the appeal, shall be paid out of the money deposited, and that the residue, if any, shall be paid to the appellant; and if the conviction or order is quashed the court shall order the money to be repaid to the appellant. (1909, c. 9.)

3. The court to which such appeal is made shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said court.

4. Whenever any conviction or order is quashed on appeal, the clerk of the peace or other proper officer shall forthwith endorse on the conviction or order a memorandum that the same has been quashed.

5. Whenever any copy or certificate of such conviction or order is made, a copy of such memorandum shall be added thereto, and shall, when certified under the hand of the clerk of the peace, or of the proper officer having the custody of the same, be sufficient evidence, in all courts and for all purposes, that the conviction or order has been quashed. 55-56 V, c. 29, s. 880; 4-5 E. VII, c. 10, s. 4.

Letter of His Honour J. A. Jackson, 9th May, 1925

Re Section 751. It has been argued very strongly that a Court has no power to vary the sentence either by increasing the penalty or decreasing same, that the only thing that the Court can do is to dismiss the appeal or allow the same. There should not be any question as to the right of the Judge to increase or vary the sentence.

F 55

752 (752). When an appeal against any summary conviction or order has been lodged in due form, and in compliance with the requirements of this Part, the court appealed to shall try, and shall be the absolute judge, as well of the facts as of the law, in respect to such conviction or order.

2. Any of the parties to the appeal may call witnesses and adduce evidence whether such witnesses were called or

evidence adduced at the hearing before the justice or not, either as to the credibility of any witness, or as to any other fact material to the inquiry.

3. Any evidence taken before the justice at the hearing below, certified by the justice, may be read on such appeal, and shall have the like force and effect as if the witness was there examined if the court appealed to is satisfied by affidavit or otherwise that the personal presence of the witness cannot be obtained by any reasonable efforts. 55-56 V, c. 29, s. 881.

*Letter of R. B. Graham, Crown Prosecutor, Winnipeg,
10th September, 1925*

Section 752 sub-section 2, should be amended by adding the words 'with the consent of the Judge' after the word 'may' in the first line, and the present custom of hearing an appeal as a trial de nova should be abolished. The depositions used at the first trial should form the evidence to be considered by the appeal court, as is the case in appeals on indictable offences.

The present system is open to many abuses, for example, two parties are charged in the Police Court with having narcotics in their possession, the evidence discloses that the drugs found were in the possession of one only of the accused and the other is acquitted. The convicted person appeals, and the one who was acquitted in the Police Court appears as a witness for the defence and deposes that the drugs were his and that he slipped them in the pocket of the other person who knew nothing of it, the convicted person is thereupon discharged and no prosecution can be launched against the other party, as he has been already acquitted.

Frequently also on an appeal you will find an entirely new defence raised in the appeal Court with witnesses who never appeared in the trial before the Magistrate.

F 56

762 (762). The appellant at the time of making such application, and before a case is stated and delivered to him by the justice, shall, in every instance, enter into a recognizance before such justice or some other justice exercising the same jurisdiction, with or without surety or sureties, and in such sum as to the justice seems meet, conditioned to prosecute his appeal without delay, and to submit to the judgment of the court and pay such costs as are awarded by the same; and the appellant shall, at the same time, and before he shall be entitled to have the case delivered to him, pay to the justice such fees as he is entitled to.

2. The appellant, if then in custody, shall be liberated upon the recognizance being further conditioned for his appearance before the same justice, or such other justice as is then sitting, within ten days after the judgment of the court has been given, to abide such judgment, unless the judgment appealed against is reversed. 55-56 V, c. 29, s. 900.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (gg)

F 57

PART XVI

771-799. This part has been redrafted.

Very many criticisms and suggestions have been received with respect to Part XVI which have been found useful in redrafting this Part, but it has not been thought necessary to print the correspondence.

- Old section 771 is contained in new 771.
- Old section 772 is contained in new 772.
- Old section 773 is contained in new 773.
- Old section 774, subsection 1, is contained in new 777, paragraph (a).
- Old section 774, subsection 2, is contained in new 772, subsection 2.
- Old section 775 is contained in new 777, paragraph (b).
- Old section 776 is contained in new 780, paragraph (c).
- Old section 777, subsections 1, 2, are contained in new 774, paragraphs (a), (b), (c), (d).
- See Appendix E.
- Old section 777, subsection 3, is contained in new 778, 779.
- Old section 777, subsection 4, is contained in new 775.
- Old section 777, subsection 5, is contained in new 777, subsection 2.
- Old section 778 is contained in new 781.
- Old section 778 (A) is contained in new 782.
- Old section 779 is contained in new 783.
- Old section 780 is contained in new 778.
- Old section 781, subsection 1, is contained in new 779 (1).
- Old section 781 1 (A) is contained in new 779, subsection 2.
- Old section 781, subsection 2, is contained in new 780.
- Old section 782 is contained in new 776, subsection 1.
- Old section 783 is contained in new 776, subsection 2.
- Old section 784 is contained in new 784.
- Old section 785 is contained in new 785.
- Old sections 786 to 799 are contained in new 786 to 799.

*Letter from R. B. Graham, Crown Prosecutor, Winnipeg, Man.,
12th August, 1926*

Sub-section "c" of section 773 is apparently unchanged. You will note that this permits a summary trial of the offence of unlawful wounding or inflicting grievous bodily harm covered by the present section 274. In my opinion this should also include the offence of assault occasioning actual bodily harm covered by section 295. This was a matter of judicial interpretation and it was held that a magistrate could not try summarily the offence defined in section 295, although it is almost identical with and nearly always less serious than the other one.

NOTE.—Criticism seems justified, but the suggestion would require legislation.

Memorandum accompanying letter of W. D. Carter, Deputy Attorney General, Victoria, B.C., 21st April, 1925

A person convicted by a Magistrate as distinguished from two Justices of the Peace, cannot appeal from conviction under subsections (a) and (f) of 773, but a person convicted before the same Magistrate for a summary offence under Part 15 may appeal. There are many cases therefore where the keeper of a disorderly house cannot appeal, but those found in such disorderly house under s. 229 can appeal. When I speak of appealing I mean an appeal to the County Court. This, to my mind is an absurdity.

F 58 **PART XVIII**

822 (822) to 842 (842):—

Memorandum of E. Bayly, Deputy Attorney General, Ontario, 2nd March, 1925

The point raised in the Home Bank cases as to the right of a man to elect trial under Part XVIII, even when he has been indicted at the Assizes, and there has been no preliminary inquiry, should be made clear. The Appellate Division here decided that he had (see *Rex v. Daly* 55 O.L.R. 156), but the dissenting judgment (given by much better criminal judges than the majority of the Court) commend themselves to us as being sounder. I do not know that it makes very much difference which way the amendment goes, but it should be clear. At present there is too much juggling.

Letter of Chief Justice Harvey, Supreme Court, Alberta, 19th June, 1925

Section 66 (Section 66 ss.A of the old Northwest Territories Act), which is a section we have to refer to very frequently, still stands in much the same condition as it was originally passed. It should, I think, be considered with the view of making the designation of the offences correspond as much as possible with the terms of the Code. For example, the terms 'aggravated assault,' and 'embezzlement' and so forth are used although they have long since disappeared from the Criminal Statutes. The case of *Rex vs. Hostetter*, 5 T.L.R. 363 might be looked at in connection with the consideration of this section.

Memorandum from Eric Armour, K.C. See Appendix F 78 (ii)

Letter of Chief Justice Brown, Regina, 7th April, 1925

It might also be possible to make some provision whereby persons sent up for trial on indictable offences and let out on bail, could be notified of their right to elect for a speedy trial. No such provision is made at the present time, and apparently no notice is given. I have written your Department on more than one occasion suggesting the advisability of notice being given in these cases in the administration of the act, but a better remedy would, of course, be to make some provision in the act itself.

Letter of His Honour J. A. Jackson, 9th May, 1925

Re sections 826 and 827, the election of prisoners for trial. I would suggest some method be devised by which prisoners on being committed shall immediately have the right to elect for method of trial. This would save much time and expense in conveying prisoners to and from gaols and courtrooms for election.

Words "or district" added to meet criticism.

See Appendix B 4 (a).

Letter of Chief Justice Harvey, Edmonton, 23 June, 1925

Some of the provisions of Part 18 seem scarcely appropriate as far as Alberta is concerned. For example, in Section 828, and some of the other sections, the two alternatives of the right to trial by jury or by the District Judge seems to be considered as covering the whole field, which, however, is not the case in Alberta. If in lieu of the words "demands a trial by jury" we used some such expression as "declines to be tried summarily" the Alberta situation would be covered as well as that of other parts of Canada. Several of the other sections would have to be considered also.

NOTE.—See also section 932, 939, in view of the North West Territories Act.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (ii)

F 59

Section 951 (951):—

TORONTO 5, May 12, 1926.

Dear Mr. CAMERON:

Re Amendment to the Criminal Code.

I desire to suggest an amendment to the Criminal Code which will probably not be considered by you to be important from a legal standpoint. There is, however, a great practical difficulty to be overcome in connection with the prosecution of persons upon charges in which someone is killed in connection with the operation of motor vehicles. As you have probably noticed, it is almost impossible to obtain a conviction upon a charge of manslaughter in these cases, although where the victim dies all the ingredients of the offence of manslaughter are included in the offence of criminal negligence (see *R. v. Forseille* 55 D.L.R. 262). My suggestion, therefore, is that the following be added to section 951 as subsection 3.

"Upon a charge of manslaughter arising out of the operation of a motor vehicle, the jury may find the accused not guilty of manslaughter, but guilty of criminal negligence under section 285, and such conviction shall be a bar to further prosecution for any offence arising out of the same facts."

I know that you, like myself, will think the point rather elementary, but there is a real practical difficulty which even certain members of the Bench are not clear upon.

Yours sincerely,
E. BAYLY.

E. R. CAMERON, Esq., K.C.,
Registrar, Supreme Court,
Ottawa, Ont.

F 60*Defence of Insanity*

966 (966). Whenever evidence is given upon the trial of any person charged with an indictable offence, that such person was insane at the time of the commission of such offence, the jury, if they acquit such person, shall be required to find, specially, whether such person was insane at the time of the commission of such offence, and to declare whether he is acquitted by it on account of such insanity.

2. If the jury finds that such person was insane at the time of committing such offence, the court before which such trial is had shall order such person to be kept in strict custody in such place and in such manner as to the court seems fit, until the pleasure of the lieutenant governor is known. 55-56 V., c. 29, s. 736.

Letter of Eric N. Armour, K.C., Crown Attorney, Toronto, 29th May, 1925. See Appendix F 78 (c)

F 61

969 (969). In all cases of insanity so found, the lieutenant governor may make an order for the safe custody of the person so found to be insane, in such place and in such manner as to him seems fit. 55-56 V., c. 29, s. 740.

Letter of Fred F. Mathers, Deputy Attorney General, Halifax, N.S., 21st July, 1925

Suggested amendment for Section 969:—

"In all cases of insanity so found the Lieutenant Governor may from time to time make an order for the safe custody during the pleasure of the Lieutenant Governor of the person so found to be insane, in such place and in such manner as to him seems fit."

The words underlined show the suggested changes. As the Section is now it is arguable that when the Lieutenant Governor once makes an Order he is functus officio. The words "during pleasure" were in the section of the criminal law dealing with the matter before the Code, but for no apparent reason were omitted. The matter is dealt with in *Re Alexander Duclos*, 12 Criminal Cases 278. Only this morning I opposed an application for writ of habeas corpus in the case of an insane person in custody under a Lieutenant Governor's warrant, and although I do not think that the application will be granted, yet I am convinced that it would be wise to make it clear in Section 969 that the Lieutenant Governor has power from time to time to make an Order, and that the detention of the insane person is during the Lieutenant Governor's pleasure.

F 62

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

- (a) to deliver such prisoner to the person named in such order to receive him; 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. 63-64 V, c. 46, s. 3.

Letter of R. A. Smith, Deputy Attorney General, Edmonton, Alberta, 19th June, 1925

I would further suggest that the provision of Section 977 should be extended so as to apply to offences which are triable summarily; as the statute now stands there is no provision for securing the attendance of a witness upon a summary trial, for an offence, where the witness is confined in gaol or prison.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (jj)

REGINA, June 30, 1926.

Dear Mr. CAMERON.—Referring to your letter of the 10th of March, 1925, requesting suggestions in regard to the revision of the Criminal Code. I wish to direct your attention to section 977 of the Criminal Code which does not appear to provide for procuring a prisoner as a witness at a preliminary or other proceedings before a Justice of the Peace.

I might state that on several occasions in this Province cases have arisen in which a prisoner is required to appear for his preliminary inquiry or on a summary conviction case in respect to a charge other than that for which he is undergoing sentence.

Practically in every case difficulty has been experienced in obtaining the Order as the Judges in this Province state that this section of the Criminal Code is not clear and they are doubtful if they have jurisdiction to grant the Order. As a last resort to obtain the Order I have been obliged to refer the Judges to the case of *Spellman v. Spellman*, 10 C.L.T. 20, referred to in Seager's Magistrates' Manual, which reads at pages 217 and 218 as follows:—

“Taking the evidence of a witness who is in prison. If a witness is in any prison (see Code 3 (u)) in Canada the justice holding a preliminary enquiry has no authority to bring such witness before him to give evidence. Code 680, as amended by the Cr. Code Amendment Act, 1900, c. 46, appears to apply only to a witness at the trial before a court of criminal jurisdiction by indictment and not to proceedings before justices.

“Such witnesses can only be brought before the justice under order of the Superior Court for a writ of habeas corpus ad testificandum: see *Spellman v. Spellman*, 10 C.L.T. 20; *R. v. Townsend*, 3 C.L.J. 184.”

It seems to me that section 977 of the Criminal Code should be amended to provide for procuring the attendance of prisoners as witnesses before a Justice of the Peace.

Yours faithfully,

(Sgd.) A. L. GEDDES,

Deputy Attorney General.

E. R. CAMERON Esq., K.C.

Vice-President,

Statute Revision Commission.

F 63

985 (985). When any cards, dice, balls, counters, tables or other instruments of gaming used in playing any game of chance or any mixed game of chance and skill are found in any house, room or place suspected to be used as a common gaming house, and entered under a warrant or order issued under this Act, or about the person of any of those who are found therein, it shall be *prima facie* evidence, on the trial of a prosecution under section two hundred and twenty-eight or section two hundred and twenty-nine, that such house, room or place is used as a common gaming house, and that the persons found in the room or place where such instruments of gaming are found were playing therein, although no play was actually going on in the presence of the officer entering the same under such warrant or order, or in the presence of the persons by whom he is accompanied. 63-64 V, c. 46, s. 3. (Am. 1918, c. 16.)

986 (986). In any prosecution under section two hundred and twenty-eight or under section two hundred and twenty-nine it shall be *prima facie* evidence that a house, room or place is a disorderly house if any constable or officer authorized to enter any house, room or place is wilfully prevented from or obstructed or delayed in entering the same, or any part thereof; and if any house, room or place is found fitted or provided with any means or contrivance for playing any game of chance or any mixed game of chance and skill, gaming or betting or for opium smoking or inhaling, or with any device for concealing, removing or destroying such means or contrivance it shall be *prima facie* evidence that such house, room or place is a common gaming house, common betting house or opium joint as the means or contrivance may indicate. (1913, c. 13, and 1918, c. 16.)

2. In any prosecution under section two hundred and twenty-nine, two hundred and twenty-nine A or two hundred and thirty evidence that a person was convicted for being the keeper of a disorderly house shall be *prima facie* evidence that such house is a disorderly house as against any person charged with being or having been at the same time, an inmate or frequenter of the same disorderly house. (Am. 1921, c. 25.)

Memorandum accompanying letter of William D. Carter, Deputy Attorney General, Victoria, B.C., 21st April, 1925.

See Appendix F 79 (e)

F 64

993 (993). When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given, at any stage of the proceedings, that there was found in the possession of such person other property stolen within

the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property which forms the subject of the proceedings taken against him to be stolen, if not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such other property, stolen within the preceding period of twelve months, having been found in his possession.

2. Such notice shall specify the nature or description of such other property, and the person from whom the same was stolen.

994 (994). When proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has, within five years immediately preceding, been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen, if not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such previous conviction.

2. It shall not be necessary, for the purposes of this section, to charge in the indictment the previous conviction of the person so accused.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (kk)

F 65

Evidence taken apart from Trial

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

2. Such commissioner shall take such statement and shall subscribe the same and add thereto the names of the persons, if any, present at the taking thereof, and if the deposition relates to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same, with the said addition, to the proper officer of the court at which such accused person is to be tried.

3. In every other case he shall transmit the same to the clerk of the peace of the county, division or city in which he has taken the same, or to such other officer as has charge of the records and proceedings of a superior court of criminal jurisdiction in such county, division or city.

4. Such clerk of the peace or other officer shall preserve the same and file it of record, and upon the order of the court or a judge transmit the same to the proper officer of the court where the same shall be required to be used as evidence. 55-56 V, c. 29, s. 681.

*Letter of R. A. Smith, K.C., Deputy Attorney General,
Edmonton, 19th June, 1925*

I would suggest that section 995 should be amended to permit the taking of evidence on commission of a witness residing in Canada, but outside of the Province in which the trial takes place, in any case in which the Judge is satisfied that it is proper to do so, having regard to all the circumstances, and provided also that the accused by himself and his counsel consents to that course.

F 66

999 (999). If upon the trial of an accused person such facts are proved upon oath or affirmation that it can be reasonably inferred therefrom that any person, whose evidence was given at any former trial upon the same charge, or whose deposition has been theretofore taken in the investigation of the charge against such accused person, is dead, or so ill as not to be able to travel, or is absent from Canada, or if such person refuses to be sworn or to give evidence, and if it is proved that such evidence was given or such deposition was taken in the presence of the person accused, and that he or his counsel or solicitor if present had a full opportunity of cross-examining the witness, then if the evidence or deposition purports to be signed by the judge or justice before whom the same purports to have been taken, it shall be read as evidence in the prosecution, without further proof thereof, unless it is proved that such evidence or deposition was not in fact signed by the judge or justice purporting to have signed the same. (1913, c. 13.)

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (ll)

F 67

Corroboration

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

- (a) Treason, Part II, section seventy-four;
- (b) Perjury, Part IV, section one hundred and seventy-four;

- (c) Offences under Part V, sections two hundred and eleven to two hundred and twenty inclusive;
- (d) Procuring feigned marriage, Part VI, section three hundred and nine;
- (e) Forgery, Part VII, sections four hundred and sixty-eight to four hundred and seventy inclusive. 55-56 V., c. 29, s. 684; 56 V., c. 32, s. 1.

Repealed and a new section enacted by 15-16 George V, Chapter 38, section 26, as follows:—

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

- (a) Treason, Part II, section seventy-four;
- (b) Perjury, Part IV, section one hundred and seventy-four;
- (c) Offences under Part V, sections two hundred and eleven to two hundred and twenty inclusive;
- (d) Offences under Part VI, sections three hundred and one and three hundred and nine;
- (e) Forgery, Part VII, sections four hundred and sixty-eight to four hundred and seventy inclusive.”

Letter of R. M. Matheson, K.C., Brandon, 28th July, 1925

That section 1002 of the Criminal Code be amended by including in subsection (e) the provisions of section 204 as to corroboration.

F 68 *Appeals.—(1013-1025)*

Repealed and new sections substituted by 1923, Chapter 41, section 9.

See Appendix C.

Memorandum by Mr. Justice Beck, Alberta

Appeals in Criminal Cases. I have always thought that it was an outrageous iniquity that in a criminal case, where a man's life or liberty and reputation, involving his future standing in the community and in his particular profession or vocation, is at stake, there should not be as extensive a right of appeal as in civil cases, where only money or property often to a comparatively small amount is in question.

The recently introduced present provisions are undoubtedly a great advance towards remedying this anomaly, but in my opinion they fall short of what justice demands. Sec. 1013 provides for an appeal

- (a) without leave on a question of law above.
- (b) with leave of the Court of Appeal, or upon the certificate of the trial Court that it is a fit case for appeal, on a question of fact alone or a question of mixed law and fact.
- (c) with leave of the Court of Appeal on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal.

It is to be remembered that appeals come not only from the verdicts of juries but under a number of Dominion Statutes in addition to the Criminal Code from the decisions in summary trials of Magistrates, District or County Court Judges and in Alberta from Supreme Court Judges

sitting without a jury and that many of these cases are of very serious consequence. In such cases it is unlikely that the convicting Magistrate or Judge will ever feel ready to certify that the case is a fit one for appeal on a question of fact alone or a question of mixed fact and law. In almost all such cases there is then no right to appeal except by leave of the Court of Appeal, with the result in practice that an application to the Court of Appeal necessitates a hearing which involves a consideration of the case as on an actual appeal with in most cases a report from the Magistrate or Judge under section 120, adverse to the accused. The conviction is that of a single individual often influenced by particular prejudices or idiosyncrasies and, owing to what I think is an exaggerated view of the advantage which the Magistrate or Judge has by reason of seeing the witnesses, the chances of a successful appeal are much less than would be on similar facts involving a civil liability only.

If the decision of the Court of Appeal of Ontario in *R. vs. De Burge* (1924) 42 C.C.C. 395 is correct—personally I should refuse to follow it—in all criminal cases the power of the Court to set aside a verdict or judgment in a criminal case is less than in a civil case. That decision is certainly not in accord with the views of the Court of Criminal Appeal in England, as I should be ready to undertake to show.

Then the right of appeal to the Supreme Court of Canada—open in all cases of moment in civil cases—is almost excluded in respect of questions of law and wholly so in respect of questions of fact by reason of the provisions of Sec. 1013, subsec. 5 and Sec. 1024, subsec. 1 as interpreted by the Supreme Court of Canada in a criminal case on a question of fact at all and none on a question of law unless there is in fact a dissent on the part of at least one Judge on a question of law and he is permitted to express his dissent and then only on the point of law on which he is permitted to express his dissent.

In civil cases the Supreme Court of Canada constantly takes a different view of the facts from that taken below. I have several suggestions to make:—

(1) That subsec. 5 of sec. 1013 be struck out, with the result that each member of the Court is at liberty to express his opinion upon both the law and the facts involved in the case, thereby opening a right of appeal to the Supreme Court of Canada in the event of a dissent in respect of either law or fact. Even this would leave the right of appeal in criminal cases more restricted than in civil cases. Dissenting opinions whether on law or fact would in any case undoubtedly be a valuable assistance to the Department of Justice whether on an application for clemency or for a new trial under Sec. 1022. Two cases recently before the Alberta Court of Appeal emphasized to my mind the desirability of each Judge expressing his individual opinion so far as he desires to do so. The first case was *R. vs. Hanson*, which called forth a great deal of criticism of the Court and in some form or other was brought to the attention of Parliament. There were several points involved—the hearing of additional evidence, whether the evidence disclosed murder or manslaughter, direction of the trial Judge, etc. There were five judges sitting on the appeal: a majority of course ruled—ruled as each question came up in its course for decision. Each ruling of course became the basis for decision for a ruling on the next point: each ruling was made after the necessarily hasty and inadequate discussion between the members of the Court while still sitting with the result that probably not more than one member of the Court was wholly satisfied with the ultimate result. Had each member of the Court been at full liberty to give his individual opinion at length even orally at the time, those reasons might well have influenced the other members of the Court who would have followed him. The several questions involved would certainly have been more carefully considered and the justification for the ultimate decision of the majority which in fact was pronounced by the then president of the Court, without reasons, would have appeared for what it was worth.

The other case is one in which a new trial was ordered. Five members of the Court sat. Two were for dismissal of the appeal. Two were for the acquittal of the defendant, which meant of course as a first step

the setting aside of the verdict. The fifth member of the Court agreed to the first step, with the obvious result that the two in favour of an acquittal had to agree to a new trial, the fifth member thus writing the judgment of the majority of the Court which in its result was the opinion of himself alone. If the Court had agreed to dissents being expressed, obviously only the two judges who were in favour of dismissing the appeal were in a position to express their reasons for dissent which would have been of no advantage to the accused, while the two judges who were in favour of acquittal were prevented from expressing any dissent. It is said that the trial cost probably \$20,000. There is to be a new trial, which will cost not less than the former. Personally I am of opinion that on a new trial there will be an acquittal. If there is a conviction, there will undoubtedly again be an appeal. Is it just that in that event the accused should not have the benefit of an appeal to the Supreme Court of Canada both on the points of law and the questions of fact which, to a large extent, are questions of the proper inferences to be drawn from facts?

By reason of the peculiar situation which arose in that case and may again arise at any time, I make the further suggestion:—

(2) That the necessity for a dissenting opinion as a basis of an appeal to the Supreme Court of Canada be eliminated.

In civil cases, where the matter is at large, in more than one case the Supreme Court of Canada has taken a different view from that taken unanimously by a Provincial Court of Appeal, even when it affirmed a trial judge

I make a third suggestion:—

(3) that leave to appeal or a certificate of the trial Court be rendered unnecessary. In practice when leave to appeal on a question of fact or a mixed question of fact and law is made it is necessarily in effect a hearing of the appeal as if leave were given.

Doubtless two objections will be made to any change:—

(1) That if more facilities are given for appeal in criminal cases there will be brought about the state of things which is supposed to exist in the United States—interminable appeals extending over long periods of time.

I think the answer to this is that a great many appeals arise in the American Courts owing to their retention in many, if not most, of the States of the old and technical practice and procedure. With the simplification in this respect provided by the Code there is no danger of a similar situation arising. Again, none of the suggestions which I have made will in reality increase the number of appeals except to the Supreme Court of Canada and the additional cases that would go there would naturally be few and finally there is the predominating reason of Justice, that a person charged with crime should have an equal right of appeal as a person engaged in a civil controversy.

(2) It may be said that our system of appeal gives as much protection to the accused as the English system. Assuming that it does, that is attributing perfection to the latter, which seems an inadequate ground of objection.

But two things have some bearing on this question—

(1) By leave of the Attorney General on application there is a right of appeal to the House of Lords on a point of law of public importance.

(2) In Canada under a number of Statutes there are constituted indictable offences triable summarily by two Justices of the Peace or Police or Stipendiary Magistrates in respect of which the penalties or punishments are very heavy. With us the only right of appeal is to the Court of Criminal Appeal. In England such cases are for the most part triable at the Sessions and so are not left to the decision of individuals often having little capacity for judicial work. In the results in a considerable number of cases the accused has the protection of a better trial Court in England than in Canada. In Canada he is generally met on appeal with the traditional inertia of the Court represented by the decision of the Ontario Court in *R. vs. De Burge* mentioned above while the English Court of Appeal certainly exercises a freer hand.

*Memorandum E. Bayly, Deputy Attorney General,
Toronto, 2nd March, 1925*

With regard to appeals from conviction on indictment Section 1012 of the Criminal Code *et seq.* as amended 13-14 George V (1923), Cap. 41, several points have arisen.

Under 1014 (1) when the appeal is from a Magistrate or a County Judge without a jury there is probably no appeal on facts at all except on the ground ((1) (c)) that there was a miscarriage of justice.

1014 (4) where the Court of Appeal directs a new trial after a conviction upon consent before a Magistrate or a Judge and the new trial is to a jury, provision should be made that the formation or charge sheet together with the Order of the Court should be sufficient to put the accused upon trial without preferring a Bill before the Grand Jury or else in the alternative the requirement that on a new trial a bill shall be specially preferred before the Grand Jury if that is the intention of Parliament. As it is now (in the few cases we have had) a bill has been preferred before the Grand Jury. If this bill were thrown out the accused would certainly not have been given a new trial and it might be the duty of the Crown to go on preferring bills until the Attorney General got tired and directed a stay under the Criminal Code Section 962 or until the Grand Jury became tired of ignoring bills and found a true one.

Provision should be made that an appeal from a conviction should be after sentence and not merely after conviction. At present if a man is sentenced he is required to stay in gaol until he can get bail at (in this Province) Osgoode Hall. If he appeals from conviction and is remanded for sentence he goes out practically on his own bail. Possibly this trouble could be overcome by allowing the trial judge to grant bail (as was formerly the case) instead of continuing the present system (under Section 1019 as enacted by 13-14 George V, Cap. 41) of having the Chief Justice (or a Judge designated by Him) make the order.

*Letter of C. S. A. Rogers, Crown Prosecutor, Dauphin,
Manitoba, 27th July, 1925*

The amendment allowing an appeal to the Court of Appeal on an indictable offence, from a Police Magistrate, recently introduced, should go further and make it necessary for the Appellant to lodge \$25 deposit for costs of such appeal and if the appeal is not allowed, the Crown should be entitled to costs, e.g., of obtaining transcripts of evidence, etc. Unless this is done, there will be innumerable appeals which cost appellants nothing which may prove costly to the Crown.

*Letter of C. S. A. Rogers, Crown Prosecutor, Dauphin,
Manitoba, 27th July, 1925*

In the matter of costs. It frequently happens* that the Crown Attorney has to travel to places outside the Judicial Centre and it seems to me that where costs are properly charged against an accused they should include the costs of transportation of such Crown Attorney (or deputy) to and from the place where the trial is held.

e.g. I might be required to attend at The Pas on an assault occasioning grievous bodily harm. On trial it might be reduced to common assault and the accused fined \$20 and costs. My travelling expenses, etc. would amount to about \$30 so that the Crown is actually out of pocket, while undoubtedly the accused should pay these costs.

F 69

1050 (1050). If any person who is guilty of any indictable offence in stealing, or knowingly receiving, any property, is indicted for such offence, by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof,

or is tried before a judge or justice for such offence under any of the foregoing provisions and convicted thereof, the property shall be restored to the owner or his representative.

2. In every such case the court or tribunal before which such person is tried for any such offence, shall have power to award, from time to time, writs of restitution for the said property or to order the restitution thereof in a summary manner.

3. The court or tribunal may also, if it sees fit, award restitution of the property taken from the prosecutor, or any witness for the prosecution, by such offence, although the person indicted is not convicted thereof, if the jury declares, as it may do, or if, in case the offender is tried without a jury, it is proved to the satisfaction of the court or tribunal by whom he is tried, that such property belongs to such prosecutor or witness, and that he was unlawfully deprived of it by such offence.

4. If it appears before any award or order is made, that any valuable security has been bona fide paid or discharged by any person liable to the payment thereof, or being a negotiable instrument, has been bona fide taken or received by transfer or delivery, by any person, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any indictable offence, been stolen, or if it appears that the property stolen has been transferred to an innocent purchaser for value who has acquired a lawful title thereto, the court or tribunal shall not award or order the restitution of such security or property.

5. Nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker or other agent entrusted with the possession of goods or documents of title to goods, for any indictable offence under sections three hundred and fifty-eight or three hundred and ninety of this Act. 55-56 V., c. 29, s. 838; 56 V., c. 32, s. 1.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Abstract F 78 (mm)

F 70

Provisions as to Sureties

1058 (1058). Every magistrate under Part XVI and every court of criminal jurisdiction before whom any person is convicted of an offence and is not sentenced to death, shall have power in addition to any sentence imposed upon such person, to require him forthwith to enter into his own recognizances, or to give security to keep the peace, and be of good behaviour for any term not exceeding two years, and that such person in default shall be imprisoned for not more than one year after the expiry of his imprisonment under his sentence, or until such recognizances are sooner entered into or such security sooner given.

2. Any such recognizance may be in form 49. 63-64 V., c. 46, s. 3.

1059 (1059). Whenever any person who has been required to enter into a recognizance with sureties, to keep the peace and be of good behaviour, or not to engage in any prizefight has, on account of his default therein, remained imprisoned for two weeks, the sheriff, gaoler or warden shall give notice, in writing, of the facts, to a judge of a superior court, or to a judge of the county court of the county or district in which said gaol or prison is situate, or, in the cities of Montreal and Quebec, to a judge of the sessions of the peace for the district, or, in the Northwest Territories, to a stipendiary magistrate.

2. Such judge or magistrate may order the discharge of such person, thereupon or at a subsequent time, upon notice to the complainant or otherwise, or may make such other order as he sees fit, respecting the number of sureties, the sum in which they are to be bound and the length of time for which such person may be bound. 55-56 V., c. 29, s. 960.

Letter of A. L. Geddes, Deputy Attorney General, Regina, Sask., 27th June, 1925

It seems to me that the provisions of the Criminal Code in regard to enforcing a recognizance to keep the peace might be simplified and that forms for use in this connection be included in the Criminal Code for the guidance of justices of the peace in dealing with such matters.

F 71

1060 (1060). Whenever whipping may be awarded for any offence, the court may sentence the offender to be once, twice or thrice whipped, within the limits of the prison, under the supervision of the medical officer of the prison, or if there be no such officer, or if the medical officer be for any reason unable to be present, then, under the supervision of a surgeon or physician to be named by the Minister of Justice, in the case of prisons under the control of the Dominion, and in the case of other prisons by the attorney general of the province in which such prison is situated.

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

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

4. Whipping shall not be inflicted on any female. 63-64 V., c. 46, s. 3.

Memorandum of Eric Armour, Crown Attorney, Toronto. See Appendix F 78 (nn)

F 72

Suspended Sentence

1081 (1081). In any case in which a person is convicted before any court of any offence punishable with not more than two years' imprisonment, and no previous conviction is proved against him, if it appears to the court before which he is so convicted, that, regard being had to the age, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognizance, with or without sureties, and during such period as the court directs, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behaviour.

2. Where the offence is punishable with more than two years' imprisonment the court shall have the same power as aforesaid with the concurrence of the counsel acting for the Crown in the prosecution of the offender.

3. The court may, if it thinks fit, direct that the offender shall pay the costs of the prosecution, or some portion of the same, within such period and by such instalments as the court directs. 63-64 V., c. 46, s. 3.

4. Where one previous conviction and no more is proved against the person so convicted and such conviction took place more than five years before that for the offence in question, or was for an offence not related in character to the offence in question, the court shall have the same power as aforesaid with the concurrence of the counsel acting for the Crown in the prosecution of the offender. (1909, c. 9.)

"(5) The court in suspending sentence may direct that the offender shall be placed on probation for such period and under such conditions as the court may prescribe, and may from time to time increase or decrease such period and change such conditions, and that during such period the offender shall report from time to time as the court may prescribe to any officer that the court may designate, and the offender shall be under the supervision of such officer during the said period, and the officer shall report to the court if the offender is not carrying out the terms on which the sentence is suspended, and thereupon the offender shall be brought again before the court for sentence. The offender may also be ordered to make restitution and reparation to a person or persons aggrieved or injured by the offence for which he was convicted for the actual damage or loss thereby caused, and the offender may while on probation be ordered as one of said conditions to provide for the support of his wife and any other dependent or dependents for which he is liable. (1921, c. 25.)

*Memorandum of E. Bayly, Deputy Attorney General, Ontario,
2nd March, 1925*

Sec. 1081. This section which deals with suspended sentences used the word "court", which word is defined in section 1026, which is the interpretation section for Part XX. You will see that while the word "court" includes any superior court of criminal jurisdiction (which is again defined, see Sec. 2 (35), and also a judge or court within the meaning of Part XVIII, and a magistrate within the meaning of Part XVI, but does not include (and this must have been a pure omission) a Court of quarter or general sessions of the Peace. This limitation is always disregarded, but the error should be corrected.

NOTE.—This has been complied with.

*Letter of R. A. Smith, K.C., Deputy Attorney General,
Edmonton, 19th June, 1925*

Section 1081 is the source of a considerable amount of trouble, arising out of the unfortunate wording of the side-note. I would suggest that instead of using the expression "suspended sentence" in the side-note, the expression "suspending sentence" would be more appropriate. You will notice that the verb "suspended" is not used anywhere in the section itself, but on account of the side-note Judges of the District Court and Magistrates exercising extended jurisdiction under Part 16 are continually passing sentence of one month's imprisonment, suspended for twelve months, or something equally peculiar, instead of closely following the procedure laid down in the section.

PART XXI

F 73

1094 to 1112

*Memorandum of Eric Armour, Crown Attorney, Toronto. See
Appendix F 78 (aa)*

F 74

1095 (1095). Every such officer shall, before any such recognizance is estreated, lay such list before the judge or one of the judges who presided at the court, or if such court was not presided over by a judge, before two justices who attended at such court, and such judge or justices shall examine such list, and make such order touching the estreating or putting in process any such recognizance as appears just, subject, in the province of Quebec, to the provisions hereinafter contained.

2. No officer of any such court shall estreat or put in process any such recognizance without the written order of the judge or justices before whom respectively such list has been laid. 55-56 V., c. 29, s. 918.

*Memorandum accompanying letter of Wm. D. Carter, Deputy
Attorney General, Victoria, B.C., 21st April 1925*

Part 21. In particular Sections 1095 and 1101. This should be simplified.

I suggest that every person who is admitted to bail but shall make default in appearance before the Court to whom he is bailed shall render

the bail liable to be estreated. The Court before whom an application is made to estreat the bail may do so by order, either forthwith without notification to the sureties or upon notice to the sureties as he shall see fit. The said order estreating the bail shall become a judgment of the Supreme or County Court in whichever court the order shall be filed according to the amount of jurisdiction in debt of such court, and all sums adjudged to be paid in such court may be enforced in the name of the Attorney General of each province, and all moneys paid shall be paid to the Attorney General of each province, forming part of the consolidated revenue fund, or to be paid to the different cities in the case of a recognizance estreated by a Police Magistrate.

F 75

1100 (1100). All recognizances taken or entered into under any provision of this Act which are forfeited or in respect to which the conditions of such recognizances, or any of them, have not been complied with, shall be liable to be estreated in the same manner as any forfeited recognizance to appear is by law liable to be estreated by the court before which the principal party thereto was bound to appear. 55-56 V., c. 29, ss. 598 and 900.

1101 (1101). The sheriff or other officer shall, without delay, pay over all moneys collected under the provisions of this Part by him, to the Minister of Finance, or other authority or person entitled to receive the same. 55-56 V., c. 29, s. 925.

Letter of Fred F. Mathers, Deputy Attorney General, Halifax, 13th March, 1925

It occurs to me now that there is conflict between some of the Sections of the Code in regard to perjury, and that the form of bail bond should be made to conform to the form of bail bond provided in the Nova Scotia Crown Rules. You may perhaps remember that the question came up in the Supreme Court of Canada in the case of *Petropolis versus The King*, S.C.R. 342.

F 76

Section 1105:—

SAINT JOHN, N.B.
October 22, 1926

E. R. CAMERON, Esq., K.C.
Registrar of Supreme Court.
Ottawa.

Dear Mr. CAMERON,—I handed your correspondence to Sir Douglas Hazen, who, I trust, has communicated with you directly. He has not yet spoken to me upon the subject.

In revising the Statutes will you look up the Criminal Code, Section 1105 (2), a Sheriff is only appointed on Provincial authority for a particular county? A case has arisen where the sureties on a recognizance live in an adjacent county. The section seems to limit the issue of the writ of *fi fa* to the Sheriff of the County where the Court sits. In the case of the County Court for the County how can the Sheriff execute the writ in any other county than his own? Should not provision be expressly made authorizing the issue of the writ to the Sheriff of any County in which the recognizer, or any of his sureties, reside; and also the issue of as many writs as may be necessary as there might be several different residences?

Yours very truly,
(Sgd.) JOHN B. M. BAXTER,
Premier and Attorney General.

F 77

LIMITATIONS OF ACTIONS

Prosecution for Crimes

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

- (a) after the expiration of three years from the time of its commission if such offence be
 - (i) treason, except treason by killing His Majesty, or where the overt act alleged is an attempt to injure the person of His Majesty—section seventy-four,
 - (ii) treasonable offences—section seventy-eight,
 - (iii) any offence against Part VII relating to the fraudulent marking of merchandise, or,
 - (iv) Any offence relating to or arising out of the location of land which was paid for in whole or in part by scrip or was granted upon certificates issued to half-breeds in connection with the extinguishment of Indian title. (1921, c. 25.)
- (b) after the expiration of two years from its commission if such offence be
 - (i) a fraud upon the government—section one hundred and fifty-eight,
 - (ii) a corrupt practice in municipal affairs—section one hundred and sixty-one,
 - (iii) unlawfully solemnizing marriage—section three hundred and eleven; or,
- (c) after the expiration of one year from its commission if such offence be
 - (i) opposing reading of Riot Act and continuing together after proclamation—section ninety-two.
 - (ii) refusing to deliver weapon to justice—section one hundred and twenty-six,
 - (iii) coming armed near public meeting—section one hundred and twenty-seven,
 - (iv) lying in wait near public meeting—section one hundred and twenty-eight,
 - (v) seduction of girl under sixteen—section two hundred and eleven,
 - (vi) seduction under promise of marriage—section two hundred and twelve,
 - (vii) seduction of a ward or employee—section two hundred and thirteen,
 - (viii) parent or guardian procuring defilement of girl—section two hundred and fifteen,
 - (ix) unlawfully defiling women, procuring, etc.—section two hundred and sixteen,
 - (x) householders permitting defilement of girls on their premises—section two hundred and seventeen; or,

- (d) after the expiration of six months from its commission if the offence be
 - (i) unlawful drilling—section ninety-eight,
 - (ii) being unlawfully drilled—section ninety-nine,
 - (iii) having possession of offensive weapons for purposes dangerous to the public peace—section one hundred and fifteen,
 - (iv) proprietor of newspaper publishing advertisement offering reward for recovery of stolen property—section one hundred and eighty-three, paragraph (d); or,
- (e) after the expiration of three months from its commission if the offence be
 - (i) cruelty to animals—section five hundred and forty-two and five hundred and forty-three,
 - (ii) railways and vessels violating provisions relating to conveyance of cattle—section five hundred and forty-four,
 - (iii) refusing peace officer or constable admission—section five hundred and forty-five; or,
- (f) after the expiration of one month from its commission if the offence be improper use of offensive weapons under sections one hundred and sixteen and one hundred and eighteen to one hundred and twenty-four inclusive.

2. No person shall be prosecuted, under the provisions of section seventy-four or seventy-eight of this Act, for any overt act of treason expressed or declared by open and advised speaking unless information of such overt act, and of the words by which the same was expressed or declared, is given upon oath to a justice within six days after the words are spoken and a warrant for the apprehension of the offender is issued within ten days after such information is given. 55-56 V., c. 29, s. 551.

Subparagraph (v) of paragraph (c) of this section was repealed by 15-16 George V, Chapter 38, section 28, and a new subparagraph substituted as follows:

Subparagraph (v) of paragraph (c) of section one thousand one hundred and forty of the said Act is repealed and the following is substituted therefor:

“(v) seduction of girl above sixteen and under eighteen—Seduction. Section two hundred and eleven.”

Memorandum of E. Bayly, Deputy Attorney General, Toronto, 2nd March, 1925

The provisions of 1140, limitations should be carefully gone over, and section 1141 recast. As 1141 now stands I have heard it argued strenuously that a charge of murder etc., could not be laid after two years, which was obviously not the intention. If you will observe its position in the old Code, 55-56 Victoria, Cap. 29, Section 930, you will see that the revisers of 1906, by altering its position, etc., altered its apparent meaning.

However, section 1140 has not been amended to limit the time within which a prosecution must be commenced under the present section 213 (a); and, so, it has been held that there is no limit of time within which a prosecution for illicit connection with a stepchild, under section 213 (a) must be commenced.

Letter of W. C. Simmons, C. J., Calgary, 19th March, 1925

Section 211 of the Code as amended has changed the age to read "of or about the age of 16 years and under the age of 18 years," in lieu of the former ages of 14 and 16 years, respectively. All the amendment that is required apparently would be to substitute the word "over" for the word "under" in the sub-subsection of section 1140 of the Criminal Code.

NOTE.—Amended by Statute 1925, Cap. 38, s. 28.

1141 (1141). No action, suit or information shall be brought or laid for any penalty or forfeiture under any Act, except within two years after the cause of action arises or after the offence for which such penalty or forfeiture is imposed is committed, unless the time is otherwise limited by any Act or by-law. 55-56 V., c. 29, s. 930.

APPENDIX F 78

ERIC ARMOUR, K.C., CROWN ATTORNEY FOR THE
CITY OF TORONTO AND COUNTY OF YORK

Correspondence, etc.

F 78 (a)

CITY HALL, TORONTO,
May 21, 1923.

The Honourable Sir LOMER GOULIN, K.C.M.G.,
Minister of Justice,
Ottawa, Ontario.

Re: Police Arrests on Telegrams.

My DEAR SIR LOMER,—You may remember my discussing this matter with you in Ottawa last February. It was also one of the matters advocated by the representatives of the Chief Constables' Association of Canada, when they waited upon you about that time, to urge certain amendments to the criminal code.

What is required is, an amendment to the criminal code that will permit of the arrest of a fugitive from justice, in the place where he is found, for whom a warrant has been issued in the place where the crime has been committed. For example, if a person commits robbery in Montreal and flees to Winnipeg, the Winnipeg police should have power to arrest him on receiving a request therefor, by telegram or letter, by the head of the Montreal police, and to detain the prisoner for a reasonable time, sufficient to permit an officer from Montreal to arrive in Winnipeg armed with the proper warrant for his apprehension.

I might point out that the present practice in such a case would be for the Chief of Police of Montreal to telegraph or write to the Winnipeg police stating that he holds a warrant for the arrest of the accused on the charge named. The Winnipeg police on receipt of the message would not immediately arrest the accused, but wire back to the Montreal police for confirmation of the message. This course is adopted to prevent an arrest on a false telegram. On further confirmation from Montreal the offender is then arrested and held pending the arrival of an officer from Montreal with a proper warrant.

While arrests on telegrams have been upheld under section 30 by the courts in some provinces, in others the right to arrest on telegram has been denied. (See *Rex v. Panases*, 36 Canadian Criminal Cases 309; *Rex v. Cloutier*, 2 Canadian Criminal Cases 43, and *Rex v. Ward*, 24 Ontario Weekly Notes 142).

In a country of the extent of Canada some amendment is necessary to validate the present practice and put the question beyond any further doubt. It would be hopeless to expect the prompt apprehension of criminals and to prevent offenders from escaping from justice if the present practice cannot be continued. If the arrest of a fugitive offender were to depend on the efforts of an officer with a warrant trailing him from one province to another, few fugitive offenders would be brought to justice. The case of the desperado Rogers, now being hunted near North Bay, is in point. Suppose that he turns up next week in Halifax. Should there be any doubt as to the Halifax police to arrest and hold him until an officer arrives from North Bay with a warrant?

I would therefore respectfully suggest that the criminal code be amended by adding the following subsection to section 30:—

2. "Every peace officer is justified in arresting without warrant, for any offence, any person whose arrest has been requested by letter or telegram by the Chief of Police, Chief Constable, Inspector, commissioner, superintendent or other head of any police force of any municipality or province in Canada or of the Royal Canadian Mounted Police, and any such person may be lawfully detained for a reasonable period not exceeding fourteen days pending the arrival of an officer bearing a lawful warrant for the apprehension of such person."

This would legalize the present practice and greatly aid in the apprehension of fugitive criminals.

Yours faithfully,

ERIC N. ARMOUR,
*Crown Attorney of the City of Toronto
and the County of York.*

F 78 (b)

TORONTO, May 15, 1925.

E. R. CAMERON, Esq., K.C.,
Registrar, Supreme Court of Canada,
Ottawa, Ontario.

My dear Mr. CAMERON,—Is it the intention of the commissioner appointed to revise the Dominion Statutes to hear suggestions on the different statutes under review? It occurred to me that it might be productive of good results if one or more of the commissioners interviewed the Deputy Attorneys General of the different provinces and other law officers of the Crown who have charge of the administration of the Criminal Code. The statute is a fine piece of work but it needs being re-cast in some instances and amended in some particulars. I think it would be a pity if the Code were altered too much, at the same time some useful changes could be made on matters which are not controversial. If I could be of any assistance to the commissioners I should gladly give my services.

With kindest regards,

Yours faithfully,

ERIC ARMOUR,
*Crown Attorney of the City of Toronto
and the County of York.*

F 78 (c)

TORONTO, May 29, 1925.

E. R. CAMERON, Esq., K.C.,
Supreme Court,
Ottawa, Ontario.

Re: Criminal Code Amendments.

My dear Mr. CAMERON,—With respect to the amendments to the criminal code, there is one matter about which I feel very strongly and which I think should have the attention of the commission.

The provisions of the code regarding the defence of insanity and the verdict given where this defence is raised, permits of miscarriages of justice and creates grave scandals in the administration of the criminal law.

While the Crown makes the fullest disclosures of its case against the accused and the accused can get the fullest discovery of what the charge against him is, the defendant is not obliged to open his mouth until the case for the prosecution is closed and he begins his defence to the jury. This practice permits the accused to set up a defence of insanity without any previous notice to the Crown and at a time and under circumstances when it is impossible for the Crown to procure evidence in rebuttal. It is not difficult to get doctors to swear that the accused is insane. This trick defence is being raised in all classes of cases from petty theft to murder.

The Crown, not being in a position to contradict the witnesses for the defence, the result is that in many cases the accused is found not guilty on account of insanity. He is sent to the asylum and in a short time he is declared to be entirely cured and is discharged a free man.

Such cases arouse very hostile criticism of the administration of justice and the impression obtains that the trial has been so planned to favour a particular defendant who has the necessary influence.

There is no reason why the Crown should not have reasonable notice when the defence of insanity is to be raised. The Counsel for the accused always knows weeks before the trial what the defence is and the Crown should have notice when insanity is going to be an issue. Besides, giving notice in many cases will save a great deal of public money, because if the Crown alienists say that the accused is insane, many witnesses would not be subpoenaed and the end of the trial materially shortened.

There is another feature regarding this class of defence which is dealt with by section 966 and the following sections.

Under the code the jury bring in a verdict of "not guilty on account of insanity." The accused is acquitted and while he is supposed to be kept in custody until the pleasure of the Lieutenant Governor is known, it simply means that in an increasing number of cases the accused is discharged from the asylum after a short incarceration.

The English verdict is "guilty but insane" which means the man is guilty of the act but is declared insane and can be therefore detained in prison or in an asylum for the criminal insane for a period that his offence warrants.

While the verdict under the code may be the more logical one it leads to the abuses above stated and an amendment to the code bringing our law in conformity with the English law would work towards a better administration of justice.

Yours faithfully,

ERIC ARMOUR,
Crown Attorney for the City of Toronto
and the County of York.

F 78 (d)

TORONTO, May 30, 1925.

E. R. CAMERON, Esq., K.C.,
Supreme Court,
Ottawa, Ontario.

Re: Criminal Code Amendments.

Dear Mr. CAMERON,—I have received a suggestion from some of the magistrates which has the concurrence of the profession here. It is in regard to the length of remands or adjournments in cases before the magistrates which as you are aware cannot, under the Code, exceed eight days.

There are numerous cases in which many remands or adjournments must of necessity be made. When a magistrate is holding a preliminary investigation under Part XIV or trying an accused summarily with his consent under Part XVI it frequently happens that the complainant is seriously injured, as in assault or automobile cases, or a necessary and material witness is absent or ill, or books have to be audited and financial statements prepared, as in conspiracy cases and in cases where fraud or false pretences is present.

Those repeated remands or adjournments are a great inconvenience to the accused and their sureties and much time is consumed in busy courts in renewing the bail.

The suggestion is that the Code be amended in this respect to permit the magistrate with the consent of the accused in adjourned cases and with the consent of the accused and his bondsmen in remanded cases to adjourn or remand the case for any period of time not exceeding, say, thirty days at any one time.

This adjournment would be in case of the accused and his sureties, many of whom are working men, and would also be a great convenience to the profession.

Yours truly

ERIC ARMOUR,
*Crown Attorney for the City of Toronto
and County of York.*

F 78 (e)

TORONTO, June 5, 1925.

E. R. CAMERON, Esq., K.C.,
Supreme Court,
Ottawa, Ontario.

Re: Canada Evidence Act.

Dear Mr. CAMERON,—When you are considering this statute it would be well, I think, to consider the advisability of introducing provisions similar to the Bankers Books Evidence Act, 1879 (42 and 43 Vict. c. 11, Imperial) quoted in Archbold's Criminal Pleading and Practice 26th edition, page 448.

We have a large number of cases where it is necessary to subpoena a bank official to produce and prove the accused's account with that bank. Where the ledger is a loose leaf one the difficulty is not great because the original account can be detached and produced in court.

Where, however, the ledgers are the old-fashioned kind a good deal of difficulty and inconvenience arises. These books are very bulky and where the account is contained in several ledgers the difficulty in bringing them to court is great. Moreover, the absence of books which are in daily use causes much inconvenience to the bank. For example, yesterday on one case we had nine ledgers produced from one bank. They have to be brought to court in a special conveyance and returned to the bank each night. This inconvenience has to be borne by the bank each time the case is up. I think that the provisions of the English Act should be incorporated in the Canada Evidence Act.

Revised Statutes Commission

I had some considerable experience with the working out of the English Act in court-martial in France and England during the war and found those provisions very serviceable.

Yours faithfully,

ERIC ARMOUR,

*Crown Attorney for the City of Toronto
and County of York.*

F 78 (f)

TORONTO, June 15, 1925.

E. R. CAMERON, Esq., K.C.,
Supreme Court,
Ottawa, Ontario.

Re: Criminal Code Amendments.

Dear Mr. CAMERON,—In further to my letter to you under date of May 30, regarding recognizances for bail. I overlooked drawing your attention to the English statute regarding continuous bail. This is the Criminal Justice Administration Act, 1914. This statute also contains an extremely useful provision with regard to bail. A justice on issuing a warrant for the arrest of any person may, if he thinks fit, endorse on the warrant the amount of the bail. Where such endorsement is made the officer in charge of any police station to which, on arrest, the person named in the warrant is brought, can take the bail. If a similar provision were inserted in our code it would supply a long felt want.

By a necessity a great many warrants of arrest must be executed at night, especially in the case of working men whose employers are not known. To get bail it means that the bondsmen, the accused and the magistrate all have to meet and the Crown Attorney has to be consulted as to the amount of bail. It is a method ill adapted to large centres of population and is very inconvenient to all concerned.

In Ontario we have the Police Constables' Bail Act, R.S.O. 1914, chapter 95, which applies only to offences under Ontario statutes and it works most satisfactorily.

I would also amend the code so that it would not be necessary to have the accused and his bondsmen all together at the same time when the bail is taken. This would obviate great inconvenience which arises when the amount of the bail is large and is being furnished by a number of sureties. In England the magistrate may take the bail of the sureties, and a jailor the bail of the prisoner, see Indictable Offences Act, 1848, section 23.

Yours faithfully,

ERIC ARMOUR,

*Crown Attorney for the City of Toronto
and the County of York.*

F 78 (g)

TORONTO, July 27, 1925

E. R. CAMERON, Esq., K.C.,
Deputy Chairman, Statute Revision Commission,
Supreme Court, Ottawa.

Re: Extradition Act—Fugitive Offenders Act

Dear Mr. CAMERON,—Both these statutes as drawn contemplate that the fugitive offender will contest his extradition or return as the case may be. Neither contain any provisions dealing with cases in which there is no contest but where the fugitive wishes to return voluntarily to the demanding country and is willing to waive all his rights under the statute. This is so in ninety-nine per centum of all the cases we have here.

Practically all our extradition cases are between Canada and the United States. Almost invariably the accused wishes to return to the

United States without the formality of extradition proceedings. In such cases it has been the practice to bring the accused before the Extradition Judge who explains his rights to him and before whom he signs a waiver and consent dispensing with further proceedings and agreeing to return voluntarily. The prisoner is then handed over to the United States officer who takes him back.

This practice is admittedly not regular but it serves the purpose and in a few hours the prisoner is in the United States and it is then his affair not ours. This course would not be practicable in extradition to other foreign countries owing to the distance and the necessity in most cases of traversing other jurisdictions to reach the destination.

For the same reasons it is impracticable with regard to fugitive offenders who, in the majority of cases, are returned in charge of the Captain of a Canadian ship. At present we have in custody a fugitive offender awaiting return to London, England, who is not only willing but anxious to return to meet the charges there pending against him. The risk, however, of putting him on a ship in charge of the captain without any warrant is obvious. Consequently he has to remain here until the properly authenticated papers arrive. This usually means a considerable delay varying according to the circumstances.

It would be advisable, therefore, to amend both these Acts so as to make provision for fugitives who wish to return voluntarily. If the Extradition Judge and the magistrate in the case of a fugitive offender were empowered on the consent of the accused to make an order for the immediate return of the fugitive much time and trouble would be saved. Besides it would obviate the somewhat irregular practice mentioned above which is generally followed throughout Canada. I suggest that this power be given to the judge and the magistrate to do away with the necessity of obtaining the order from the Minister of Justice or the warrant from the Governor General. The order could be a combination of the warrant committing the accused to prison to await his return and the order or warrant issued by the Minister of Justice and the Governor General.

I enclose the form of waiver and consent in use here.

With kind regards,
Yours very truly,

ERIC ARMOUR,
C. A.

F 78 (h)

TORONTO, February 18, 1927.

E. R. CAMERON, Esq., K.C.,
Vice President,
Statute Revision Commission,
Ottawa, Ontario.

My dear Mr. CAMERON,—At the last meeting of the Benchers of the Law Society of Upper Canada, I was instructed to write to you on behalf of the Law Society regarding section 179A of the Criminal Code.

In the opinion of the law officers of the Crown here, that section does not apply to the case of a person who merely signs a form of affidavit or declaration in blank, because the blank form does not purport to be an affidavit or declaration.

Irregularities in connection with affidavits and declarations have so much increased in this province in recent years as to cause grave concern. The worst of these, and one which has lately been brought to the attention of the Society, is the practice among certain solicitors of affixing their signatures and seals to blank printed forms of statutory declaration and putting these, so to speak, in circulation. These forms so signed in blank can afterwards be made or converted into seemingly genuine statutory declarations. Any person can fill in the blank form, sign it and make it applicable to any matter he may choose and use it as if it were a bona fide declaration. I enclose a form fictitiously signed to show

what I mean. The result is that these fraudulent and bogus declarations are received by innocent persons who act upon them to their detriment believing them to be genuine.

The Benchers of the Law Society, therefore, are desirous of having section 179A amended to make it an offence to sign forms of affidavits of declaration in blank and they have authorized me to write to you on their behalf for that purpose.

I shall be obliged if you would be kind enough to bring this matter to the attention of the Commission at your earliest convenience.

With kindest regards, I am
Yours very sincerely,

ERIC ARMOUR,
Crown Attorney.

F 78 (i)

CITY HALL, Toronto,
June 4, 1925.

E. R. CAMERON, K.C.,
Supreme Court,
Ottawa.

Re Criminal Code Amendments

My dear Mr. CAMERON,—I have dictated the enclosed suggestions for some amendments to the Criminal Code. These suggestions are the result of my experience as Crown Attorney, and they would, I think, improve what is on the whole an admirable piece of legislation.

I have tried to avoid any controversial subjects, probably section 235 (f) is the only one. If I were asked to state which in my opinion were most needed I think that parts XVI, XVIII need most attention and, in Ontario, the procedure in estreat of bail and appeals from summary convictions. I also think that section 4 (4) of the Canada Evidence Act should be carefully considered.

If our personal attendance before the Commission to discuss matters would be of assistance I believe that Mr. Edward Bayly, K.C., Deputy Attorney General, and I could arrange to attend.

In making these suggestions I have no other purpose than to assist the Commission with whatever knowledge and experience I possess of the criminal law.

With kindest regards,
Yours faithfully,

ERIC ARMOUR.

SUGGESTED AMENDMENTS TO THE CRIMINAL CODE

BY ERIC ARMOUR, K.C.

PART I

F 78 (j)

SECTION 30

To this section should be added a sub-section to authorize an arrest by a peace officer on receipt of a telegram from the chief of police of any municipality or the head of any provincial police force in Canada; and to authorize the retention of the accused in custody for fourteen days to await the arrival of a peace officer with the warrant. The decisions on the subject are conflicting and the right to arrest on telegraphic advice is an urgent necessity in a country so extensive as Canada.

F 78 (k)**SECTION 157**

Since the decision in *Rex vs. Smith*, 51 O.L.R. 324, it is incumbent upon the prosecution to prove that the accused knew that the person to whom he gave the bribe was an officer. In nearly all cases this is impossible. The section should be amended so that it would make no difference whether the accused believes the person to whom he gives the bribe to be an officer or not.

PART IV

F 78 (l)**SECTIONS 172 to 176**

It should be provided that the accused is estopped from setting up that he was not duly sworn or that the last paragraph in the statutory declaration was not read over to him. It is a frequent form of defence to charges of perjury in affidavits or statutory declarations that the accused was not duly sworn or that the last paragraph of the declaration was not read to him. It is usually impossible to meet this defence as it is only in rare cases that the notary public or other person before whom the affidavit was sworn or the declaration was made can distinctly remember the circumstances so as to be able to swear positively that he administered the oath in legal form or that he read to the declarant the last paragraph of the declaration beginning "And I make this solemn declaration, etc." (See *The King v. Phillips*, 14 Can. Cr. Cases 239).

F 78 (m)**SECTION 179 (a)**

This section should be redrafted to cover the case of a notary public, commissioner, etc., signing affidavit or statutory declaration forms in blank, so that the contents may be filled in afterwards. This practice is somewhat prevalent. The present section does extend to such documents. Being merely forms signed in blank they do not purport to be affidavits or statutory declarations.

F 78 (n)**SECTION 180**

The punishment provided by this section is too low. Under section 157 for bribing a policeman the punishment is fourteen years' imprisonment but under this section for bribing a witness or worse still a juror the punishment is only two years' imprisonment. Offences under this section are becoming much more frequent, especially the corruption of witnesses.

PART V

F 78 (o)**SECTION 235 (f)**

Since the decision of the Ontario Appellate Division in *Rex v. Hewitt*, 51 O.L.R. 322, it is impossible to obtain convictions under this sub-section. The country is being flooded by all kinds of publications from the United States, the sole purpose of which being to encourage and facilitate betting on horse races. The business of betting and book-making has become highly organized of late years and is widely spread over the country and constitutes a very serious public menace. If the dissemination of betting information were stopped, it would go more than half way to put down betting houses and illegal betting.

Paragraph (f) of sub-section 1 should be amended by striking out the words "intended to assist in or intended for use" where they occur in the second and third lines thereof. All offences in this section should be punishable on summary conviction. The offence of keeping a common betting house, (section 227), is tried summarily under section 773 (f). The offences under section 227 and 235 are closely related and the procedure should be the same. Moreover most cases under section 235 are not worth the expense of a jury trial. The penalty is too great.

F 78 (p)**SECTION 286**

The offences under this section should all be punishable on summary conviction. None of them are ever serious enough to require a trial by jury. The penalty is too great.

PART VII**F 78 (q)****SECTION 400**

A curious anomaly occurs in the punishment provided by this section. Any one convicted of receiving any stolen property under section 399 is liable to imprisonment for fourteen years although the theft of the article may be punishable with five years' imprisonment or less.

While the theft of the post letter is an offence punishable with life imprisonment, receiving a post letter knowing it to have been stolen is only a five year offence. In a recent case a post letter containing \$100,000 in victory bonds and other securities, was stolen. The thief was liable to imprisonment for life but the receiver, who is in law, and in fact the more serious offender, could only receive five years imprisonment.

F 78 (r)**SECTIONS 405, 405 (a) and 406**

The punishment for these offences is too low. These crimes are very common and on the increase. There is no logical reason why the punishments provided should not be the same as for theft. A man may get nine years for theft of \$500 but he can only get three years for obtaining a million dollars by false pretences.

F 78 (s)**SECTION 409**

Personation at examinations is covered by this section and the theft or receiving of examination papers is covered elsewhere in the Code but there is no provision which makes it an offence for a person to obtain or sell information obtained from stolen examination papers. For example: A steals examination papers, hands them to B who receives them knowing them to be stolen. B makes copies of the papers and gives the copies to C who in turn sells the information to the candidates. C is guilty of no offence although his operations may have made the examination worthless.

F 78 (t)**SECTIONS 413 and 414**

The word "public" before office, in the third line of each of these sections should be deleted. The words "public officer" as defined by section 2 (29) is meaningless in these sections.

F 78 (u)**SECTION 417**

The punishment is too low. This serious crime is much more prevalent than prosecutions indicate. An increase in the number of offences has been noticeable since the passing of the Bankruptcy Act. The infancy of the accused should not be a defence—see *Rex vs. Rash*, 53 O.L.R. 245.

F 78 (v)**SECTIONS 421 and 422**

These sections should be amended to include personal property so as to cover fraudulent sales or mortgages of chattels covered by liens or hire receipts. Section 421 should also be amended by inserting the words "lien, hire receipt" after the word "hypothec."

F 78 (w)**SECTION 438**

This section should be amended by inserting after the word "arms" in the second line of sub-section (a) the words "ammunition, property, equipment." There has been much traffic lately in militia property not covered by this section.

F 78 (x)**SECTION 460**

The section in the English Act from which this section was taken has since been amended and this section should be amended to conform with present day requirements, (see English Larceny Act, 1916, section 26). The words "office, office-building, theatre, store, store-house, garage, pavilion, factory or work shop, or any building belonging to His Majesty, or to any Government department, or to any municipal or other public authority" should be inserted after the word "counting house" in the fourth line thereof. The section as it stands does not cover many buildings which are frequently entered by "shop breakers."

F 78 (y)**SECTION 464 (a)**

It is suggested that a new section be inserted making it an offence to trespass on public or private property by night. The Provincial statutes relating to petty trespasses do not afford an adequate remedy for this offence. The present day methods of criminals coupled with the use of the automobile in crime makes it very difficult to secure convictions in burglaries, etc. If, however, night trespassers could be adequately punished, it would assist materially in putting down burglaries and shop breaking by night. The method adopted by criminals in carrying out their operations especially with reference to bulky or weighty goods is as follows: A "spots" the building and obtains advance information. B breaks in and moves the goods to a convenient place, usually to other premises or to a lane. C keeps watch and later advises D where the goods are hidden, D removes them in a truck or an automobile. It often happens that one or other of the parties to the offence are found trespassing by night on the premises adjacent to the house or shop broken into, but it is usually impossible to connect the trespasser with the crime.

F 78 (z)**SECTION 479**

The section should be amended so as to make it an offence to have forged revenue stamps in one's possession. The traffic in revenue stamps has become very extensive and forged excise labels, etc. are being printed in very large quantities for use by bootleggers and moonshiners. Possession of forged revenue stamps is no offence at present.

F 78 (aa)**SECTION 488**

The words "with intent to defraud" should be deleted. It is impossible to get convictions under the present section unless under very special circumstances. The section was originally intended to apply to trade cases, where for example, a manufacturer forged the trade mark belonging to another person and then sold inferior articles under the forged trade mark. This class of case is extremely rare. The section, however, has come to life again with the trade in forged whisky labels which are the trade marks of well known distillers. The practice has become very prevalent among bootleggers of having these trade marks printed and affixed to bottles containing their own concoctions, facilitating at the same time a breach of the Provincial statute against the illegal sale of liquor and the traffic in the product of their own stills which are being operated in defiance of the Dominion excise laws. The only way to stop this practice is by the prosecution of the person who prints the labels. Experience has shown that convictions cannot be obtained against printers in view of the words above referred to.

Moreover, the section does not make it an offence to have forged trade marks in one's possession. Many instances have come to notice where persons known to be trafficking illegally in liquor or to be operating illicit stills have been found with large quantities of forged trade marks representing different brands of liquor. The reason for the possession of these forged trade marks is obvious, but it is no offence under the section to have them on one's possession.

F 78 (bb)

PART VIII

SECTION 511 (2)

The amount of \$200 fixed by the amendment of 1921 is too high. It is submitted that it should be \$25.

The amendment was intended to meet cases of fraudulent burning of chattels, for the purpose of obtaining the insurance thereon. The offence is common in respect of motor vehicles. If the accused swears that the automobile or other chattel was not worth \$200, he does not come within the section and the Crown is unable in most cases to prove that the value of the chattel was over two hundred dollars. A lower valuation would make it easier to prove the offence.

F 78 (cc)

PART IX

SECTIONS 561 and 563

The punishment provided by these sections are too low. Cases of counterfeiting United States coins are frequent and with the use of nickel alloys very good counterfeits are being obtained especially with regard to weight and ring.

F 78 (dd)**SECTION 573 (a)**

A new section might be introduced to cover conspiracy which has as its object the contravention of a Provincial statute. While it is true that such conspiracy is criminal apart from the Code, it would be well to have an express provision inserted.

PART XII

F 78 (ee)**SECTION 623**

In the compiled copy of the Code some words such as "being satisfied" have been omitted after the word "justice" in the first line.

(Corrected in the revision)

PART XV

F 78 (ff)**SECTION 479 (a)**

The word "only" should be deleted where it occurs in the second line of paragraph (a), because many offences under both Provincial and Dominion statutes are punishable on summary conviction by both fine and imprisonment. If the defendant is fined and imprisoned his appeal at present lies, in Ontario, to the Division Court. This was not the intention of the section.

The words "Court of General Sessions of the Peace" should be stricken out and the words "The County (or District) Court Judges' Criminal Court" substituted therefor.

The sittings of the General Sessions of the Peace in Ontario are held semi-annually except in the Counties of York and Wentworth when four sittings are held each year. In consequence, a person appealing from a summary conviction in Ontario can delay the final disposition of his case for many months and as time always runs in favour of the accused many appeals are taken for purposes of delay only. For example: If an accused person is convicted in Toronto on the 30th of April, he can by merely appealing the case throw it over until the following September. The present method of appeal has led to great abuses and in some cases to miscarriage of justice. As the County Court Judges' Criminal Court sits in most counties weekly, the proposed amendment would result in the prompt disposition of appealable cases.

F 78 (gg)**SECTION 762**

The following words should be added to this section: "Provided that when a case is stated on the application of the Attorney General of Canada or of any Province no such recognizance shall be required, nor shall the justice be entitled to any fees."

PART XVI

F 78 (hh)**SECTIONS 773 to 779**

This part should be rewritten. In its present condition it is confusing and the sections need rearrangement. The value of property giving the magistrate absolute jurisdiction in section 773 (a) should be increased to fifty dollars. Cases under this amount are not worth the expense consequent upon their being committed for trial.

PART XVIII

This part should be recast and revised. The right of election given to the accused has been much abused and has been used for the purpose of delay and at a great expense to the public. For example: A defendant when brought before a magistrate elects to be tried by a jury and after being committed for trial the case has to stand until a bill can be placed before a grand jury. Then after a true bill has been returned and the witnesses summoned to appear for trial, the accused can re-elect to be tried by a judge without a jury and usually succeeds in getting the case again thrown over until the jury cases are disposed of. If it were provided that the accused should be required to elect before the magistrate whether he wishes to be tried summarily, or by a jury, or by a judge

without a jury, much public time and money could be saved and in some counties the necessity of summoning a grand jury and a petty jury could be dispensed with. If after electing for a jury trial the accused desired to be tried by a judge without a jury, he might be given this further election on the ground that it saves public expense. Part XVIII as it stands at present allows too much delay and "jockeying" at the public expense.

A general section should be added to this part giving the judge all the powers exercised by a judge and jury on the trial of an indictment.

PART XVIII

F 78 (ii)

SECTION 834

This section should be amended to allow charges to be preferred other than those upon which the accused has been committed for trial. As this section stands the accused may take advantage of a slip made in laying the wrong charge before the justice or magistrate. This often happens in closely related offences such as theft, receiving or false pretences, etc. To overcome this the direction of the Attorney General that the charge be tried by a jury or fresh proceedings commenced before the justice or magistrate. If the accused elects to be tried by a judge without a jury he should be in no different position than if he were being tried in the ordinary way.

PART XIX

F 78 (jj)

SECTION 977

This section as it stands applies in Ontario only to the Court of General Sessions of the Peace and the Assizes. There is no provision in the Code for procuring the attendance of a witness who is in jail before a justice of the peace holding a preliminary investigation, or a magistrate trying a case summarily, or before the County Court Judges' Criminal Court. The words "in any case cognizable therein by indictment" should be deleted so as to make the section applicable to all courts having criminal jurisdiction.

F 78 (kk)

SECTIONS 993 and 994

The sections of the English Act from which these sections were taken have since been amended and are re-enacted in section 43 of the English Larceny Act, 1916. These sections should be amended. Under their present form they are indefinite as they do not state from what date "within the preceding period of twelve months" or "within five years immediately preceding" commences. Moreover, section 993 is limited to property found in accused's possession and does not apply to stolen property which had been in his possession but which he has subsequently got rid of (See *R. vs. Carter*, 12 Q.B.D. 522).

F 78 (ll)

SECTION 999

The present section is too limited in its application. After the word "Canada" in the seventh line, the words, "or is insane, or cannot be found after diligent effort, or is kept out of the way by the accused, or by any person on his behalf," should be inserted.

Sections should be introduced in this Part to provide that on any trial for theft, the accused may be found guilty of obtaining the property by false pretences and vice versa.

And similarly provision should be made for a verdict of receiving on a trial for theft and vice versa.

The above provisions are found in the English Larceny Act, 1916, section 44.

The line between these three offences is sometimes very finely drawn and it is often very difficult to determine what offence has been committed. The present practice of laying alternate counts on the trial of an indictment, is cumbersome.

It conveys the impression that the accused is being persecuted. On the other hand if the indictment does not contain the proper charge the accused must be acquitted and be retried on another indictment. The same result obtains when the accused elects to be tried summarily before a magistrate because of the rule that an information may contain only one charge. So too when an accused elects to be tried by the County Judge without a jury. Unless he consents he must be tried on the charge upon which he was committed for trial.

PART XX

F 78 (mm)

SECTION 1050

The provisions of this section should be extended. It does not apply to obtaining property by false pretences. Furthermore, the court should be empowered to order restitution out of the money found on the accused or in his possession, an amount equal to the value of the property stolen, obtained by false pretences, or knowingly received. The present section does not cover the case where the accused has either obtained cash by his crime or converted the property into cash and has the money in his bank or on his person.

F 78 (nn)

SECTION 1060

A provision permitting spanking as a punishment for any and all offences is urgently required, especially in the case of young offenders.

Magistrates who have used this means of punishment report that in a large number of cases where it has been administered, the offender has never been guilty of a second offence.

This form of punishment is not open to the objections that are raised to the use of the lash. It leaves no permanent mark or disfigurement and properly administered has been found to be the greatest deterrent that can be used for beginners in crime. Its use obviates, in most cases, imprisonment for first offenders and solves the difficulty most judges and magistrates have in dealing with offences committed by young persons where it is undesirable to impose imprisonment but where the offence is too serious to be treated by suspended sentence and probation.

The efficacy in spanking lies in the fact that it is a psychological punishment administered at the psychological time, that it takes the heroism out of crime, and in all known cases has prevented the offender in returning to his old haunts and former companions which he invariably does if he is sent to jail, or allowed out on suspended sentence.

PART XXI

F 78 (oo)

SECTIONS 1094 to 1112

In Ontario recognizances taken before justices, magistrates or in the County Court Judges' Criminal Court or in the Court of General Sessions of the Peace are estreated in the Court of General Sessions of the Peace. The present method of estreating recognizances in Ontario is antiquated and entails far more delay than is necessary and dates from the time when the Court of General Sessions of the Peace was composed of all the justices in the county. At that time that court had administrative as well as judicial duties to perform. By the provisions of the Code, applicable to Ontario, recognizances cannot be estreated until the end of the next sittings of the Court of General Sessions of the Peace held after the accused has failed to appear (S-1098). The result is that, in Ontario, many months elapse before recognizances are estreated and this delay

causes great inconvenience and, in many cases, results in a complete failure of justice. Cases of personation in giving bail are not uncommon. Owing to the long time that elapses before a recognizance can be estreated it is impossible to answer a motion to set aside the estreat when the ground for the motion is that the alleged surety was impersonated and did not enter into the recognizance. Moreover the delay in enforcing the recognizance enables a surety to get rid of his property and abscond, the result being that the Crown has neither the accused nor his bondsman. There is no reason why all estreats in Ontario should not be put into effect by any County Court Judge immediately after the date on which the accused has failed to appear.

F 78 (pp)

SECTION 4 (5)

CANADA EVIDENCE ACT.—It is submitted that there is, at this date, no valid reason for retaining this provision. In the majority of cases it does the accused more harm than good and affords him no real protection. The right of the accused to testify on his own behalf is so well known to present day juries that his failure to do so invariably leads to the conclusion that he is guilty, or that he dare not go into the witness box which amounts in the result to the same thing. Its effect against a prisoner is particularly great where two or more persons are jointly tried and one of them does not give evidence on his own behalf. In the result both Judge and Crown Council ignore him entirely and his position is tacitly assumed to be one of admitted guilt.

Furthermore, the penalty for not strictly observing the provisions of the sub-section is too great. An inadvertent slip will cause a mistrial and time and public money is thereby wasted. If these provisions are to be retained the sub-section should not operate where the comment has been adequately withdrawn before the case is given to the jury, or where it appears that no substantial wrong has been done to the accused.

At least this section should be amended by striking out the words "by the judge or" so as to make it conform to the English Act. The section at present makes it extremely difficult in many cases for the trial judge to sum up the evidence properly when the accused or his wife does not give evidence. This is particularly true when an onus is cast upon the accused or where presumptions of law or fact arise as in theft and receiving cases with respect to possession of recently stolen property.

A further provision should be added, following the English practice, to provide that when an accused intends to give evidence himself, he must do so first and before the other witnesses for the defence are examined. The present practice permits an accused person to listen to the other witnesses giving their evidence first and then supplement or explain their testimony by his own. The evil of this practice is particularly noticeable where the defence is an alibi or the like and it enables an accused who has heard the evidence of his own witnesses to patch up the discrepancies in their evidence and to make his own conform to theirs.

ERIC ARMOUR,

*Crown Attorney for the City of Toronto
and the County of York.*

F 79

ADMINISTRATION OF CRIMINAL JUSTICE

As already pointed out the published reports of the proceeding of the Canadian Bar Association show that this subject has been much discussed by its members.

Volume VIII at page 390 contains the second report on this subject. This was considered by a Committee of the Vancouver Bar Association and the report of the latter body subsequently was the subject of a report of a committee of the Benchers of

the Law Society of British Columbia. These two provincial reports have been forwarded to the Commissioners by W. L. Carter, K.C., Deputy Attorney General.

They have not been heretofore published and as they contain much valuable material they are reproduced in this appendix.

F 79 (a)

BRITISH COLUMBIA CORRESPONDENCE

VICTORIA, April 21, 1925.

E. R. CAMERON, Esq.,
Vice-President, Statute Revision Commission,
Supreme Court Registry,
Ottawa.

Dear Mr. CAMERON,—In further connection with your letter of the 10th ultimo I herewith forward you communications received from H. S. Wood, Crown Prosecutor at Vancouver, and C. L. Harrison, Crown Prosecutor at Victoria, with suggestions therein contained as to amendments to the Criminal Code.

Major W. M. McKay, Police Prosecutor at Vancouver, has written me that he wishes to make some suggestions which he will forward in a few days. Upon receipt of this I will forward same to you.

It occurs to me that possibly a provision could be inserted in the Code whereby the territorial jurisdiction of a Magistrate in a summary conviction case shall be presumed unless proof is offered to the contrary. For instance, a Magistrate in and for the County of Vancouver tries summarily a case of common assault. It is proved that the assault took place at Squamish but there is no evidence that Squamish is in the County of Vancouver. Habeas Corpus or Certiorari is taken and the conviction is quashed because the assault is not proved to have taken place within the Magistrate's jurisdiction. There are more convictions quashed in this Province on that ground than for any other cause, and even the most careful Counsel sometimes forget to offer the necessary proof. I would suggest the amendment above indicated.

Yours truly,

W. D. CARTER,
Deputy Attorney General.

F 79 (b)

VANCOUVER BAR ASSOCIATION

F. R. McD. RUSSELL, Esq., K.C., VANCOUVER, B.C., Feb. 22, 1924.
Barrister, etc.,
Credit-Foncier Bldg.,
Vancouver, B.C.

Re Criminal Code.

DEAR SIR,—At a meeting of the Vancouver Bar Association held on January 9, 1924, the following resolution was unanimously passed:

RESOLVED that the report drawn up by the Committee on Criminal Code (Mr. Wood, Chairman), be procured by the Secretary and forwarded to Mr. Russell with our recommendation.

I understand Mr. H. S. Wood has already sent you a copy of the report which was adopted by our Association early last year, and which came up for discussion at the annual meeting of the Canadian Bar Association.

This association would be glad to see a complete revision of the Criminal Code at the time the Revised Statutes of Canada are brought up to date.

Yours faithfully,

W. H. DIXON,
Secretary.

F 79 (c)

VANCOUVER, B.C., February 26, 1924.

F. R. McD. RUSSELL, Esq., K.C.,
850 Hastings Street,
Vancouver, B.C.

Re Revision of Criminal Code.

DEAR SIR,—I have already sent you a copy of the report made by the Committee of the Vancouver Bar Association of which I was chairman. That report touched only on some of the matters which, in the view of the Committee required consideration. Generally speaking, the Committee came to the conclusion that the whole code needed a thorough revision, and not a consolidation, that there were a great many parts of it which needed changing. It is difficult at this time to go over the code in detail, but there are a few points which occur to me, and the following remarks may be of some value to you:—

At present in certain indictable offences tried by a Magistrate under the summary trials provisions of the code there is no appeal of any kind, although there is an appeal when the same charge is tried before the assizes, or before the County Court Judge's Criminal Court. I think there should be no provision in the code restricting the right of appeal, particularly from Magistrates.

In many of the Statutes we find provisions taking away the right to certiorari. I think that all such provisions should be eliminated. In the first place, from the point of the accused they are not fair, and any person convicted should have the right of having his conviction reviewed by a Supreme Court Judge.

From the point of view of the Crown such provisions defeat the benefit to be obtained from Sec. 1124 of the code, because under this section any defects can be amended only when the conviction has been removed by certiorari. See *R. v. Nelson*, 15 C.C.C. page 10.

The provision has been struck out of the B.C. Liquor Act at last session.

Sec. 1124 also needs amending, because the amendment can only be made on the perusal of the depositions, and the section, therefore, does not apply if the accused person pleads guilty.

As to appeals to the Supreme Court of Canada. The section of the Supreme Court Act dealing with appeals does not grant the person who is convicted the right to appeal if the Court of Appeal order a new trial. The anomaly of the situation is this, that when a person has been convicted at the trial and appeals to the Court of Appeal he can appeal to the Supreme Court of Canada if there is one dissenting Judge, but if the whole Court, or the majority allowed his appeal and order a new trial, he has no further right of appeal, no matter how ridiculous the judgment of the Court of Appeal may be. On this point see *R. v. Fitzpatrick*, 32 B. C. R., page 289. In that case the Court of Appeal held that there was no evidence upon which the accused could be convicted but they ordered a new trial. Clearly I should think the judgment should have been a dismissal of the charge. In that particular case the Crown entered a stay of proceedings.

The provisions with regard to the taking and estreating of bail require complete overhauling and simplification.

Section 591 needs amending in view of the decision of our Court of Appeal in *R. v. Johansson*, 31 B. C. R. 211.

In *R. v. Cross*, 14 C. C. C., page 171, the full Court of Nova Scotia held that Sections 756 and 857 of the code applied to Part 18 the "Speedy Trials Act."

I have just been looking at that decision, but I do not see any reference to any section of the code which makes the general provisions of the code as to procedure apply to Part 18, and I think it might fairly be argued that in view of the fact that Part 18 creates a statutory court that that court has no power except such as is specifically given to it. That is virtually the decision of Justice D. A. McDonald in *R. v. Simpson* (1923) 3 W. W. R. In that case he quashed the warrant of com-

mitment brought up on a writ of habeas corpus. The accused was committed for trial on a charge of theft, and at the trial counsel for the Crown added the charge of receiving stolen goods. The same goods were referred to, they having been found in the possession of the accused at the time of his arrest. The accused consented to be tried before the County Court Judge's Criminal Court on both charges, and they were tried together. Mr. Justice McDonald held that while these charges could have been tried together at the assizes that the County Court Judge could not try them together, but must take each count by itself, although in this case the evidence would have been identical.

It appears to me that the same argument will apply to a case in which two prisoners are charged together with the same offence. It has been the practice in such cases to try both together, and I have done it many, many times.

Another point which occurs to me is that in view of the enlarged right of appeal, that any person who is convicted by a Court of Record should have the right of appeal only, and should not be able to bring up the conviction by certiorari, or by writ of habeas corpus. There are numbers of authorities to this effect. But the Honourable the Chief Justice in *Rex v. Chow Chin*, 29 B. C. R., page 445, and Mr. Justice D. A. McDonald in *Rex v. Simpson* have held to the contrary.

Yours truly,
H. S. WOOD.

F 79 (d)

REPORT OF THE COMMITTEE ON THE ADMINISTRATION OF CRIMINAL JUSTICE APPOINTED BY THE VANCOUVER BAR ASSOCIATION.

To the President and Members of the Vancouver Bar Association:

We, your Committee, consisting of Messrs. H. S. Wood, Convenor, H. C. Shaw and J. P. Hogg were appointed on receipt of the draft of the second report of the Committee of the Canadian Association dealing with this subject.

We understand that our duty is to consider the report which has been presented to us and also to make such further recommendations as we may see fit.

We shall first deal with the latter.

REVISION OF CRIMINAL CODE

The Criminal Code of Canada was enacted by Parliament in 1892. It was a memorable achievement and is and always will be a monument to the late Sir John Thompson. Since that time the Code has been amended year after year, here and there, something added to one section, something taken from another, with many entirely new sections and even new statutes of a criminal nature. One is reminded of an ancient edifice to which additions have been made planned by many architects and carried out with little regard to the appearance of the completed structure.

We have, for example, a recent case in this province, *re Mah Shin Shong* 1923—1 W.W.R. 1366.

The accused was charged with an offence against the "Opium and Narcotic Drug Act" prosecuted under the provisions of the Code, convicted, and later ordered deported under the combined provisions of the Drug Act and the Immigration Act. When he was released under a writ of Habeas Corpus, we have the spectacle of the Court of Appeal in order to decide as to whether or not it had jurisdiction to hear the Crown's appeal, struggling with the question as to whether the cause before it was Civil or Criminal. Is it necessary to say that the point was not decided? We can if required multiply instances of ambiguities, inconsistencies and unreasonable provisions but in our opinion the only satisfactory manner of dealing with these is by a complete review.

The so-called Revision of 1906 was a consolidation rather than a revision. We therefore recommend that representations made to the Minister of Justice urging upon him the necessity of a complete revision (and would suggest the appointment of a board of not more than three members of the bar with large experience in the actual practice of criminal law who should be allowed a period of at least two years for the task) that they communicate with judges, magistrates, lawyers and others in, and visit all parts of Canada and be paid salaries proportionate to the importance of their work.

We regard the subject of criminal law and its administration as the most important one at present being dealt with by the Canadian Bar Association and therefore view with pleasure the outstanding place which it is to take at the coming Montreal meeting.

Habeas Corpus.

We are of opinion that the ancient practice of canvassing the Judges should be abolished by Statutes, Dominion and Provincial, and that an appeal to the Court of Appeal should be provided in every case.

In British Columbia the Court of Appeal Act provides for an appeal, but this applies only to offences against Provincial Statutes and to civil matters. This is necessarily so because the practice in criminal matters comes within the jurisdiction of Parliament. See *Re Tiddington*, 17 B.C.R., p. 81.

In spite, however, of an appeal being provided, the practice of canvass still continues although it would seem that the legislature in providing an appeal may well have intended otherwise. In *re Hall*, 8 O.A.R. 135. Courts in some of the provinces have held that there is an appeal. In *re Hall supra*.

We recommend that the practice be made uniform in all provinces and as to both classes of offences.

Grand Jury.

We recommend the abolition of the Grand Jury and annex to this report a letter written by Mr. C. M. O'Brian of our Bar giving reasons why the Grand Jury at the present is of little practical value, with which opinion our Committee agrees. We are indebted to Mr. O'Brian for his assistance in this matter.

Appointment of Judges.

In our opinion there should be appointed to each Provincial Court of Appeal at least one Judge of wide experience in Criminal Practice.

The first part of the report under consideration is a general statement. We have no unfavourable criticism to make except to say that the element of punishment must not be too much subordinated to other considerations. Criminals are not by any means all subnormal nor creatures of circumstances.

Probation, Parole, etc.

The many suggestions in the report with reference to ticket of leave, parole, probation, extramural acts, etc., require very grave consideration, and should not have approval without it. It seems to me that these are matters with which law enforcement officers are particularly qualified to deal. There is in Canada as well as in the United States an Association of Chief Constables meeting annually. These very matters are being considered by that body and we recommend that they be consulted.

Appeals.

We are not in favour of the creation of Courts of Criminal Appeal. The present courts now have by a recent amendment power to review sentences. There are however numerous questions as to appeals which have been considered by us but the subject is too large a one to be discussed here. It can be dealt with properly only by a revision as suggested above.

The same applies to many other of the recommendations covering amendments to the code. We can suggest many more which should and would be considered on a revision.

We shall however deal seriatim with some of the suggested amendments*:

3. *Spanking*. We agree.
 4. *Habitual Criminals Act*. We agree.
 5. *Family courts, etc.* We agree.
 6. *Feeble minded*. We agree.
 7. *Breach of Bond*. We agree.
 - 8, 9. *Perjury*. We agree.
 10. We do not agree.
 - 11, 12. *Confessions*. We do not agree.
- As the law stands no warning need be given. *Ibrahim v. The King*, 1914 A.C. 599. *R. v. Rodney*, 42 O.L.R. 645. It is for the Court to decide in each case whether the statements have been made voluntarily or not. We do not think that a warning should be essential or that legislation can improve the situation.
13. *Certiorari*. We do not agree.
 14. We do not agree that all magistrates be lawyers, but the provisions of the code dealing with summary trials of indictable offences require complete revision.
 15. *Deportation*. We agree.
 16. *Interprovincial Arrest*. We agree.
 17. *Bail*. The provisions of the code dealing with the estreating of bail require revision.
 18. *Conviction*. Of full offence when charged with attempt. We agree.
 19. *Court of Criminal Appeal*. We do not agree.
 20. *Public defender*. We do not agree because under British law the Judge is always of counsel for the prisoner.
 21. *Examination for discovery*. We do not agree. The accused now has sufficient opportunity under the present provisions of the code to obtain particulars and, further, the Crown's case is disclosed at the preliminary inquiry. As to the accused we do not think it fair that he should early in the proceedings be necessarily committed to a particular line of defence. He may be badly advised.
 22. *Comment*. We agree.
 - 23-24. *Sterilization*. We agree.
 25. *Probation of children*. We agree. See *Juvenile Delinquents Act* 1908, cap. 40.
 26. *Probation*. See previous remarks.
 27. *Trial without delay*. We agree.
 28. *Sentences*. We agree.
 29. *Specialized Judges*. We agree.
 - 30, 31. *Indeterminate Sentences*. We do not think this is within the province of this Committee.
 - 32, 33, 34, 35, 36. *Parole, etc.* See previous remarks.
 37. *Treatment of prisoners prior to trial*. We agree.
 - 38, 39, 40. *Employment and Wages*. This is a matter of prison reform with which we are not concerned.
 41. We agree but see previous remarks as to consultation with law enforcement officers.

* This reference is to the Report to be found in Volume VIII of the proceedings of the Canadian Bar Association at p. 390.

Summary.

The report deals generally with two classes of the subject.

1. *Amendments to the code.* As to this we strongly advise a revision.
2. *As to the treatment of criminals.* We advise consultation with law enforcement officers including the Canadian Association of Chief Constables before legislation is recommended by the Canadian Bar Association, or brought down. The reviewers of the Code should consider all these matters.

All of which is respectfully submitted.

F 79 (e)

SUGGESTIONS IN RESPECT TO THE REVISION OF THE
CRIMINAL CODE

1. Settle the problem of suspended sentence in a case where a minimum penalty is imposed by Statute, such as, for instance, theft of postal letters, theft of automobile, etc. This has been dealt with to some extent in the case of *Rex v. Herron*, 36 C. C. C. 398, which seems to indicate that suspended sentence was alright in these cases, but is not very clear. We do not care to make any recommendation as to policy, but simply think the matter should be made definite one way or another.

2. A definite interpretation should be given to Sections 985 and 986. The Court of Appeal at the present time are struggling with this in the case of *Rex v. Coy*. It appears from reading Section 986 and the cases decided thereunder, such as *Rex v. O'Meara*, 25 C.C.C. 16, that the mere finding of gaming apparatus places the onus upon the person to prove innocence, regardless of whether the Constable has a Warrant or is a trespasser. You will note the word "and" after the semicolon seems to prescribe two sets of facts which constitute prima facie cases.

3. Sections 774 and 776 seem to give the Magistrates in British Columbia absolute jurisdiction, and there are two County Court decisions here to the effect that cases arising under Section 773 cannot be tried by any other Court but the Magistrate, although Section 784 seems quite explicit on this. The Court seemed to think that the committal for trial can only take place after Crown's evidence is in, and that the Magistrate has no jurisdiction to take a preliminary hearing in the first instance. The net result means that offenders in Cities and places where there are Magistrates are amenable to less punishment by Sections 780 and 781 than if they had been tried by the Courts on indictment.

4. We think there ought to be a clear statutory demarkation or limitation of the power to amend an Information and the time when same can be done either in a summary conviction matter or an Indictable case.

5. We think that some similar legislation to the English Larceny Act should be introduced into this country to enable a person to be tried at one and the same time on a charge of stealing and retaining.

6. *Section 750.*—There has been considerable dispute in some of the Courts over the meaning of the words in the first three lines of Sub-section (a) of this Section, and we think a clear statutory interpretation should be made showing how to count "more than fourteen days." This becomes of considerable importance to practitioners when it is only a question of a day either way. You will see from *Rex v. Judge of the County Court*, 13 C.C.C. 179, that the Court divided on this question, and after reading all Judgments one can still come to the conclusion that all three Judges are right.

7. *Penitentiary Act.*—The recent amendment to this Act complementary to the new appeal sections to the Code by which a prisoner is not to be sent to the penitentiary until the time for his appeal has expired is all very well, but no provision is made as to who shall keep the prisoner in custody in the interim. The matter is of importance in Cities if they have a lockup, because in our own case in Vancouver Oakalla jail will not take a prisoner in the meantime because there is no commitment for Oakalla, and it is a very serious thing to keep certain classes of prisoners

thirty days in the City lockup while they make up their minds whether they want to appeal or not. As an instance of this, in the past week one prisoner on three different occasions managed to saw the bars of his cell but was fortunately discovered before a jailbreak occurred. City lockups, in any case, as a rule have no facilities to keep a man for that length of time, there being no laundry and no provision for repair or replacement of clothing. We think that some legislation might be brought out providing for the Keeper of the Common jail to take the custody of a prisoner until he is finally turned over to the penitentiary.

F 79 (f)

VANCOUVER, B.C., 27th July, 1923.

*To the Benchers
of the Law Society of British Columbia.*

At the last meeting of the Society the resident Vancouver Benchers were appointed a Committee to consider the report of the Vancouver Bar Association upon the question of the "Administration of Criminal Justice," and therein have suggested amendments by the Committee of the Canadian Bar Association. The Treasurer of the Society, addressed a note to all the resident Vancouver Benchers, inviting them to meet at his office at ten o'clock on Friday morning, the 27th July, 1923, but so many are absent on their holidays that only Sir Charles Hibbert Tupper and Mr. A. H. MacNeill attended. Mr. H. S. Wood was also present, and the Committee had the benefit of his assistance and his knowledge and experience on the subject.

The Committee went through the report of the Vancouver Bar Association item by item. With the general tenor of the report on pages 1 and 2 your Committee find themselves in accord with the statement contained in the report.

With respect to the suggestion upon the subject of Habeas Corpus, "that the ancient practice of canvassing the Judges should be abolished by Statutes, and that an appeal to the Court of Appeal should be provided in every case." Your Committee are very strongly of opinion that no alteration should be made in the existing law upon the subject, or the existing rules and method of procedure. Your Committee have very high authority for the position that they are taking. In the recent case of *Ex parte O'Brien* before the House of Lords, Lord Birkenhead said:—

"In the course of time certain rules and principles have been evolved; many of these have been declared so frequently and by such high authority as to become elementary. Perhaps the most important for our present purpose is that which lays it down that if the writ is once directed to issue and discharge is ordered by a competent court, no appeal lies to any superior court. Co-relative with this rule, and markedly indictive in itself of the spirit of our law, is that other which establishes that he who applies unsuccessfully for the issue of the writ may appeal from court to court, until he reaches the highest tribunal in the land."

Your Committee look upon the Great Charter of King John and the "Habeas Corpus Act" which provided the procedure with respect to the issuance of that writ in criminal cases as the very foundation stone of our liberty and do not think any encroachment should be made thereon.

Your Committee are further of opinion that in many cases it might be well for a Judge to refer a matter to the Full Court and that the Full Court, consisting of three or more Judges, should sit upon the return of a writ of habeas corpus and hear and determine it.

If an appeal be desired your Committee are of opinion that an appeal should be allowed to the prisoner alone. If any Judge can be found either in the Full Court or the Court of Appeal in whose opinion the accused should be discharged, then he should be at liberty.

These rules should apply in extradition cases.

Revised Statutes Commission

With respect to Grand Juries. The matter is so open to doubt that your Committee have been unable to reach any satisfactory conclusion with respect to the matter.

With respect to the appointment of Judges, your Committee are of opinion that this paragraph should be left out.

With respect to Appeals. There are a number of matters there under many numbered heads, from 3 to 15. Your Committee find themselves in accord with the view of the report of the Vancouver Bar Association.

With respect to No. 16, interprovincial arrest, your committee find themselves unable to agree with the suggestion of the Vancouver Bar Association.

With respect to No. 17, Recognizance of Bail. Your Committee agree with the conclusion and statements in the report of the Vancouver Bar Association.

With respect to No. 17, Conviction of full offence when charged with attempt. Your Committee are of opinion that this is rather a startling proposition and find themselves unable to agree with the report of the Vancouver Bar Association.

19. Court of Criminal Appeal.

20. Public Defender.

21. Examination for Discovery.

23 and 24, now 20 and 21.

} Your Committee agree
with the report of the Van-
couver Bar Association.

With respect to old No. 25, now No. 26, your Committee find themselves unable to agree with the report of the Vancouver Bar Association.

With respect to present No. 27. Your Committee agree with the conclusion reached by the Vancouver Bar Association.

With respect to present No. 28. Your Committee are without any evidence that there is any undue delay in bringing criminals to trial.

Present Nos. 29 and 30, Sentences and Specialized Judges. Your Committee are of opinion that these two articles are impracticable.

Nos. 30 and 31, Indeterminate Sentences. Your Committee are of opinion that the report of the Vancouver Bar Association should be made as follows: "We do not think this advisable," and that the remainder of the passage should be eliminated.

Nos. 32, 3-4-5 and 6, Parole, etc. Your Committee agree with the conclusion reached by the Vancouver Bar Association.

No. 37. Treatment of Prisoners prior to trial. We think that this should be eliminated.

Nos. 38, 39, 40 and 41. Your Committee agree with the conclusions reached by the Vancouver Bar Association.

We have the honour to remain,

Your obedient servants,

CHARLES HIBBERT TUPPER,

A. H. MacNEILL,

CHARLES WILSON.

F 79 (g)

MEMORANDUM AS TO AMENDMENT TO THE
CRIMINAL CODE

C. L. HARRISON, Crown Attorney,
Victoria, B.C.

In my experience I have found that the Criminal Code needs amendment in regard to the following matters. This is only a draft of the difficulties I have come across.

SEDUCTION

In my opinion the provisions in regard to seduction as at present in force are not as advantageous and workable as the Statute read prior to the year 1920.

Section 211. Seduction between 14 and 16. This section as it stood prior to the date mentioned provided that anyone (regardless of their age)

who should have illicit connection with a girl between these ages, if she was of previously chaste character, was guilty of an offence. It did not matter whether the girl was partly to blame or not.

This section was struck out and was in effect re-enacted as s. 2 of section 301 (1920 cap. 43 s. 8). The penalty was increased but the value of the section in my opinion was seriously impaired by s. 17 of cap. 43, 1920. The effect of s. 17 I will mention presently.

Seduction between 16 and 18 (now s. 211). This section created a new offence. It provides that every person *over the age of 18* who seduces a girl of previously chaste character above 16 and under 18 years is guilty of an offence. This section was inserted in the Code by cap. 43 above mentioned.

The defects of this section, to my mind, are very serious as follows:—

(a) The age limit of the man and the consequent difficulty of the prosecution being able to prove his age. The proof of age is dealt with by s. 984. In this section it is necessary to produce a certificate and evidence identifying the person with such certificate or proof in the ordinary way by a birth certificate together with proof of identity. This is a matter of great difficulty and is almost useless in practice. It is true that s. 2 of s. 984 may infer the age from the appearance; this is obviously a very unsatisfactory method of proof for the prosecution to rely on.

(b) The word "seduces" has already been argued out and it has been held that as the Code omitted the words "or has illicit connection" as provided in the former section, the fact that the girl has had illicit connection with the prisoner on previous occasions, she no longer can be seduced. The latter part of s. 211 deals with chaste character and not with seduction.

(c) Section 17 of cap. 43 is the third drawback. Sec. 17 of cap. 43, 1920, has been a serious stumbling block to enforcing the seduction clauses above mentioned. This section of fact provides that it must be shewn that the accused was wholly or chiefly to blame, and if not he may be acquitted. This section has caused several cases to be dismissed. It seems to me that this section makes an impossible condition. In practice a girl either claims to be raped or on the other hand is always ready to admit to a cross-examining counsel that she was about as much to blame as he was. After a few questions are put to a girl, as a rule counsel then says: "Well, now, you are really about as much to blame as the prisoner?" She will almost invariably say "yes" unless, of course, it is a rape case. This being the case, girls between 14 and 16, under s. 301, s. 2, and s. 211 have less protection than they had prior to the year 1920.

In my opinion it would be better to go back to the section as it was before 1920 rather than leave it in its present state unless of course s. 17 of cap. 43, 1920, is repealed and the objections to s. 211 above-mentioned are struck out.

JURISDICTION

Section 773.

This section and subsequent sections of this part (Part 16) need considerable amendment. Section 773 s.s. (a). The latter part of this subsection should be amended by striking out the words "in the judgment of the Magistrate." There is no necessity to compel the Magistrate to express an opinion. If he does not say that in his judgment the value of the property does not exceed \$10, then a conviction may not be made. Again, this section is giving jurisdiction and I presume that strictly speaking the Magistrate should determine the value of the property before the defendant is formally charged. This would be a needless procedure. I think it is clear that all courts originally get their jurisdiction from a statement on oath, or in civil cases a pleading, which is nothing more than an ex parte statement. This subsection should read in effect that the Magistrate shall, if the evidence shows that the property exceeds \$10 in value, commit the prisoner for trial.

Subsection (c) does not include an assault occasioning *actual* bodily harm.

Actual bodily harm is of course not such a serious offence as grievous bodily harm, and yet grievous bodily harm is triable under this part. This has caused a great deal of confusion and I see there are judgments both ways. Subsection (d). The same objection applies as in s. s. (a) and I think the same remedy should be applied. It should be borne in mind that a Magistrate acting under this part has power under s. 784 to commit for trial. S. 784 could be amended so as to make it clear with regard to subsections (a) and (d). *Section 797.* A person convicted by a Magistrate as distinguished from two Justices of the Peace, cannot appeal from conviction under subsections (a) and (f) of 773, but a person convicted before the same Magistrate for a summary offence under Part 15 may appeal. There are many cases therefore where the keeper of a disorderly house cannot appeal but those found in such disorderly house under s. 229 can appeal. When I speak of appealing I mean an appeal to the County Court. This, to my mind, is an absurdity.

This whole part, in my opinion, should be changed. The jurisdiction of a Magistrate for the summary trial of offences should be defined as follows: A Magistrate shall mean and include a Police or Stipendiary Magistrate, Judge of a County Court, Police Magistrate of incorporated cities having a population of more than 2,500 people according to the last decennial or other census taken under the authority of an Act of the Parliament of Canada.

Such Magistrate shall have power to try any person who shall be brought before him charged with any offence referred to in s. 582 with the exceptions provided in 583.

My experience has been that a great deal of confusion has arisen under Part 16 and I think the whole section should be altered as above-mentioned.

MEMORANDUM AS TO AMENDMENT TO THE CRIMINAL CODE
TAKING DOWN EVIDENCE

Section 688.

This section refers to "a duly sworn official court stenographer." There is no provision in the Code whereby a person can become a duly sworn official court stenographer. It undoubtedly applies to the official stenographers appointed under authority of the civil Acts of each province. This should be made clear. A Magistrate should be given authority to appoint an official court stenographer who shall thereafter during his appointment be not required to take any further oath for the purposes of any matter brought before the Magistrate within his jurisdiction, whether under this part or any other part of the Code.

It would be a great saving of time in the cities where there is so much work to have it clear that where a duly sworn official court stenographer takes the evidence it shall be unnecessary for the Magistrate to make any notes. The reason for this is that the stenographer takes down every part of the proceedings, i.e., the charge, the evidence, the judgment, and the conviction. The authorities are clear in civil cases that where a Judge takes notes and they conflict with the notes of the Registrar, the Registrar's notes shall prevail. I mention this to emphasize the point that it is of not much consequence what the Magistrate takes down if it is taken down by a properly sworn stenographer.

Sections 985 and 986.

985 could be altered so as to make it clearer and avoid the difficulties which this section and 986 create. This section could provide as follows: "when any instruments, books, or articles used in playing any game of chance or mixed game of chance and skill are found in any house, room, or place suspected to be used as a common gaming house or common betting house and entered under a warrant or order issued under this Act, or about the person of any of those who are found therein, it shall be prima facie evidence at the trial of any person under s. 228 or 229 that such house, room, or place is a common gaming house or common betting house, and that the persons found in such room or place were there unlawfully, although no play was actually going on in the presence of the officer entering the same."

Section 986 should be amended to read as follows: "In any prosecution under s. 228 or s. 229 it shall be prima facie evidence that a house, room, or place is a disorderly house if any constable or officer authorized to enter any house, room, or place, is wilfully prevented from or obstructed or delayed in entering the same or any part thereof," and by adding a subsection to read: "If any house, room, or place is found fitted or provided with any means or contrivance for playing any game of chance or any mixed game of chance and skill, gaming or betting, or with any device for concealing, removing, or destroying any such means or contrivance, it shall be prima facie evidence that such house, room, or place is a common gaming house or common betting house, as the means or contrivance may indicate."

Subsection 2 of s. 986 should be amended by inserting after the word "of" in the 6th line the words "or without lawful excuse found in."

MEMORANDUM AS TO AMENDMENT TO THE CRIMINAL CODE
BAIL

A serious question has always arisen as to whether or not a Magistrate can take cash bail.

It has been done for a great many years following a case in England. This case is reported at In this case cash bail was taken but the question was never argued out and as above stated, it is still very questionable.

I think that a provision should be inserted expressly authorizing cash bail. It is in practice very essential.

Part 21. In particular Sections 1095 and 1101. This should be simplified.

I suggest that every person who is admitted to bail but shall make default in appearance before the Court to whom he is bailed shall render the bail liable to be estreated. The court before whom an application is made to estreat the bail may do so by order, either forthwith without notification to the sureties or upon notice to the sureties as he shall see fit. The said order estreating the bail shall become a judgment of the Supreme or County Court in whichever court the order shall be filed according to the amount of jurisdiction in debt of such court, and all sums adjudged to be paid in such court may be enforced in the name of the Attorney-General of each province, and all monies paid shall be paid to the Attorney-General of each province, forming part of the consolidated revenue fund, or to be paid to the different cities in the case of a recognisance estreated by a Police Magistrate.

APPEARANCE OF THE ACCUSED

In summary matters an accused person may appear either personally or by their respective counsel or solicitors or agents.

Section 720.

This is inconvenient and often causes a case to fail because witnesses have not the opportunity of identifying the accused.

I suggest that s. 720 be amended by adding thereto a subsection providing that the Justice may, notwithstanding this section, require the personal attendance of the accused.

F 79 (h)

NANAIMO, B.C., August 26, 1925.

E. R. CAMERON, Esq.
Vice-President, Statute Revision Commission,
Ottawa, Canada.

DEAR SIR,—I am in receipt of your circular letter of the 4th inst. and there are one or two suggestions I should like to make which may appeal to you as minor improvements.

Sections 687 and 696 need rearranging. 696 should be immediately after 690. 691 should follow 695.

The heading of 696, "The rule as to bail," is misleading. This is really a "rule as to binding over to appear for trial in lieu of committal." From the heading, one would think that it dealt with the matter of bail generally. This section appears in the index under "bail, rules as to," from which no one would suspect the contents of the section. I suggest the re-grouping because it would surely be clearer if all the sections dealing with what may be done to an accused person at the conclusion of a preliminary inquiry, were put together. They might even be sub-sections of one section.

The jurisdiction of the magistrate under part 16, needs more clearly defining, particularly with regard to Sections 274 and 295. The offence described in these two sections is practically the same thing. In 2 C. E. D., page 608, it is said "There is a conflict of judicial opinion as to the scope of the subsection (773 (c)). This difference is due largely to the over-lapping of the offences declared by Code, Sections 274 and 295, the former dealing with the wilful infliction of grievous bodily harm whether there is, or is not, an assault, and the latter dealing with an assault which occasions 'actual bodily harm'".

I find it difficult to imagine the infliction of grievous bodily harm without an assault, unless it was a pure accident, which would not be a criminal offence. Why could not these two sections 274 and 295 be amalgamated into one? There need then be no doubt as to the magistrate's jurisdiction. Common assaults (291), assaults occasioning bodily harm (295) and aggravated assaults (296), should be grouped with wounding (274) and the following sections, instead of being mixed, as they are, with indecent assaults on females (292), indecent assaults on males (293), section dealing with consent (294). A person charged with rape (298) may be convicted of indecent assault, and it would seem to me that these three sections, 292, 293 and 294 should follow 298 and 299.

There is another group of sections dealing with sexual offences, 201 and 220-A. The person charged under 202 might be convicted under 293, and it would seem to me that 202, 203 and 293 should follow one another. In fact, all these assaults of a sexual nature should be grouped together, and not mixed up with assaults involving mere violence. The former come under rules of evidence peculiarly their own, and much time and many mistakes would be saved if offences closely related to one another were properly grouped.

There are many other places in the Code where a similar re-arrangement might be advantageous, but I have picked out the ones which have been particularly within my personal observation.

I do not know whether the scope of your revising would include actual amending of the Law. If it does, I would suggest that serious consideration be given to the interpretation of Section 5 of the Canada Evidence Act in *Rex v. Mah Hon Hing*, 1920, 28 B. C. R. 431, which apparently allows any lying alibi to be set up and sprung on the prosecution at the trial, but prohibits an obvious line of cross-examination and comment by Crown counsel or from the Judge. It would appear that the English cases—*Rex v. Moran*, 3 Crim. App. R. 25, and *Rex v. Maxwell*, 2 Crim. App. R. 29, are more reasonable.

Yours truly,

ARTHUR LEIGHTON.

F 80

COPY OF REPORT SIGNED BY SIR HENRY STRONG, CHIEF JUSTICE OF CANADA, FEBRUARY, 1906—FROM FILES OF THE DEPARTMENT OF JUSTICE.

The Honourable CHARLES FITZPATRICK, K.C.,
Minister of Justice of Canada.

SIR,—The undersigned have the honour to present the following preliminary report with respect to the Criminal Code.

We have carefully considered the voluminous correspondence on the files of the Department of Justice containing criticisms of the Code and suggested amendments thereto, and with respect to the same beg to say:—

1. The aim and object to be attained in codifying the criminal law and procedure which Sir John Thompson, the Attorney General of Canada, had in view, can perhaps be best stated by quoting shortly from his remarks when introducing into Parliament his Bill respecting criminal law, in April, 1882.

“The objects of the Bill are stated very tersely in one passage of the report of the Royal Commission which investigated the subject of the Criminal Law in England, in defining the effort at codification in a similar Bill in Great Britain in these words:

‘It is a reduction of the existing law to an orderly written system, freed from needless technicalities, obscurities, and other defects which the experience of its administration has disclosed. It aims at the reduction to a system of that kind of substantive law relating to crimes and the law of procedure, both as to indictable offences and as to summary convictions.’

The Bill is founded on the English draft code prepared by the Royal Commission of 1880, on Stephens' Digest of the Criminal Law (the edition of 1887), and the Canadian Statutory Law. The efforts at the reduction of the Criminal law of England into this shape have been carried on for nearly sixty years, and, although not yet perfected by statute, those efforts have given us immense help in simplifying and reducing into a system of this kind, our law relating to criminal matters and criminal procedure.

The present Bill aims at codification of both common and statutory law; but it does not aim at completely superseding the common law, while it does aim at completely superseding the statutory law relating to crimes.

The common law will still exist and be referred to; and in that respect the Code will have the elasticity so much desired by those who are opposed to codification on general principles.”

The possibility of successfully expressing in the form of a code the criminal law and procedure in force in Canada was at first gravely doubted by the lawyers and judges who were familiar with the work of the Commissioners appointed from time to time by the Imperial Government to inquire into and consider the provisions of a draft code relating to indictable offences. Although the work of the Imperial Commissioners was not approved by the great majority of the English judges, yet many expressed an opinion favourable to a criminal code, if a satisfactory one could be made.

In 1879, in reporting to the Attorney General upon the draft Bill prepared by the Commissioners, of which Sir James Fitzjames Stephen was one, Lord Chief Justice Cockburn, although opposed to the Bill, said:—

“I have long been a firm believer in not only the expediency and possibility, but also in the coming necessity of codification.”

The results which have been disclosed by over twelve years' experience and use of the Code in Canada have happily proven unfounded the misgivings which the opinions of the English judges naturally aroused.

It is quite true that the Criminal Code of Canada was at the time of its promulgation, and still is, in many respects lacking in the characteristics of an ideal code. The fact that it does not profess to repeal the common law, and therefore, in this respect, is in no sense a complete compendium of the criminal law, theoretically is a grave defect, but in practice no serious difficulty appears to have resulted therefrom. The correspondence above referred to with the Department of Justice fails to shew the slightest suggestion from any of those in whose hands the administration of the criminal law of the country is placed, that the Criminal Code was no improvement upon the law as it stood previous to its enactment.

In any attempt to prepare a satisfactory code in the face of the difficulties which lay in the way and which had proved insuperable in England, it was to be expected that crudities, anomalies and inconsistencies should be found.

Indeed considering the magnitude of the undertaking, one is more surprised at the success which was attained than at the defects which are found to exist.

The Code was assented to by Parliament in July, 1892, to come into force on the 1st July, 1893. In January, 1893, Sir Elzear Taschereau, the present Chief Justice of the Supreme Court, presented to the Attorney General an elaborate criticism of the Code. It was probably too late at that time to remedy the defects pointed out by him, and many of which were, and still are, apparent. His criticisms dealt with over one hundred sections of the Code, and when analysed mainly fall into four divisions:

1st. Offences at common law which were not made offences by the Code.

2ly. Inconsistencies.—The same offence appearing in different sections with different penalties attached.

3ly. Disproportion in the punishment affixed to offences.

4ly. No basis for the distinction made with respect to the limitation of time in which prosecutions may be brought for different offences.

A few years ago, the attention of the Minister of Justice was again called by the President of the Law School of Toronto to the defects pointed out in Chief Justice Taschereau's letter, and he was informed that the matter would probably be taken into consideration upon the revision of the Statutes.

Comparatively few amendments have been made by Parliament to the Criminal Code since it was promulgated, and it appears to us that the present is an opportune time for a general revision.

2. In the correspondence handed to us we find many valuable suggestions made for the improvement of the provisions relating to procedure. Some of these would have been carried into effect had the Bill No. 215 which was introduced into Parliament by yourself in 1903 been passed. A few of these suggestions may be noted.

The Honourable Mr. Justice Wurtelle, Court of King's Bench, Montreal, has pointed out that the Criminal Code Amendment Act of 1900, 63-64 V., c. 46, extends the powers theretofore vested only in police magistrates and stipendiary magistrates in Ontario, to the same functionaries and recorders in all cities and incorporated towns in Canada, and that in the Province of Quebec the jurisdiction should have been conferred upon judges of sessions and district magistrates, and although they had been exercising jurisdiction under the section, it has been held in the case of the *King v. Breckenridge*, that they were acting without jurisdiction. He therefore suggests that the words "Judges of Sessions and District Magistrates" should be inserted after the word "Recorders."

Sufficient attention does not appear to have been given to the qualifications which these magistrates were required to have in the different provinces of Canada. In some provinces only a lawyer could be appointed. In such cases no objection could be raised to their exercising more extended judicial functions. In other provinces, however, no special qualifications were required, and the judges of the Supreme Court of Prince Edward Island complain of incompetency on the part of some of those who were exercising jurisdiction under this section.

3. It has been objected that the present Criminal Code has repealed a number of Acts except one or two sections, and has left the original a thing of shreds and patches, and particular attention is called to R. S. C. c. 146, An Act respecting Treason and other Offences against the Queen's Authority, in which the whole Act, except secs. 6 and 7, is repealed.

Also R. S. C. c. 148, in which all of the Act except s. 7 is repealed.

Similarly, R. S. C. c. 149, An Act respecting the Seizure of Arms, in which all of the Act is repealed except secs. 5 and 7.

R. S. C. c. 152, where all of the Act is repealed except secs. 1, 2 and 3.

R. S. C. c. 153, An Act respecting Prize-fighting, all of the Act is repealed except secs. 6, 7 and 10.

R. S. C. c. 154, An Act respecting Perjury, all of the Act repealed except sec. 4.

R. S. C. c. 157, An Act respecting Offences against Public Morals, all of the Act repealed except sec. 8, subsec. 4.

R. S. C. c. 158, An Act respecting Gaming Houses, all of the Act repealed except secs. 9 and 10.

R. S. C. c. 163, An Act respecting Libel, all of the Act repealed except secs. 6 and 7 etc.

We think these objections are well taken, and that with respect to these the criticism of Lord Chief Justice Cockburn to the corresponding sections of the Imperial Draft Code are applicable:—

“We have next a section which I cannot contemplate without much regret, as it proceeds upon a principle which I cannot help thinking fatal to the completeness of the Code, and seriously detrimental to its utility. While the Act abrogates the whole of the common law with reference to the offences being proceeded against under it, which was, of course, necessary,” (and which our Code does not do) “it keeps alive statutes, or parts of statutes, relating to Criminal Law, the whole of which, in the present Code, should cease to have a separate existence, and so far as it is desirable to keep these enactments alive, should be embodied in it. On turning to the second Schedule of the Bill, which deals with the repeal of existing statutes, I find that, out of 83 Acts of Parliament therein dealt with, no less than 39, some of them important ones, are thus partially repealed and partially left standing. Nor, in dealing with the latter class, is any system adopted. Sometimes a whole Act is repealed, with the exception of a section; Sometimes a single section, or one or two sections of a voluminous Act are abolished. I have no hesitation in saying that the course thus pursued is radically wrong, and can only lead to embarrassment and confusion.”

The result of the preliminary investigation which we have made of the matter submitted, leads us to make the following recommendations:

1st. That so far as possible all common law offences should be contained in the Code.

2ly. That the anomalies with respect to the punishment attached to offences under the Code and the repetition of the same offences coupled with a different punishment, etc., be rectified and made consistent and harmonious.

3ly. That the amendments to the Criminal Law which have been recommended by the judges and magistrates and which were not the subject of controversy when Bill No. 215 above mentioned was under discussion in the House, but which were recognized as necessary for the proper administration of the law, should be be-introduced.

3ly. That the defects which have been found to exist in the sections relating to procedure and to which the attention of the Department of Justice has been called from time to time, should be corrected.

5ly. That where a statute has been almost entirely reproduced in the Code, the remaining sections should also be carried in, and the entire original statute repealed.

(Signed) HENRY STRONG,

(Signed) E. R. CAMERON.

APPENDIX G

COURTS OF GENERAL OR QUARTER SESSIONS OF
THE PEACE

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 province 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 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.

Later on an intermediate judicial tribunal was established in certain provinces called the County or District Court, presided over by a judge who is a trained lawyer and who has civil jurisdiction in matters involving a limited amount. This judge is also a justice of the peace and has the power, authority and jurisdiction of the Court of General or Quarter Sessions of the Peace. In some provinces he exercises his jurisdiction in criminal matters, as Chairman of the Court of Sessions, in others, he is given that authority expressly by statute as Judge of the County or District Court. This judge, with the consent of the accused, may sit at any time and dispose of criminal cases without waiting for the regular sitting of his court. His jurisdiction in this respect is provided for in Part XVIII of the Criminal Code.

Justices of the peace also have jurisdiction *outside the sessions*, as it is said. Indeed, it is here their most important functions are exercised. First, they take cognizance of all crimes and offences in their bailiwick; arrest persons who are accused of committing the same, and after inves-

tigation, if a *prima facie* case is made out, commit the accused to the common jail to await trial by some court of competent jurisdiction. The jurisdiction of these justices of the peace is provided for generally in Part XIV of the Code. In the second place, in addition to the above, a justice out of sessions has jurisdiction to try summarily certain offences of a minor character, and if he finds the accused guilty, he may impose the penalty provided by law. The provisions for this are contained in Part XV of the Code, which deals with *summary convictions*. Moreover, certain additional powers are conferred on two or more Justices, sitting together to summarily try certain offences with the consent of the accused, and finally, other justices, generally in cities and towns, under the name of police and stipendiary magistrates, are given jurisdiction, with consent of the accused, with respect to offences ordinarily cognizable by two justices of the peace, and again in certain provinces and in cities with large populations, even without such consent in certain cases. These provisions form the subject of consideration of Part XVI of the Code.

The jurisdiction of justices of the peace is the most complex part of our judicial machinery. In the reports of one of the early Royal Commissions on the criminal laws, it is pointed out that the greater part of the criminal justice in England is administered by Courts of Quarter Sessions of the Peace. The Criminal Code to-day is defective in not clearly differentiating between those functionaries to whom is entrusted so large a part of the administration of the criminal law.

In view of the preceding, it has been thought advisable, in this special report, to consider a little more in detail the jurisdiction of justices of the peace, and the manner in which this ancient jurisdiction has reached the various provinces of Canada and finally finds itself embedded in the Criminal Code.

The Court of General or Quarter Sessions of the Peace was and is one of the most useful tribunals in England.

Blackstone says:—

“The Common Law hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society. Touching the number and qualification of these justices, it was ordained as early as 18 Edward III that they should be of the most worthy men of the county and of the best reputation, and be severally resident in their several counties. Their duties, generally, are as conservators of the

peace to suppress riots and affrays, taking security for the peace, apprehending and committing felons and other inferior criminals."

The same ancient authority says:—

"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 magistrates 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.

By the Imperial Statute of 1791 (31, George III, chapter 31), commonly called the Constitutional Act, which divided the old province of Quebec into the new provinces of Upper and Lower Canada, it was provided that the statutes and ordinances in force at that date should continue in the new provinces, except as expressly varied by that Act.

In 1801 (41, George III, chapter 6, Canada) a doubt having been expressed with respect to the authority of justices of the peace and of other persons concerned in the administration of justice, it was provided that a Court of the General Sessions of the Peace should be held in certain cities and on certain dates of the year. This provision was carried into the Consolidated Statutes of Canada of 1859 as chapter 17.

In the province of Ontario, by 53, Victoria, chapter 18 (1890), the powers of the Court of General or Quarter Sessions of the Peace are differentiated from those of the High Court of Justice, and it is declared that the former should not have power to try any treason, felony, punishable with death or homicide or libel, and finally in 1909, by 9, Edward VII, chapter 30, section 3, it was expressly

provided that the Courts of General Sessions of the Peace in Ontario should have jurisdiction over criminal cases, except homicide and the offences mentioned in section 583 of the Criminal Code of Canada, and this provision is now contained in the Revised Statutes of Ontario, 1914.

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.

In Quebec, R.S.Q., chapter 145 says that a judge of the Superior Court may hold a Court of General Sessions of the Peace. He shall hold it alone without the assistance of any justice of the peace. In this province, therefore, the functions of the old Court of General Sessions of the Peace has disappeared, and they are now exercised by a single judge of the Superior Court.

In New Brunswick, from the earliest times there has been a Court of General Sessions of the Peace and legislation regarding its jurisdiction is found in 31, George III; 35, George III; 4, George IV; 3 William IV; 2, 3 and 4 Victoria; 13 Victoria and 16 Victoria. In the Consolidated Statutes of 1877 of this province, chapter 120, all these earlier acts are repealed and the jurisdiction formerly exercised by the Court of General Sessions of the Peace is conferred upon the County Courts by chapter 51, section 62 *et seq.*

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.

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