WHEN JUSTICE MAY COMPEL APPEARANCE.

554. Every justice may issue a warrant or summons as hereinafter mentioned to compel the attendance of an accused person before him, for the purpose of preliminary inquiry in any of the following cases :

(*a*) If such person is accused of having committed *in any place whatever* an indictable offence triable in the province in which such justice resides, and is, or is suspected to be, within the limits over which such justice has jurisdiction, or resides or is suspected to reside within such limits ;

(*b*) If such person, wherever he may be, is accused of having committed an indictable offence within such limits ;

(*c*) If such person is alleged to have anywhere unlawfully received property which was unlawfully obtained within such limits ;

(*d*) *If such person has in his possession, within such limits, any stolen property.*

What are the offences committed out of a province that are triable in that province? This Code does not say.

OFFENCES IN CERTAIN PARTS OF ONTARIO.

555. All offences committed in any of the unorganized tracts of country in the province of Ontario, including lakes, rivers and other waters therein, not embraced within the limits of any organized county, or within any provisional judicial district, may be laid and charged to have been committed and may be inquired of, tried and punished within any county of such province; and such offences shall be within the jurisdiction of any court having jurisdiction over offences of the like nature committed within the limits of such county, before which court such offences may be prosecuted ; and such court shall proceed therein to trial, judgment and execution or other punishment for such offence, in the same manner as if such offence had been committed within the county where such trial is had.

2. When any provisional judicial district or new county is formed and established in any of such unorganized tracts, all offences committed within the limits of such provisional judicial district or new county, shall be inquired of, tried and punished within the same, in like manner as such offences would have been inquired of, tried and punished if this section had not been passed.

3. Any person accused or convicted of any offence in any such provisional district may be committed to any common gaol in the province of Ontario; and the constable or other officer having charge of such person and intrusted with his conveyance to any such common gaol, may pass through any county in such province with such person in his custody ; and the keeper of the common gaol of any county in such province in which it is found necessary to lodge for safe keeping any such person so being conveyed through such county in custody, shall receive such person and safely keep and detain him in such common gaol for such period as is reasonable or necessary ; and the keeper of any common gaol in such province, to which any such person is committed as aforesaid, shall receive such person and safely keep and detain him in such common gaol under his custody until discharged in due course of law, or bailed in cases in which bail may by law be taken. R. S. C. c. 174, s. 14.

OFFENCES IN GASPE.

556. Whenever any offence is committed in the district of Gaspe, the offender, if committed to gaol before trial, may be committed to the common gaol of the county in which the offence was committed, or may, in law, be deemed to have been committed, and if tried before the Court of Queen's Bench, he shall be so tried at the sitting of such court held in the county to the gaol of which he has been committed, and if imprisoned in the common gaol after trial he shall be so imprisoned in the common gaol of the county in which he has been tried. R. S. C. c. 174, s. 15.

OFFENCES COMMITTED OUT OF JURISDICTION. (*Amended*).

557. The preliminary inquiry may be held either by one justice or by more justices than one: Provided that if the accused person is brought before any justice charged with an offence committed out of the limits of the jurisdiction of such justice, such justice may, after hearing both sides, order the accused at any stage of the inquiry to be taken by a constable before some justice having jurisdiction in the place where the offence was committed. The justice so ordering shall give a warrant for that purpose to a constable, which may be in the form A in schedule one hereto, or to the like effect, and shall deliver to such constable the information, depositions and recognizances if any taken under the provisions of this Act, to be delivered to the justice before whom the accused person is to be taken, and such depositions and recognizances shall be treated to all intents as if they had been taken by the last-mentioned justice.

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

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

A.——(*Section* 557.)

WARRANT TO CONVEY BEFORE A JUSTICE OF ANOTHER COUNTY.

Canada,
Province of ,
County of .

Whereas information upon oath was this day made before the undersigned that A. B. of , on the day of , in the year , at , in the county of (*state the charge.*)

And whereas I have taken the deposition of X. Y. as to the said offence.

And whereas the charge is of an offence committed in the county of

This is to command you to convey the said (*name of accused*), of , before some justice of the last-mentioned county, near the above place, and to deliver to him this warrant and the said deposition.

Dated at , in the said county of , this day of , in the year .

J. S.,
J. P., (Name of county,)

To of .

B.—(*Section* 557.)

RECEIPT TO BE GIVEN TO THE CONSTABLE BY THE JUSTICE FOR THE COUNTY IN WHICH THE OFFENCE WAS COMMITTED.

Canada,
Province of ,
County of .

I, J. L., a justice of the peace in and for the county of , hereby certify that W. T., peace officer of the county of , has, on this day of , in the year , by virtue of and in obedience to a warrant of J. S., Esquire, a justice of the peace in and for the county of , produced before me one A. B., charged before the said J. S. with having (*etc., stating shortly the offence*), and delivered him into the custody of . by my direction, to answer to the said charge, and further to be dealt with according to law, and has also delivered unto me the said warrant, together with the information (*if any*) in that behalf, and the deposition (*s*) of C. D. (*and of*), in said warrant mentioned, and that he has also proved to me, upon oath, the handwriting of the said J. S. subscribed to the same.

Dated the day and year first above mentioned, at , in the said county of .

J. L.,
J. P., (Name of county.)

INFORMATION.

558. Any one who, upon reasonable or probable grounds, believes that any person has committed an indictable offence *against this Act* may make a complaint or lay an information in writing and under oath before any magistrate or justice of the peace having jurisdiction to issue a warrant or summons against such accused person in respect of such offence.

2. Such complaint or information may be in the form C. in schedule one hereto, or to the like effect.

The words "against this Act" are a grave mistake. As to a warrant *see* s. 568.

C.—(*Section* 558.)

INFORMATION AND COMPLAINT FOR AN INDICTABLE OFFENCE.

Canada,
Province of ,
County of .

The information and complaint of C. D. of , (*yeoman*), taken this day of , in the year before the undersigned (*one*) of Her Majesty's justices of the peace in and for the said county of , who saith that (*etc., stating the offence*).

Sworn before (*me*), the day and year first above mentioned, at .

J. S.,
J. P., (Name of county).

HEARING ON INFORMATION.

559. Upon receiving any such complaint or information the justice shall hear and consider the allegations of the complainant, and if of opinion that a case for so doing is made out he shall issue a summons, or warrant, as the case may be, in manner hereinafter mentioned; *and such justice shall not refuse to issue such summons or warrant only because the alleged offence is one for which an offender may be arrested without warrant.* R. S. C. c. 174, s. 30.

OFFENCES COMMITTED ON THE HIGH SEAS.

560. Whenever any indictable offence is committed on the high seas, or in any creek, harbour, haven or other place in which the Admiralty of England have or claim to have jurisdiction, and whenever any offence is committed *on land beyond the seas* for which an indictment may be preferred or the offender may be arrested in Canada, any justice for any territorial division in which any person charged with, or suspected of, having committed any such offence is or is suspected to be, may issue his warrant, in the form D in schedule one hereto, or to the like effect to apprehend such person, to be dealt with as herein and hereby directed. R. S. C. c. 174, s. 32.

"Beyond the seas" in England, means *outside* of the realm. The words have been recopied here from the English Act to mean outside of Canada, it must be assumed. It may be that the United States are *beyond the seas* in the construction of this enactment: Lane v. Bennet, 1 M. & W. 70; Ruckmaboye v. Lullooblioy Mottichund, 8 Moo. P. C. 4; Davie v. Briggs, 97 U. S. 628. But it would have been better to say "outside of Canada."

This enactment assumes that there are offences committed *on land beyond the seas* that are indictable in Canada. What these offences are, and under what circumstances they are indictable in Canada, is not to be found in the Code. Likewise for offences committed within the jurisdiction of the Admiralty, the Code is silent as to Canada's jurisdiction. Sections 8 & 9 of c. 174, R. S. C. are repealed, and probably intended to be covered by s. 640: *sed quære?*

D.—(*Section* 560.)

WARRANT TO APPREHEND A PERSON CHARGED WITH AN INDICTABLE OFFENCE ON THE HIGH SEAS OR ABROAD.

For offences committed on the high seas the warrant may be the same as in ordinary cases, but describing the offence to have been committed "on the high seas, out of the body of any district or county of Canada and within the jurisdiction of the Admiralty of England."

For offences committed abroad, for which the parties may be indicted in Canada, the warrant also may be the same as in ordinary cases, but describing the offence to have been committed "on land out of Canada, to wit: at in the Kingdom of , *or*, at , in the Island of , in the West Indies, *or* at , in the East Indies," *or as the case may be.*

ARREST OF SUSPECTED DESERTERS.

561. Every one who is reasonably suspected of being a deserter from Her Majesty's service may be apprehended and brought for examination before any justice of the peace, and if it appears that he is a deserter he shall be confined in gaol until claimed by the military or naval authorities, or proceeded against according to law. R. S. C. c. 169, s. 6.

2. No one shall break open any building to search for a deserter unless he has obtained a warrant for that purpose from a justice of the peace,—such warrant to be founded on affidavit that there is reason to believe that the deserter is concealed in such building, and that admittance has been demanded and refused; and every one who resists the execution of any such warrant shall incur a penalty of eighty dollars, recoverable on summary conviction in like manner as other penalties under this Act. R. S. C. c. 169, s. 7.

Section 9 of c. 169, R. S. C. is unrepealed.

SUMMONS.

562. Every summons issued by a justice *under this Act* shall be directed to the accused, and shall require him to appear at a time and place to be therein mentioned. Such summons may be in the form E in schedule one hereto, or to the like effect. *No summons shall be signed in blank.*

2. Every such summons shall be served by a constable or other peace officer upon the person to whom it is directed, either by delivering it to him personally or, if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode *with some inmate thereof apparently not under sixteen years of age.*

3. The service of any such summons may be proved by the oral testimony of the person effecting the same *or by the affidavit of such person purporting to be made before a justice.* R. S. C. c. 174, ss. 40, 41 & 42.

E.—(*Section* 562.)

SUMMONS TO A PERSON CHARGED WITH AN INDICTABLE OFFENCE.

Canada,
Province of ,
County of .

To A. B. of , (*labourer*):

Whereas you have this day been charged before the undersigned , a justice of the peace in and for the said county of , for that you on , at , (*stating shortly the offence*): These are therefore to command you, in Her Majesty's name, to be and appear before (*me*) on , at o'clock in the (fore) noon, at , or before such other justice or justices of the peace for the same county of , as shall then be there, to answer to the said charge, and to be further dealt with according to law. Herein fail not.

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

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

WARRANT OF APPREHENSION.

563. The warrant issued by a justice for the apprehension of the person against whom an information or complaint has been laid, as provided in section five hundred and fifty-eight, may be in the form F in schedule one hereto, or to the like effect. *No such warrant shall be signed in blank.*

2. Every such warrant shall be under the hand and seal of the justice issuing the same, and may be directed, either to any constable by name, or to such constable and all other constables within the territorial jurisdiction of the justice issuing it, or generally to all constables within such jurisdiction.

3. The warrant shall state shortly the offence for which it is issued, and shall name or otherwise describe the offender, and it shall order the officer or officers to whom it is directed to apprehend the offender and bring him before the justice or justices issuing the warrant, or before some other justice or justices to answer to the charge contained in the said information or complaint, and to be further dealt with according to law. It shall not be necessary to make such warrant returnable at any particular time, but the same shall remain in force until it is executed.

4. The fact that a summons has been issued shall not prevent any justice from issuing such warrant at any time before or after the time mentioned in the summons for the appearance of the accused; and where the service of the summons has been proved and the accused does not appear, or when it appears that the summons cannot be served, the warrant (form G) may issue. R. S. C. c. 174, ss. 31, 43, 44 & 46.

F.—(*Section* 563.)

WARRANT IN THE FIRST INSTANCE TO APPREHEND A PERSON CHARGED WITH AN INDICTABLE OFFENCE.

Canada,
Province of ,
County of .

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

Whereas A. B. of , (*labourer*), has this day been charged upon oath before the undersigned , a justice of the peace in and for the said county of , for that he, on , at , did (*etc., stating shortly the offence*): These are therefore to command you, in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*me*) (or some other justice of the peace in and for the said county of), to answer unto the said charge, and to be further dealt with according to law.

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

J. S., [SEAL.]

J. P., (*Name of County.*)

G.—(*Section* 563.)

WARRANT WHEN THE SUMMONS IS DISOBEYED.

Canada,
Province of ,
County of .

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

Whereas on the day of , (instant *or* last past) A. B., of , was charged before (*me* or *us*,) the undersigned (*or name the justice or justices, or as the case may be*), (*a*) justice of the peace in and for the said county of , for that (*etc., as in the summons*); and whereas I (*or* he *the said justice of the peace, or* we *or* they *the said justices of the peace* did then issue (*my, our, his* or *their*) summons to the said A. B., commanding him, in Her Majesty's name, to be and appear before (*me*) on at o'clock in the (fore) noon, at , or before such other justice or justices of the peace as should then be there, to answer to the said charge and to be further dealt with according to law; and whereas the said A. B. has neglected to be or appear at the time and place appointed in and by the said summons, although it has now been proved to (*me*) upon oath that the said summons was duly served upon the said A. B.; These are therefore to command you in Her Majesty's name, forthwith to apprehend the said A. B., and to bring him before (*me*) or some other justice of the peace in and for the said county of , to answer the said charge, and to be further dealt with according to law.

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

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

EXECUTION OF WARRANT.

564. Every such warrant may be executed by arresting the accused wherever he is found in the territorial jurisdiction of the justice by whom it is issued, or in the case of fresh pursuit, at any place in an adjoining territorial division within seven miles of the border of the first-mentioned division. R. S. C. c. 174, ss. 47 & 48.

2. Every such warrant may be executed by any constable named therein, or by any one of the constables to whom it is directed, whether or not the

place in which it is to be executed is within the place for which he is a constable.

3. Every warrant authorized *by this Act* may be issued and executed on a Sunday or statutory holiday. R. S. C. c. 174, ss. 37, 47 & 48.

The words "by this Act" are wrong; they constitute a limitation that clearly was not intended.

PROCEEDING WHEN ACCUSED IS OUT OF THE JURISDICTION.

565. If the person against whom any warrant has been issued cannot be found within the jurisdiction of the justice by whom the same was issued, but is or is suspected to be in any other part of Canada, any justice within whose jurisdiction he is or is suspected to be, upon proof being made on oath or affirmation of the handwriting of the justice who issued the same, shall make an endorsement on the warrant, signed with his name, authorizing the execution thereof within his jurisdiction; and such endorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed, and also to all constables of the territorial division where the warrant has been so endorsed, to execute the same therein and to carry the person against whom the warrant issued, when apprehended, before the justice who issued the warrant, or before some other justice for the same territorial division. Such endorsement may be in the form H. in schedule one hereto. R. S. C. c. 174, s. 49.

H.—(*Section* 565.)

ENDORSEMENT IN BACKING A WARRANT.

Canada,
Province of ,
County of .

Whereas proof upon oath has this day been made before me , a justice of the peace in and for the said county of , that the name of J. S. to the within warrant subscribed, is of the handwriting of the justice of the peace within mentioned: I do therefore hereby authorize W. T. who brings to me this warrant and all other persons to whom this warrant was originally directed, or by whom it may be lawfully executed, and also all peace officers of the said county of , to execute the same within the said last mentioned county.

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

J. L.,
J. P., (*Name of county.*)

DISPOSAL OF PERSON SO ARRESTED.

566. If the prosecutor or any of the witnesses for the prosecution are in the territorial division where such person has been apprehended upon a warrant endorsed as provided in the last preceding section the constable or other person or persons who have apprehended him may, if so directed by the justice endorsing the warrant, take him before such justice, or before some other justice for the same territorial division; and the said justice may thereupon take the examination of such prosecutor or witnesses, and proceed in every respect as if he had himself issued the warrant. R. S. C. c. 174, s. 50.

DISPOSAL OF PERSON APPREHENDED. (*New*).

567. When any person is arrested upon a warrant he shall, except in the case provided for in the next preceding section, be brought as soon as is practicable before the justice who issued it or some other justice for the same territorial division, and such justice shall either proceed with the inquiry or postpone it to a future time, in which latter case he shall either commit the accused person to proper custody or admit him to bail or permit him to be at large on his own recognizance according to the provisions hereinafter contained.

CORONER'S INQUISITION. (*New*).

568. Every coroner, upon any inquisition taken before him whereby any person is charged with manslaughter or murder, shall (if the person or persons, or either of them, affected by such verdict or finding be not already charged with the said offence before a magistrate or justice), by warrant under his hand, direct that such person be taken into custody and be conveyed, with all convenient speed, before a magistrate or justice; or such coroner may direct such person to enter into a recognizance before him, with or without a surety or sureties, to appear before a magistrate or justice. In either case, it shall be the duty of the coroner to transmit to such magistrate or justice the depositions taken before him in the matter. Upon any such person being brought or appearing before any such magistrate or justice, he shall proceed in all respects as though such person had been brought or had appeared before him upon a warrant or summons.

This virtually gives an appeal from the coroner's jury to a single magistrate, who consequently, though heretofore he had not even the right to bail any one charged by a verdict of the coroner's jury, will now have the right to set him free altogether.

SEARCH WARRANTS.

569. Any justice who is satisfied by information upon oath in the form J in schedule one hereto, that there is reasonable ground for believing that there is in any building, receptacle, or place—

(*a*) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed; or

(*b*) anything which there is reasonable ground to believe will afford evidence as to the commission of any such offence; or

(c) anything which there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which the offender may be arrested without warrant—

may at any time issue a warrant under his hand authorizing some constable or other person named therein to search such building, receptacle or place, for any such thing, and to seize and carry it before the justice issuing the warrant, or some other justice for the same territorial division to be by him dealt with according to law. R. S. C. c. 174, ss. 51 & 52.

2. Every search warrant shall be executed by day, *unless the justice shall by the warrant authorize the constable or other person to execute it at night.*

3. Every search warrant may be in the form I in schedule one hereto, or to the like effect.

4. When any such thing is seized and brought before such justice he may detain it, taking reasonable care to preserve it till the conclusion of the investigation; and, if any one is committed for trial, he may order it further to be detained for the purpose of evidence on the trial. If no one is committed, the justice shall direct such thing to be restored to the person from whom it was taken, except in the cases next hereinafter mentioned, unless he is authorized or required by law to dispose of it otherwise. In case any improved arm or ammunition in respect to which any offence under section one hundred and sixteen has been committed has been seized, it shall be forfeited to the Crown. R. S. C. c. 50, s. 101.

5. If under any such warrant there is brought before any justice any forged bank note, bank note-paper, instrument or other thing, the possession whereof in the absence of lawful excuse is an offence under any provision of this or any other Act, the court to which any such person is committed for trial or, if there is no commitment for trial, such justice may cause such thing to be defaced or destroyed. R. S. C. c. 174, s. 55.

6. If under any such warrant there is brought before any justice, any counterfeit coin or other thing the possession of which with knowledge of its nature and without lawful excuse is an indictable offence under any provision of Part XXXV. of this Act (s. 460), every such thing as soon as it has been produced in evidence, or as soon as it appears that it will not be required to be so produced, shall forthwith be defaced or otherwise disposed of as the justice or the court directs. R. S. C. c. 174, s. 56.

7. Every person acting in the execution of any such warrant may seize any explosive substance which he has good cause to suspect is intended to be used for any unlawful object,—and shall, with all convenient speed, after the seizure, remove the same to such proper place as he thinks fit, and detain the same until ordered by a judge of a superior court to restore it to the person who claims the same. R. S. C. c. 150, s. 11.

8. Any explosive substance so seized shall, in the event of the person in whose possession the same is found, or of the owner thereof, being convicted of any offence under Part VI. of this Act (s. 99), be forfeited; and the same shall be destroyed or sold under the direction of the court before which such person is convicted, and, in the case of sale, the proceeds arising therefrom shall be paid to the Minister of Finance and Receiver General, for the public uses of Canada. R. S. C. c. 150, s. 12.

9. If offensive weapons believed to be dangerous to the public peace are seized under a search warrant the same shall be kept in safe custody in such place as the justice directs, unless the owner thereof proves, to the satisfaction of such justice, that such offensive weapons were not kept for any purpose dangerous to the public peace; and any person from whom any such offensive weapons are so taken may, if the justice of the peace upon whose warrant the same are taken, upon application made for that purpose, refuses to restore the same, apply to a judge of a superior or county court for the restitution of such offensive weapons, upon giving ten days' previous notice of such application to such justice; and such judge shall make such order for the restitution or safe custody of such offensive weapons as upon such application appears to him to be proper. R. S. C. c. 149, ss. 2 & 3.

10. If goods or things by means of which it is suspected that an offence has been committed under Part XXXIII. (ss. 443 *et seq.*) are seized under a search warrant, and brought before a justice, such justice and one or more other justice or justices shall determine summarily whether the same are or are not forfeited under the said Part XXXIII.; and if the owner of any goods or things which, if the owner thereof had been convicted, would be forfeited under this Act, is unknown or cannot be found, an information or complaint may be laid for the purpose only of enforcing such forfeiture, and the said justice may cause notice to be advertised stating that unless cause is shown to the contrary at the time and place named in the notice, such goods or things will be declared forfeited; and at such time and place the justice, unless the owner, or any person on his behalf, or other person interested in the goods or things, shows cause to the contrary, may declare such goods or things, or any of them, forfeited. 51 V. c. 41, s. 14.

J.—(*Section* 569.)

INFORMATION TO OBTAIN A SEARCH WARRANT.

Canada,
Province of ,
County of .

The information of A. B., of , in the said county (*yeoman*) taken this day of , in the year , before me, J. S., Esquire, a justice of the peace, in and for the county (*describe things to be searched for and offence in respect of which search is made*), of , who says that and that he has just and reasonable cause to suspect, and suspects, that the said goods and chattels, or some part of them are concealed in the (*dwelling-house, &c.*) of C. D., of , in the said county, (*here add the causes of suspicion, whatever they may be*): Wherefore (*he*) prays that a search warrant may be granted to him to search the (*dwelling-house, &c.*), of the said C. D., as

aforesaid, for the said goods and chattels so feloniously stolen, taken and carried away as aforesaid.

Sworn (*or* affirmed) before me the day and year first above mentioned, at , in the said county of .

J. S.,

J. P., (Name of county.)

I.—(*Section* 569.)

WARRANT TO SEARCH.

Canada,
Province of ,
County of .

Whereas it appears on the oath of A. B. of , that there is reason to suspect that (*describe things to be searched for and offence in respect of which search is made*) are concealed in at .

This is, therefore, to authorize and require you to enter between the hours of (*as the justice shall direct*) into the said premises, and to search for the said things, and to bring the same before me or some other justice.

Dated at , in the said county of , this day of , in the year .

J. S.,

J. P., (Name of county).

To of .

SEARCH FOR PUBLIC STORES.

570. Any constable or other peace officer, if deputed by any public department, may, within the limits for which he is such constable or peace officer, stop, detain and search any person reasonably suspected of having or conveying in any manner any public stores, defined in section three hundred and eighty-three, stolen or unlawfully obtained, or any vessel, boat or vehicle in or on which there is reason to suspect that any public stores stolen or unlawfully obtained may be found.

2. A constable or other peace officer shall be deemed to be deputed within the meaning of this section if he is deputed by any writing signed by the person who is the head of such department, or who is authorized to sign documents on behalf of such department. 50-51 V. c. 45, s. 10.

SEARCH WARRANT FOR GOLD.

571. On complaint in writing made to any justice of the county, district or place, by any person interested in any mining claim, that mined gold or gold-bearing quartz, or mined or unmanufactured silver or silver ore, is unlawfully deposited in any place, or held by any person contrary to law, a general search warrant may be issued by such justice, as in the case of stolen goods, including any number of places or persons named in such complaint; and if, upon such search, any such gold or gold-bearing quartz, or silver or silver ore, is found to be unlawfully deposited or held, the justice shall make such order for the restoration thereof to the lawful owner as he considers right.

2. The decision of the justice in such case is subject to appeal as in ordinary cases coming within the provisions of Part LVIII (s. 839, *post*). R. S. C. c. 174, s. 53.

A proviso as to security to be given on such appeal is now to be found in s. 880 *post*.

SEARCH FOR TIMBER.

572. If any constable or other peace officer has reasonable cause to suspect that any timber, mast, spar, saw-log or other description of lumber, belonging to any lumberman or owner of lumber, and bearing the registered trade mark of such lumberman or owner of lumber, is kept or detained in any saw-mill, mill-yard, boom or raft, without the knowledge or consent of the owner, such constable or other peace officer may enter into or upon the same, and search or examine, for the purpose of ascertaining whether such timber, mast, spar, saw-log or other description of lumber is detained therein without such knowledge and consent. R. S. C. c. 174, s. 54.

SEARCH FOR LIQUORS NEAR HER MAJESTY'S VESSELS.

573. Any officer in Her Majesty's service, any warrant or petty officer of the navy, or any non-commissioned officer of marines, with or without seamen or persons under his command, may search any boat or vessel which hovers about or approaches, or which has hovered about or approached, any of Her Majesty's ships or vessels mentioned in section one hundred and nineteen, Part VI. of this Act, and may seize any intoxicating liquor found on board such boat or vessel; and the liquor so found shall be forfeited to the Crown. 50-51 V. c. 46, s. 3.

SEARCH IN HOUSES OF ILL-FAME.

574. Whenever there is reason to believe that any woman or girl mentioned in section one hundred and eighty-five, Part XIII., has been inveigled or enticed to a house of ill-fame or assignation, then upon complaint thereof being made under oath by the parent, *husband*, master or guardian of such woman or girl, or in the event of such woman or girl having no known parent, *husband*, master nor guardian in the *place* in which the offence is alleged to have been committed, by any other person, to any justice of the peace, or to a judge of any court authorized to issue warrants in cases of alleged offences against the criminal law, such justice of the peace or judge of the court may issue a warrant to enter, by day or night, such house of ill-fame or assignation, *and if necessary use force for the purpose of effecting such entry*

whether by breaking open doors or otherwise, and to search for such woman or girl, and bring her, and the person or persons in whose keeping and possession she is, before such justice of the peace, or judge of the court, who may, on examination, order her to be delivered to her parent, *husband*, master or guardian, or to be discharged, as law and justice require. R. S. C. c. 157, s. 7. 48-49 V. c. 69, s. 10 (Imp.).

The word "province" instead of "a place" was in the repealed clause, in the eighth line.

Under the repealed clause, this provision applied only to women under 21 years of age. The words in italics are new: *see* Lea v. Charrington, 16 Cox, 704,23 Q. B. D. 45.

SEARCH IN GAMING-HOUSE.

575. If the chief constable or deputy chief constable of any city or town, or other officer authorized to act in his absence, reports in writing to any of the commissioners of police or mayor of such city or town, or to the police magistrate of any town, that there are good grounds for believing, and that he does believe, that any house, room or place within the said city or town is kept or used as a common gaming or betting-house as defined in Part XIV., sections one hundred and ninety-six, and one hundred and ninety-seven, *or is used for the purpose of carrying on a lottery, or for the sale of lottery tickets, contrary to the provisions of Part XV.*, section two hundred and five, whether admission thereto is limited to those possessed of entrance keys or otherwise, the said commissioners or commissioner, or mayor, or the said police magistrate, may, by order in writing, authorize the chief constable, deputy chief constable, or other officer as aforesaid, to enter any such house, room or place, with such constables as are deemed requisite by the chief constable, deputy chief constable or other officer,—and, if necessary, to use force for the purpose of effecting such entry, whether by breaking open doors or otherwise,—and to take into custody all persons who are found therein, and to seize, as the case may be (1) all tables and instruments of gaming, and all moneys and securities for money, or (2) *all instruments or devices for the carrying on of such lottery, and all lottery tickets found in such house or premises.* R. S. C. c. 158, s. 2.

2. The chief constable, deputy chief constable or other officer making such entry, in obedience to any such order, may, with the assistance of one or more constables, search all parts of the house, room or place which he has so entered, where he suspects that tables or instruments of gaming or betting, or any instruments or devices for the carrying on of such lottery or any lottery tickets, are concealed, and all persons whom he finds in such house or premises, and seize all tables and instruments of gaming, *or any such instruments or devices or lottery tickets as aforesaid, which he so finds.* R. S. C. c. 158, s. 3.

3. The police magistrate or other justice of the peace before whom any person is taken by virtue of an order or warrant under this section, may direct any cards, dice, balls, counters, tables or other instruments of gaming, used in playing any game, and seized under this Act in any place used as a common gaming-house, *or any such instruments or devices for the carrying on of a lottery, or any such lottery tickets as aforesaid*, to be forthwith destroyed, and

any money or securities seized under this section shall be forfeited to the Crown for the public uses of Canada. R. S. C. c. 158, s. 5.

4. The expression "chief constable" includes chief of police, city marshal or other head of the police force of any city, town or place. R. S. C. c. 158, s. 1.

5. The expression "deputy chief constable" includes deputy chief of police, deputy *or assistant* city marshal or other deputy head of the police force of any city, town or place, *and the expression "police magistrate" includes stipendiary magistrates.*

SEARCH FOR VAGRANT.

576. Any stipendiary or police magistrate, mayor or warden, or any two justices of the peace, upon information before them made, that any person described in Part XV. (s. 207), as a loose, idle or disorderly person, or vagrant, is or is reasonably suspected to be harboured or concealed in any disorderly house, bawdy-house, house of ill-fame, tavern or boarding-house, may, by warrant, authorize any constable or other person to enter at any time such house or tavern, and to apprehend and bring before them or any other justices of the peace, every person found therein so suspected as aforesaid. R. S. C. c. 157, s. 8.

PART XLV.

PROCEDURE ON APPEARANCE OF ACCUSED.

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

This applies to *all* indictable offences, not only to those under *this Act.*

NO FORMAL OBJECTION.

578. No irregularity or defect in the substance or form of the summons or warrant, and no variance between the charge contained in the summons or warrant and the charge contained in the information, or between either and the evidence adduced on the part of the prosecution at the inquiry, shall affect the validity of any proceeding at or subsequent to the hearing. R. S. C. c. 174, s. 58.

JUSTICE MAY POSTPONE HEARING.

579. If it appears to the justice that the person charged has been deceived or misled by any such variance in any summons or warrant, he may

adjourn the hearing of the case to some future day, and in the meantime may remand such person, or admit him to bail as hereinafter mentioned. R. S. C. c. 174, s. 59.

PROCURING ATTENDANCE OF WITNESSES.

580. If it appears to the justice that any person being or residing within *the province* is likely to give material evidence either for the prosecution *or for the accused* on such inquiry he may issue a summons under his hand, requiring such person to appear before him at a time and place mentioned therein to give evidence respecting the charge, *and to bring with him any documents in his possession or under his control relating thereto.*

2. Such summons may be in the form K. in schedule one hereto, or to the like effect. R. S. C. c. 174, s. 60.

The words "the province" are substituted for the word "Canada": *see* s. 584. The other words in italics are extensions of the enactment. The repealed clause required that the witness be made to appear material by oath or affirmation. That is now required only for a warrant: s. 582.

K.—(*Section* 580.)

SUMMONS TO A WITNESS.

Canada
Province of , }
County of . }

To E. F., of ,(labourer):

Whereas information has been laid before the undersigned , a justice of the peace in and for the said county of , that A. B. (*&c., as in the summons or warrant against the accused*), and it has been made to appear to me upon (*oath*), that you are likely to give material evidence for (*the prosecution*); These are therefore to require you to be and to appear before me on next, at o'clock in the (fore) noon, at , or before such other justice or justices of the peace of the same county of , as shall then be there, to testify what you know concerning the said charge so made against the said A. B. as aforesaid. Herein fail not.

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

J. S [SEAL.]

J. P., (Name of county.)

SERVICE ON WITNESS. (*Amended*).

581. Every such summons shall be served *by a constable or other peace officer* upon the person to whom it is directed either personally, or, if such person cannot conveniently be met with, by leaving it for him at his last or most usual place of abode *with some inmate thereof apparently not under sixteen years of age.* R. S. C. c. 174, s. 61.

WARRANT AGAINST A WITNESS. (*Amended*).

582. If any one to whom such last-mentioned summons is directed does not appear at the time and place appointed thereby, and no just excuse is offered for such non-appearance, then (after proof upon oath that such summons has been served as aforesaid, *or that the person to whom the summons is directed is keeping out of the way to avoid service*) the justice before whom such person ought to have appeared, *being satisfied by proof on oath that he is likely to give material evidence* may issue a warrant under his hand to bring such person at a time and place to be therein mentioned before him or any other justice in order to testify as aforesaid.

2. The warrant may be in the form L. in schedule one hereto, or to the like effect. Such warrant may be executed anywhere within the territorial jurisdiction of the justice by whom it is issued, or, if necessary, endorsed as provided in section five hundred and sixty-five, and executed anywhere in *the province* but out of such jurisdiction. R. S. C. c. 174, s. 61.

3. If a person summoned as a witness under the provisions of this part is brought before a justice on a warrant issued in consequence of refusal to obey the summons such person may be detained on such warrant before the justice who issued the summons, or before any other justice in and for the same territorial division who shall then be there, or in the common gaol, or any other place of confinement, or in the custody of the person having him in charge, with a view to secure his presence as a witness on the day fixed for the trial; or in the discretion of the justice such person may be released on recognizance, with or without sureties, conditioned for his appearance to give evidence as therein mentioned, and to answer for his default in not attending upon the said summons as for contempt; and the justice may, in a summary manner, examine into and dispose of the charge of contempt against such person, who, if found guilty thereof, *may be fined or imprisoned, or both, such fine not to exceed twenty dollars, and such imprisonment to be in the common gaol, without hard labour, and not to exceed the term of one month,* and may also be ordered to pay the costs incident to the service and execution of the said summons and warrant and of his detention in custody. 51 V. c. 45, s. 1.

(The conviction under this section may be in the form PP in schedule one hereto.) *See under s. 781.*

L. (*Section* 582.)

WARRANT WHEN A WITNESS HAS NOT OBEYED THE SUMMONS.

Canada,
Province of ,
County of .

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

Whereas information having been laid before , a justice of the peace, in and for the said county of , that A. B. (*&c., as in the summons*); and it having been made to appear to (*me*) upon oath that E. F. of , (*labourer*), was likely to give material evidence for (*the prosecution*), (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before (*me*) on , at , or before such other justice or justices of the peace for the same county, as should then be there to testify what he knows respecting the said charge so made against the said A. B., as aforesaid; and whereas proof has this day been made upon oath before (*me*) of such summons having been duly served upon the said E. F.; and whereas the said E. F. has neglected to appear at the time and place appointed by the said summons, and no just excuse has been offered for such neglect: These are therefore to command you to bring and have the said E. F. before (*me*) on at o'clock in the (fore) noon, at , or before such other justice or justices for the same county, as shall then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid.

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

J. S. [SEAL.]

J. P., (*Name of county.*)

WARRANT FOR WITNESS IN FIRST INSTANCE.

583. If the justice is satisfied by evidence upon oath that any person *within the province*, likely to give material evidence either for the prosecution or for the accused, will not attend to give evidence without being compelled so to do, then instead of issuing a summons, he may issue a warrant in the first instance. Such warrant may be in the form M. in schedule one hereto, or to

the like effect, and may be executed anywhere within the jurisdiction of such justice, or, if necessary, endorsed as provided in section five hundred and sixty-five, and executed anywhere *in the province* but out of such jurisdiction. R. S. C. c. 174, s. 62.

M.—(*Section* 583.)

WARRANT FOR A WITNESS IN THE FIRST INSTANCE.

Canada,
Province of ,
County of .

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

Whereas information has been laid before the undersigned , a justice of the peace, in and for the said county of , that (*&c., as in the summons*); and it having been made to appear to (*me*) upon oath, that E. F. of , (*labourer*); is likely to give material evidence for the prosecution, and that it is probable that the said E. F. will not attend to give evidence unless compelled to do so: These are therefore to command you to bring and have the said E. F. before (*me*) on , at o'clock in the (fore) noon, at , or before such other justice or justices of the peace for the same county as shall then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid.

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

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

WITNESSES OUT OF THE PROVINCE. (*New*).

584. If there is reason to believe that any person residing anywhere in Canada out of the province and not being within the province, is likely to give material evidence either for the prosecution or for the accused, any judge of a Superior Court or a County Court, on application therefor by the informant or complainant, or the Attorney-General, or by the accused person or his solicitor or some person authorized by the accused, may cause a writ of subpœna to be issued under the seal of the court of which he is a judge, requiring such person to appear before the justice before whom the inquiry is being held or is intended to be held at a time and place mentioned therein to give evidence respecting the charge and to bring with him any documents in his possession or under his control relating thereto.

2. Such subpœna shall be served personally upon the person to whom it is directed and an affidavit of such service by a person effecting the same purporting to be made before a justice of the peace, shall be sufficient proof thereof.

3. If the person served with a subpœna as provided by this section, does not appear at the time and place specified therein, and no just excuse is offered for his non-appearance, the justice holding the inquiry, after proof upon oath that the subpœna has been served, may issue a warrant under his hand directed to any constable or peace officer of the district, county or place where such person is, or to all constables or peace officers in such district, county or place, directing them or any of them to arrest such person and bring him before the said justice or any other justice at a time and place mentioned in such warrant in order to testify as aforesaid.

4. The warrant may be in the form N in schedule one hereto or to the like effect. If necessary, it may be endorsed in the manner provided by section five hundred and sixty-five, and executed in a district, county or place other than the one therein mentioned.

N.—(*Section* 584.)

WARRANT WHEN A WITNESS HAS NOT OBEYED THE SUBPŒNA.

Canada,
Province of ,
County of .

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

Whereas information having been laid before , a justice of the peace, in and for the said county, that A. B. (*etc, as in the summons*); and there being reason to believe that E. F., of , in the province of (*labourer*), was likely to give material evidence for (*the prosecution*), a writ of subpœna was issued by order of , judge of (*name of court*) to the said E. F., requiring him to be and appear before (*me*) on at or before such other justice or justices of the peace for the same county as should then be there, to testify what he knows respecting the said charge so made against the said A. B., as aforesaid; and whereas proof has this day been made upon oath before (*me*) of such writ of subpœna having been duly served upon the said E. F., and whereas the said E. F. has neglected to appear at the time and place appointed by the said writ of subpœna, and no just excuse has been offered for such neglect: These are

therefore to command you to bring and have the said E. F. before (*me*) on at o'clock in the (fore) noon), at , or before such other justice or justices for the same county as shall then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid.

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

J. S., [SEAL]

J. P., (*Name of county*).

WITNESS REFUSING TO BE EXAMINED.

585. Whenever any person appearing, either in obedience to a summons or subpœna, or by virtue of a warrant, or being present and being verbally required by the justice to give evidence, refuses to be sworn, or having been sworn, refuses to answer such questions as are put to him, *or refuses or neglects to produce any documents which he is required to produce, or refuses to sign his depositions* without in any such case offering any just excuse for such refusal, such justice may adjourn the proceedings for any period not exceeding *eight* clear days, and may in the meantime by warrant in form O in schedule one hereto, or to the like effect, commit the person so refusing to gaol, unless he sooner consents to do what is required of him. *If such person upon being brought up upon such adjourned hearing, again refuses to do what is so required of him, the justice, if he sees fit, may again adjourn the proceedings, and commit him for the like period, and so again from time to time until such person consents to do what is required of him.*

2. Nothing in this section shall prevent such justice from sending any such case for trial, or otherwise disposing of the same in the meantime, according to any other sufficient evidence taken by him. R. S. C. c. 174, s. 63.

O.—(*Section* 585.)

WARRANT OF COMMITMENT OF A WITNESS FOR REFUSING TO BE SWORN OR TO GIVE EVIDENCE.

Canada,
Province of ,
County of .

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

Whereas A. B. was lately charged before , a justice of the peace in and for the said county of , for that

(*etc., as in the summons*); and it having been made to appear to (*me*) upon oath that E. F. of , was likely to give material evidence for the prosecution (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before me on , at , or before such other justice or justices of the peace for the same county as should then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid; and the said E. F. now appearing before (*me*) (*or* being brought before (*me*) by virtue of a warrant in that behalf), to testify as aforesaid, and being required to make oath or affirmation as a witness in that behalf, now refuses so to do (*or* being duly sworn as a witness now refuses to answer certain questions concerning the premises which are now here put to him, and more particularly the following) without offering any just excuse for such refusal: These are therefore to command you, the said constables or peace officers, or any one of you, to take the said E. F. and him safely to convey to the common gaol at , in the county aforesaid, and there to deliver him to the keeper thereof, together with this precept: And (*I*) do hereby command you, the said keeper of the said common gaol to receive the said E. F. into your custody in the said common gaol, and him there safely keep for the space of days, for his said contempt, unless in the meantime he consents to be examined, and to answer concerning the premises; and for your so doing, this shall be your sufficient warrant.

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

J. S., [SEAL.]

J. P., (*Name of county.*)

DISCRETIONARY POWERS OF THE JUSTICE. (*Amended*).

586. A justice holding the preliminary inquiry may in his discretion—

(*a*) permit or refuse permission to the prosecutor, his counsel or attorney to address him in support of the charge, either by way of opening or summing up the case, or by way of reply upon any evidence which may be produced by the person accused;

(*b*) receive further evidence on the part of the prosecutor after hearing any evidence given on behalf of the accused;

(*c*) adjourn the hearing of the matter from time to time, and change the place of hearing, if from the absence of witnesses, the inability of a witness who is ill to attend at the place where the justice usually sits, or from any other reasonable cause, it appears desirable to do so, and may remand the accused if required by warrant in the form P in schedule one hereto: Provided that no such remand shall be for more than eight clear days, the day following that on which the remand is made being counted as the first day; and further provided, that if the remand is for a time not exceeding three clear days, the justice may verbally order the constable or other person in whose custody the accused then is or any other constable or person named by the justice in that behalf, to keep the accused person in his custody and to bring him before the same or such other justice as shall be there acting at the time appointed for continuing the examination; R. S. C. c. 174, ss. 64, 65.

(*d*) order that no person other than the prosecutor and accused, *their counsel and solicitor* shall have access to or remain in the room or building in which the inquiry is held (which shall not be an open court), if it appears to him that the ends of justice will be best answered by so doing: R. S. C. c. 174, s. 67.

(*e*) regulate the course of the inquiry in any way which may appear to him desirable, and which is not inconsistent with the provisions of this Act.

P.—(*Section* 586.)

WARRANT REMANDING A PRISONER.

Canada,
Province of ,
County of .

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

Whereas A. B. was this day charged before the undersigned , a justice of the peace in and for the said county of , for that (*&c., as in the warrant to apprehend*), and it appears to (*me*) to be necessary to remand the said A. B.: These are therefore to command you, the said constables and peace officers, or any of you, in Her Majesty's name, forthwith to convey the said A. B. to the common gaol at , in the said county, and there to deliver him to the keeper thereof, together with this precept: And I hereby command you the said keeper to receive the said A. B. into your custody in the said common gaol, and there safely keep him until the day of (*instant*), when I hereby command you to have him at , at o'clock in the (fore) noon of the same day before (*me*)

or before such other justice or justices of the peace for the said county as shall then be there, to answer further to the said charge, and to be further dealt with according to law, unless you shall be otherwise ordered in the meantime.

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

J. S., [SEAL.]

J. P., (Name of county.)

BAIL ON REMAND.

587. If the accused is remanded under the next preceding section the justice may discharge him, upon his entering into a recognizance in the form Q in schedule one hereto, 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. R. S. C. c. 174, s. 67.

Q.—(*Section* 587.)

RECOGNIZANCE OF BAIL INSTEAD OF REMAND ON AN ADJOURNMENT OF EXAMINATION.

Canada, }
Province of , }
County of . }

Be it remembered that on the day of in the year , A. B., of , (*labourer*), L. M., of , (*grocer*), and N. O., of , (*butcher*), personally came before me , a justice of the peace for the said county, and severally acknowledged themselves to owe to our Sovereign Lady the Queen, her heirs and successors, the several sums following, that is to say: the said A. B. the sum of , and the said L. M., and N. O., the sum of , each, of good and lawful current money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lady the Queen, her heirs and successors, if he, the said A. B., fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned, at before me.

J. S.,

J. P., (Name of county).

CONDITION.

The condition of the within (*or* above) written recognizance is such that whereas the within bounden A. B. was this day (*or* on last past) charged before me for that (*&c., as in the warrant*); and whereas the examination of the witnesses for the prosecution in this behalf is adjourned until the day of (*instant*): If, therefore, the said A. B. appears before me on the said day of (*instant*), at o'clock in the (fore) noon, or before such other justice or justices of the peace for the said county as shall then be there, to answer (*further*) to the said charge, and to be further dealt with according to law, the said recognizance to be void, otherwise to stand in full force and virtue.

HEARING MAY PROCEED BEFORE REMAND IS OVER.

588. The justice may order the accused person to be brought before him, or before any other justice for the same territorial division, at any time before the expiration of the time for which such person has been remanded, and the gaoler or officer in whose custody he then is shall duly obey such order. R. S. C. c. 174, s. 66.

BREACH OF RECOGNIZANCE.

589. If the accused person does not afterwards appear at the time and place mentioned in the recognizance the said justice, or any other justice who is then and there present, having certified upon the back of the recognizance the non-appearance of such accused person, in the form R in schedule one hereto, may transmit the recognizance to the clerk of the court where the accused person is to be tried, or other proper officer appointed by law, to be proceeded upon in like manner as other recognizances; and such certificate shall be *prima facie* evidence of the non-appearance of the accused person. R. S. C. c. 174, s. 68.

R.—(*Section* 589.)

CERTIFICATE OF NON-APPEARANCE TO BE ENDORSED ON THE RECOGNIZANCE.

I hereby certify that the said A. B. has not appeared at the time and place in the above condition mentioned, but therein has made a default, by reason whereof the within written recognizance is forfeited.

J. S.,

J. P., (*Name of county.*)

EVIDENCE FOR THE PROSECUTION. (*Amended*).

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

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

3. The evidence of each witness shall be taken down in writing in the form of a deposition, which may be in the form S in schedule one hereto, or to the like effect.

4. Such deposition shall, at some time before the accused is called on for his defence, be read over to and signed by the witness and the justice, *the accused, the witness and justice being all present together at the time of such reading and signing.*

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

6. *Every justice holding a preliminary inquiry is hereby required to 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.* R. S. C. c. 174, s. 69.

7. *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 make oath that he shall truly and faithfully report the evidence; and 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 transcript be signed by the justice and be accompanied by an affidavit of the stenographer that it is a true report of the evidence.*

S.—(*Section* 590.)

DEPOSITION OF A WITNESS.

Canada,
Province of ,
County of .

The deposition of X. Y. of , taken before the undersigned, a justice of the peace for the said county of , this day of , in the year , at (*or* after notice to C. D. who stands committed for in) the presence and hearing of C. D. who stands charged that (*state the charge*). The said deponent saith on his (*oath or affirmation*) as follows: (*Insert deposition as nearly as possible in words of witness.*)

(*If depositions of several witnesses are taken at the same time, they may be taken and signed as follows:*)

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The depositions of X. of , Y. of Z. of &c., taken in the presence and hearing of C. D., who stands charged that

The deponent X. (*on his oath or affirmation*) says as follows:

The deponent Y. (*on his oath or affirmation*) says as follows;

The deponent Z. (*on his oath, &c., &c.*)

(*The signature of the justice may be appended as follows:*)

The depositions of X., Y., Z., &c., written on the several sheets of paper, to the last of which my signature is annexed, were taken in the presence and hearing of C. D. and signed by the said X., Y., Z., respectively in his presence. In witness whereof I have in the presence of the said C. D. signed my name.

J. S.,
J. P., (*Name of county.*)

EVIDENCE TO BE READ TO THE ACCUSED. (*Amended*).

591. After the examination of the witnesses produced on the part of the prosecution has been completed, *and after the depositions have been signed as aforesaid, the justice, unless he discharges the accused person, shall ask him whether he wishes the depositions to be read again, and unless the accused dispenses therewith shall read or cause them to be read again.* When the depositions have been again read, *or the reading dispensed with*, the accused shall be addressed by the justice in these words, or to the like effect:

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

2. Whatever the accused then says in answer thereto shall be taken down in writing in the form T in schedule one hereto, or to the like effect, and shall be signed by the justice and kept with the depositions of the witnesses and dealt with as hereinafter mentioned. R. S. C. c. 174, ss. 70 & 71.

See s. 689, *post*.

T.—(*Section* 591.)

STATEMENT OF THE ACCUSED.

Canada,
Province of ,
County of .

A. B. stands charged before the undersigned , a justice of the peace in and for the county aforesaid, this day of , in the year , for that the said A. B., on , at (*&c., as in the captions of the depositions*); and the said charge being read to the said A. B., and the witnesses for the prosecution, C. D. and E. F., being severally examined in his presence, the said A. B. is now addressed by me as follows: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you at your trial. You must clearly understand that you have nothing to hope from any promise of favour, and nothing to fear from any threat which may have been held out to induce you to make any admission or confession of guilt, but whatever you now say may be given in evidence against you upon your trial, notwithstanding such promise or threat." Whereupon the said A. B. says as follows: (*Here state whatever the prisoner says and in his very words, as nearly as possible. Get him to sign it if he will*).

A. B.

Taken before me, at , the day and year first above mentioned.

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

ADMISSIONS BY ACCUSED.

592. Nothing herein contained shall prevent any prosecutor from giving in evidence any admission or confession, or other statement, made at any time by the person accused or charged, which by law would be admissible as evidence against him. R. S. C. c. 174, s. 72.

EVIDENCE FOR THE DEFENCE. (*New*).

593. After the proceedings required by section five hundred and ninety-one are completed the accused shall be asked if he wishes to call any witnesses.

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

DISCHARGE OF ACCUSED.

594. 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; and 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 next hereinafter contained. R. S. C. c. 174, s. 73.

ACCUSER MAY HAVE HIMSELF BOUND OVER. (*Amended*).

595. 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 the form U in schedule one hereto, or to the like effect.

3. If the prosecutor so bound over at his own request does not prefer and prosecute such an indictment, or if the grand jury do 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.

4. 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. R. S. C. c. 174, s. 80.

Sub-section 1 is an extension to all offences whatever of an enactment that applied only to the offences falling under the vexatious indictments clause: R. S. C. c. 174, s. 140.

U.—(*Section* 595.)

FORM OF RECOGNIZANCE WHERE THE PROSECUTOR REQUIRES THE JUSTICE TO BIND HIM OVER TO PROSECUTE AFTER THE CHARGE IS DISMISSED.

Canada,
Province of ,
County of .

Whereas C. D. was charged before me upon the information of E. F. that C. D. (*state the charge*), and upon the hearing of the

said charge I discharged the said C. D., and the said E. F. desires to prefer an indictment against the said C. D. respecting the said charge, and has required me to bind him over to prefer such an indictment at (*here describe the next practicable sitting of the court by which the person discharged would be tried if committed*).

The undersigned E. F. hereby binds himself to perform the following obligation, that is to say, that he will prefer and prosecute an indictment respecting the said charge against the said C. D. at (*as above*). And the said E. F. acknowledges himself bound to forfeit to the Crown the sum of $, in case he fails to perform the said obligation.

E. F.

Taken before me.

J. S.,

J. P. (*Name of county.*)

COMMITTAL FOR TRIAL.

596. 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 the form V in schedule one hereto, or to the like effect. R. S. C. c. 174, s. 73.

V.—(*Section* 596.)

WARRANT OF COMMITMENT.

Canada,
Province of ,
County of .

To the constable of , and to the keeper of the (*common gaol*) at , in the said county of

Whereas A. B. was this day charged before me, J. S., one of Her Majesty's justices of the peace in and for the said county of , on the oath of C. D. of (*farmer*), and others for that (*&c., stating shortly the offence*): These are therefore to command you the said constable to take the said A. B,, and him safely to convey to the (*common gaol*) at aforesaid, and there to deliver him to the keeper thereof, together with this precept: And I do hereby command you the said keeper of the said (*common gaol*) to receive the said A. B. into your custody in

the said (*common gaol*), and there safely keep him until he shall be thence delivered by due course of law.

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

J. S., [SEAL.]

J. P., (*Name of county.*)

COPY OF DEPOSITIONS.

597. Every one who has been committed for trial, whether he is bailed or not, may 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. R. S. C. c. 174, s. 74.

RECOGNIZANCES TO PROSECUTE OR GIVE EVIDENCE. (*Amended*).

598. 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 the form W, X or Y in schedule one hereto, or to the like effect, and shall be acknowledged by the person entering into the same, and be subscribed by the justice or one of the justices before whom it is acknowledged.

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

5. All such recognizances and all other recognizances taken under this Act 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. R. S. C. c. 174, ss. 75 & 76.

6. Whenever any person is bound by recognizance to give evidence before a justice of the peace, or any criminal court, in respect of any offence *under this Act*, any justice of the peace, 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; and if such person is arrested any justice of the peace, 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; but 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. 48-49 V. c. 7, s. 9.

A notice to the person bound is not now required. The exception as to married women and infants has been left out: s-s. 6 applied heretofore to the *Explosive Substances Act*.

W.—(*Section* 598.)

RECOGNIZANCE TO PROSECUTE.

Canada,
Province of ,
County of ,

Be it remembered that on the day of , in the year , C. D. of , in the of , in the said county of , (*farmer*), personally came before me , a justice of the peace in and for the said county of , and acknowledged himself to owe to our Sovereign Lady the Queen, her heirs and successors, the sum of , of good and lawful current money of Canada, to be made and levied of his goods and chattels, lands and tenements, to the use of our said Sovereign Lady the Queen, her heirs and successors, if the said C. D. fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned at , before me.

J. S.,
J. P., (Name of county).

CONDITION TO PROSECUTE.

The condition of the within (*or* above) written recognizance is such that whereas one A. B. was this day charged before me, J. S., a justice of the peace within mentioned, for that (*etc., as in the caption of the depositions*); if, therefore, he the said C. D. appears at the court by which the said A. B. is or shall be tried* and there duly prosecutes such charge then the said recognizance to be void, otherwise to stand in full force and virtue.

X.—(*Section* 598.)

RECOGNIZANCE TO PROSECUTE AND GIVE EVIDENCE.

(*Same as the last form, to the asterisk,* and then thus*):—And there duly prosecutes such charge against the said A. B. for the offence aforesaid, and gives evidence thereon, as well to the jurors who shall then inquire into the said offence, as also to them who shall pass upon the trial of the said A. B., then the said recognizance to be void, or else to stand in full force and virtue.

Y.—(*Section* 598.)

RECOGNIZANCE TO GIVE EVIDENCE.

(*Same as the last form but one, to the asterisk,* and then thus*): —And there gives such evidence as he knows upon the charge to be then and there preferred against the said A. B. for the offence aforesaid, then the said recognizance to be void, otherwise to remain in full force and virtue.

WITNESSES REFUSING TO BE BOUND OVER.

599. 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 the form Z in schedule one hereto, 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 a recognizance as aforesaid before a justice of the peace having jurisdiction in the place where the prison is situated: Provided that if the accused is afterwards discharged any justice having such jurisdiction may order any such witness to be discharged by an order which may be in the form AA in the said schedule, or to the like effect. R. S. C. c. 174, ss. 78 & 79.

Z.—(*Section* 599.)

COMMITMENT OF A WITNESS FOR REFUSING TO ENTER INTO THE RECOGNIZANCE.

Canada,
Province of ,
County of .

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

Whereas A. B. was lately charged before the undersigned (*name of the justice of the peace*), a justice of the peace in and for the said county of , for that (*&c., as in the summons to the witness*), and it having been made to appear to (*me*) upon oath that E. F., of , was likely to give material evidence for the prosecution, (*I*) duly issued (*my*) summons to the said E. F., requiring him to be and appear before (*me*) on , at or before such other justice or justices of the peace as should then be there, to testify what he knows concerning the said charge so made against the said A. B. as aforesaid; and the said E. F. now appearing before (*me*) (or being brought before (*me*) by virtue of a warrant in that behalf to testify as aforesaid), has been now examined before (*me*) touching the premises, but being by (*me*) required to enter into a recognizance conditioned to give evidence against the said A. B., now refuses so to do: These are therefore to command you the said peace officers, or any one of you, to take the said E. F. and him safely convey to the common gaol at , in the county aforesaid, and there deliver him to the said keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said E. F. into your custody in the said common gaol, there to imprison and safely keep him until after the trial of the said A. B. for the offence aforesaid, unless in the meantime the said E. F. duly enters into such recognizance as aforesaid, in the sum of before some one justice of the peace for the said county, conditioned in the usual form to appear at the court by which the said A. B. is or shall be tried, and there to give evidence upon the charge which shall then and there be preferred against the said A. B. for the offence aforesaid.

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

J. S.,

J. P., (*Name of county.*)

AA.—(*Section* 599.)

SUBSEQUENT ORDER TO DISCHARGE THE WITNESS.

Canada,
Province of ,
County of .

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

Whereas by (*my*) order dated the day of (*instant*) reciting that A. B. was lately before then charged before (*me*) for a certain offence therein mentioned, and that E. F. having appeared before (*me*) and being examined as a witness for the prosecution on that behalf, refused to enter into recognizance to give evidence against the said A. B., and I therefore thereby committed the said E. F. to your custody, and required you safely to keep him until after the trial of the said A. B. for the offence aforesaid, unless in the meantime he should enter into such recognizance as aforesaid; and whereas for want of sufficient evidence against the said A. B., the said A. B. has not been committed or holden to bail for the said offence, but on the contrary thereof has been since discharged, and it is therefore not necessary that the said E. F. should be detained longer in your custody: These are therefore to order and direct you the said keeper to discharge the said E. F. out of your custody, as to the said commitment, and suffer him to go at large.

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

J. S., [SEAL.]

J. P., (*Name of county.*)

TRANSMISSION OF DOCUMENTS. (*Amended*).

600. The following documents 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, that is to say, 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.*

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. R. S. C. c. 174, ss. 77, 102.

RULE AS TO BAIL.

601. 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 Part IV. of this Act (s. 65), 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; and 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 as to their sufficiency, which oath the said justice *or justices* may administer; and 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.

2. The recognizance mentioned in this section shall be in the form BB in schedule one to this Act. R. S. C. c. 174, s. 81.

BB.—(*Section* 601).

RECOGNIZANCE OF BAIL.

Canada,
Province of ,
County of .

Be it remembered that on the day of , in the year , A. B. of , (*labourer*), L. M. of , (*grocer*), and N. O. of , (*butcher*), personally came before (*us*) the undersigned, (*two*) justices of the peace for the county of , and severally acknowledged themselves to owe to our Sovereign Lady the Queen, her heirs and successors, the several sums following, that is to say: the said A. B. the sum of , and the said L. M. and N. O. the sum of , each, of good and lawful current money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Sovereign Lady the Queen, her heirs and successors, if he, the said A. B., fails in the condition endorsed (*or* hereunder written).

Taken and acknowledged the day and year first above mentioned, at before us.

J. S.,
J, N.,
J. P., (*Name of county.*)

CONDITION.

The condition of the within (*or* above) written recognizance, is such that whereas the said A. B. was this day charged before (*us*), the justices within mentioned for that (*etc., as in the warrant*); if, therefore, the said A. B. appears at the next court of oyer and terminer (*or* general gaol delivery *or* court of General or Quarter Sessions of the Peace) to be holden in and for the county of , and there surrenders himself into the custody of the keeper of the common gaol (*or* lock-up house) there, and pleads to such indictment as may be found against him by the grand jury, for and in respect to the charge aforesaid, and takes his trial upon the same, and does not depart the said court without leave, then the said recognizance to be void, otherwise to stand in full force and virtue.

BAIL AFTER COMMITTAL.

602. In case of any offence other than treason or an offence punishable with death, or an offence under Part IV. of this Act, (s. 65), where the accused has been finally committed as herein provided, any judge of any superior or county court, having jurisdiction in the district or county within the limits of which the accused is confined, may, in his discretion, on application made to him for that purpose, order the accused to be admitted to bail on entering into recognizance with sufficient sureties before two justices, in such amount as the judge directs, and thereupon the justices shall issue a warrant of deliverance as hereinafter provided, and shall attach thereto the order of the judge directing the admitting of the accused to bail.

2. Such warrant of deliverance shall be in the form CC in schedule one to this Act. R. S. C. c. 174, s. 82.

CC.—(*Section* 602.)

WARRANT OF DELIVERANCE OF BAIL BEING GIVEN FOR PRISONER ALREADY COMMITTED.

Canada,
Province of ,
County of .

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

Whereas A. B. late of , (*labourer*) has before (*us*) (*two*) justices of the peace in and for the said county of , entered into his own recognizance, and found sufficient sureties for his appearance at the next court of oyer and terminer or general gaol delivery (*or* court of General or Quarter Sessions of the Peace), to be holden in and for the county of , to answer our Sovereign Lady the Queen, for that (*etc., as in the commitment*), for which he was taken and committed to your said common gaol: These are therefore to command you, in Her Majesty's name, that if the said A. B. remains in your custody in the said common gaol for the said cause, and for no other, you shall forthwith suffer him to go at large.

Given under our hands and seals, this day of , in the year , at , in the county aforesaid.

J. S., [SEAL.]
J. N., [SEAL.]
J. P., (*Name of county.*)

BAIL BY SUPERIOR COURT.

603. No judge of a county court or justices shall admit any person to bail accused of treason or an offence punishable with death, or an offence under Part IV. of this Act, s. 65, nor shall any such person be admitted to bail, except by order of a superior court of criminal jurisdiction for the province in which the accused stands committed, or of one of the judges thereof, or, in the province of Quebec, by order of a judge of the Court of Queen's Bench or Superior Court. R. S. C. c. 174, s. 83.

APPLICATION FOR BAIL AFTER COMMITTAL.

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

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

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

Warrant of Deliverance.

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

Warrant for Arrest of Person about to Abscond. (*New*).

606. Whenever a person charged with any offence has been bailed in manner aforesaid, it shall be lawful for any justice, if he sees fit, upon the application of the surety or of either of the sureties of such person and upon information being made in writing and on oath by such surety, or by some person on his behalf, that there is reason to believe that the person so bailed is about to abscond for the purpose of evading justice, to issue his warrant for the arrest of the person so bailed, and afterwards, upon being satisfied that the ends of justice would otherwise be defeated, to commit such person when so arrested to gaol until his trial or until he produces another sufficient surety or other sufficient sureties, as the case may be, in like manner as before. 14-15 V. c. 93, s. 17 (Imp.).

Delivery of Accused to Prison.

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

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

DD.—(*Section* 607.)

GAOLER'S RECEIPT TO THE CONSTABLE FOR THE PRISONER.

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

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

PART XLVI.

INDICTMENTS.

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

By the interpretation clause, s. 3, *ante*, the word *indictment* includes *information, presentment, plea, record, etc.*

By the 4 Geo. II. c. 26, and 6 Geo. II. c. 14, "all indictments, informations, inquisitions and presentments shall be in English, and be written in a common legible hand, and not court hand, on pain of £50 to him that shall sue in three months."

No part of the indictment must contain any abbreviation, or express any number or date by figures, but these as well as every other term used, must be expressed in words at length, except where a fac-simile of an instrument is set out: 3 Burn, 35; 1 Chit. 175.

Formerly, like all other proceedings, they were in Latin, and though Lord Hale thinks this language more appropriate, as not exposed to so many changes and alterations, "it was thought in modern times to be of very greater use and importance," says his annotator *Emlyn*, "that they should be in a language capable of being known and understood by the parties concerned, whose lives and liberties were to be affected thereby."

Before confederation in Ontario and Quebec, the indictment in cases of high treason only had to be written on parchment: C. S. C. c. 99, s. 20.

By s. 133 of the *British North America Act*, the French language may be used in any of the courts of Quebec and in any court in Canada established under that Act.

STATEMENT OF VENUE.

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

This section is taken from s. 23, 14 & 15 V. c. 100, of the Imperial statutes, upon which Greaves says: "This section was framed with the intention of placing the statement of venue upon the same footing in criminal cases upon which it was placed in civil proceedings by Reg. Gen., H. T., 4 Wm. IV. By this section, in all cases, except where some local description is necessary, no place need be stated in the body of the indictment; thus in larceny, robbery, forgery, false pretenses, etc., no venue need be stated in the body of the indictment. In such cases, before the passing of this Act, although it was considered necessary to state some parish or place, it was quite immaterial whether the offence was committed there or at any other parish in the county. On the other hand, in burglary, sacrilege, stealing in a dwelling house, etc., the place where the offence was committed must be stated in the indictment. It was necessary so to state it before the Act, and to prove the statement as alleged, and so it is still, subject ever to the power of amendment given by the first section." (*See* now, ss. 611, 613, *post.*)

"The *venue*, that is, the county in which the indictment is preferred, is stated in the margin thus "*Middlesex*," or "*Middlesex*, to wit," but the latter method is the most usual. In the body of the indictment a special venue used to be laid, that is, the facts were in general stated to have arisen in the county in which the indictment was preferred." 3 Burn, 21.

"The place (or *special venue*, as it is technically termed) must be such as in strictness the jury who are to try the cause should come from. At common law, the jury, in strictness, should have come from the town, hamlet, or

parish, or from the manor, castle, or forest, or other known place out of a town, where the offence was committed, and for this reason, besides the county, or the city, borough, or other part of the county to which the jurisdiction of the court is limited, it was formerly necessary to allege that every material act mentioned in the indictment was committed in such a place.

Under ss. 611, 613, no indictment will now probably be quashed for want of a sufficient description.

The cases in which a local description has been held to be necessary in the body of the indictment, are:

Burglary, 2 Russ. 47; house-breaking, R. v. Bullock, 1 Moo. 324, note (*a*); stealing in a dwelling-house, under section corresponding to s. 345 *ante*: R. v. Napper, 1 Moo. 44; being found, by night, armed, with intent to break into a dwelling-house, under section corresponding to s. 417, *ante*, and all offences under part XXX., *ante*: R. v. Jarrald L. & C. 301; riotously demolishing churches, houses, machinery, etc., or injuring them, under sections corresponding to ss. 85, 86, *ante*: R. v. Richards, 1 M. & Rob. 177; maliciously firing a dwelling-house, perhaps an out-house, and probably all offences that fell under ss. 2, 3, 4, 5, 6, 7, 8, 9, 10, 13 & 14 of the repealed Act, as to malicious injuries to property, but not the offences under ss. 18, 19, 20, 21, of the same Act: R. v. Woodward, 1 Moo. 323; forcible entry, Archbold, 50; nuisances to highways: R. v. Steventon, 1 C. & K. 55; malicious injuries to sea-banks, milldams, or other local property, Taylor, Ev., 1 vol., par. 227; not repairing a highway, in which even a more accurate description is necessary, as the situation of the road within the parish, etc.; indecent exposure in a public place, R. v. Harris, 11 Cox, 659.

But in most cases of want of local description, where necessary, or of variance between the proof and the allegations in the indictment respecting the place, local descrip-

tion, etc., the courts would now allow an amendment, or order particulars.

It is well remarked in Taylor Ev., vol. 1, par. 228:

"It would be extremely difficult to advance any sensible argument in favour of this distinction which the law recognizes between local and transitory offences. On an indictment, indeed, against a parish for not repairing a highway, it may be convenient to allege, as it will be necessary to prove, that the spot out of repair is within the parish charged, . . . but why a burglar should be entitled to more accurate information respecting the house he is charged with having entered, than the highway robber can claim as to the spot where his offence is stated to have been committed, it is impossible to say: either full information should be given in all cases or in none."

HEADING OF INDICTMENTS. (*New*).

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

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

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

E. E. (*Sections* 610, 626.)

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

The jurors for our Lady the Queen present that

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

"The said jurors further present that ".

See, as to forms, generally, s. 982, *post*.

FORM AND CONTENTS OF COUNTS. (*New*).

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

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

3. Such statement may be in the words of the enactment describing the offence or declaring the matter charged to be an indictable offence or in any

words sufficient to give the accused notice of the offence with which he is charged.

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

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

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

EXAMPLES OF THE MANNER OF STATING OFFENCES.

F. F. (*Section* 611.)

(*a*) A. murdered B. at , on (s. 231).

(*b*) A. stole a sack of flour *from* a ship called the at , on (s. 349).

(*c*) A. obtained by false pretenses from B., a horse, a cart and the harness of a horse at , on (s. 359).

(*d*) A. committed perjury with intent to procure the conviction of B. for an offence punishable *with penal servitude*, namely robbery, by swearing on the trial of B. for the robbery of C. at the Court of Quarter Sessions for the county of Carleton, held at Ottawa, on the day of , 1879; first that he, A. saw B. at Ottawa, on the day of ; secondly, that B. asked A. to lend B. money on a watch belonging to C.; thirdly, etc. (S. 146, s-s. 2); *or*

(*e*) The said A. committed perjury on the trial of B. at a Court of Quarter Sessions held at Ottawa on for an assault alleged to have been committed by the said B. on C. at Ottawa, on the day of by swearing to the effect that the said B. could not have been at Ottawa, at the time of the alleged assault, inasmuch as the said A. had seen him at that time in Kingston, (s. 146, s-s. 1).

(*f*) A. with intent to maim, disfigure, disable or do grievous bodily harm to B. or with intent to resist the lawful apprehension or detainer of A. (*or* C.), did actual (*grievous?*) bodily harm to B. (*or* D.) (S. 241).

(*g*) A. with intent to injure or endanger the safety of persons on the Canadian Pacific Railway, did an act calculated to inter-

fere with an engine, a tender, and certain carriages on the said railway on at by (*describe with so much detail as is sufficient to give the accused reasonable information as to the acts or omissions relied on against him, and to identify the transaction*). (Ss. 250, 489).

(*h*) A. published a defamatory libel on B. in a certain newspaper, called the , on the day of A.D. , which libel was contained in an article headed or commencing (*describe with so much detail as is sufficient to give the accused reasonable information as to the part of the publication to be relied on against him*), and which libel was written in the sense of imputing that the said B. was (*as the case may be*). (S. 302.)

The first sub-section of this s. 611 cannot, probably bear the construction that the wording of it taken literally would, at first, suggest. The whole Act taken together does not seem to allow of such a construction. Section 614, for instance, as to treason, is directly against it. An indictmen for obtaining by false pretenses is, perhaps, the only one that can be laid, without an averment of the intent, where the intent is necessary to constitute the offence, and this, because the form FF given in schedule one does not aver the intent: s. 982 *post*; *see* R. v. Pierce, 16 Cox, 213. But the same form, in all the other cases, where the intent is an ingredient of the offence as enacted by statute, does contain an averment of such intent. If it were sufficient, in any indictment, to simply aver in all cases that the defendant has committed an indictable offence therein specified, the Act would not contain s. 618, for instance, which specially decrees that in an indictment under s. 361, it shall not be necessary to allege or to prove that the act was done with intent to defraud, though s. 361 has no mention whatever of an intent to defraud, and ss. 618, 619, 620, 621, 622, 623, 624, 625 would be superfluous. Section 733 also provides for the case where the indictment does not state any indictable offence, and s. 723, s-s. 2, likewise assumes that indictments are not always to be so carelessly drawn as s. 611 would, at first sight, seem to allow.

Sub-section 2 of this s. 611 may perhaps dispense of, for instance, the word "burglariously" in indictments for burglary, but leaves it necessary to aver all matter *necessary to be proved.* S-s. 3 will, probably, not receive a wider construction than the same enactment, as reproduced in s. 734, as to indictments for any offence against this Act has heretofore received. *See post,* under that section.

Sub-sections 4 & 6 are no additions to the law. S-s. 5 may help an indictment in certain cases. *See* remarks, *post,* under s. 629.

"The rule is, that, with certain exceptions, all the circumstances necessary to constitute the offence charged should be stated with certainty and precision, to the end that the defendant may be enabled to form a judgment whether or not they constitute an indictable offence, and so demur or plead accordingly; or that he may be enabled to plead *autrefois acquit,* or *convict* or *a pardon,* in bar of a subsequent prosecution for the same offence; and in order also that the court may know what judgment may legally be passed in the event of a conviction. The courts, however, will construe the words of an indictment according to their ordinary and usual acceptation; and as regards technical expressions—these they will construe according to their technical meaning, and if the sense of a word be ambiguous in its ordinary acceptation it will be construed according as the context and subject matter may require, in order to render the whole consistent and sensible; and in doing so, the courts will disregard ungrammatical language if the real meaning be sufficiently expressed: R. v. Stevens, 5 East, 244; R. v. Stokes, 1 Den. 307. But although the courts will thus construe the averments of an indictment so as to give effect to them, they will not supply the omission of anything which is essential. If, therefore, any necessary averment is omitted no intendment will be made in its favour—the rule upon the subject being that the courts will presume the negative of everything

that has not been expressly affirmed, and the affirmative of everything which has not been expressly negatived": Saunders.

If there be any exception contained in the same clause of the Act which creates the offence the indictment must show negatively that the defendant does not come within the exception: R. v. Earnshaw, 15 East 456; R. v. Baxter, 5 T. R. 83; R. v. Pearce, R. & R. 174. If, however, the exception or proviso be in a subsequent clause or statute, or, although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is matter of defence, and need not be negatived in the indictment: R. v. Hall, 1 T. R. 320; Steel v. Smith, 1 B. & Ald. 94; R. v. White, 21 U. C. C. P. 354; R. v. Strachan, 20 U. C. C. P. 182; R. v. MacKenzie, 6 O. R. 165.

In an indictment under s. 431 of this Code, for instance, it must be averred that the defendant made the document *with intent to defraud and without lawful authority or excuse.* An indictment, however, which would negative only "lawful excuse" and not "lawful authority" would be sufficient: R. v. Harvey, L. R. 1 C. C. R. 284. As to the rules of evidence in such cases, *see* Taylor, Ev. par. 344, *et seq.*

An indictment for indecent assault by a male on another male (*see* s. 260 *ante*) is defective, even after verdict, if it does not aver that defendant is a male: R. v. Montminy, Quebec, Q. B. May, 1893.

Such are the rules that have heretofore been recognized in the framing of indictments. How far this Code alters them remains to be settled by the jurisprudence. But it must not be lost sight of that it is technical objections only that the Imp. Commissioners report as being put an end to by the Code. That every indictment must charge an offence, and that every accused person is entitled to know what he is accused of, still remains the law, it must be assumed: R. v. Clement, 26 U. C. Q. B. 297; *see* case of R. v. Cummings under s. 933 *post.* Parliament has undoubtedly the right to decree that such shall not be the

law any longer, but when they come to that determination the courts of the country will probably require that such determination be expressed in clear and unequivocal terms. S-s. 2 of this s. 611 assumes negatively that all matter of fact necessary to be proved must be alleged in the indictment. It still remains the rule that an indictment which does not substantially set down all the elements of the offence is void : *see* 1 Bishop, Cr. Proc. 98.

OFFENCES MAY BE CHARGED IN THE ALTERNATIVE. (*New*).

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

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

Though the statute is in the disjunctive the offence may be charged in the conjunctive. An indictment under s. 436 for instance, which charges that the defendant did destroy, deface *and* injure a register is not bad for duplicity or multifariousness, though the section says "destroy, deface *or* injure": R. v. Bowen, 1 Den. 22, and cases there cited ; also R. v. Patterson, 27 U. C. Q. B. 142. The above section permits of an alternative charge only where the statute itself describes the offence in the alternative. A charge made in the alternative as a general rule is no charge at all; the defendant either did one thing *or* the other ; *per* Gurney, B., in R. v. Bowen, *ubi supra*. An indictment that would charge an offence in the disjunctive would be bad, if not amended, though the defect would be cured by verdict under s. 734.

See R. v. Baby, 12 U. C. Q. B. 346, and Cotterill v. Lempriere, 17 Cox, 97.

CERTAIN OBJECTIONS NOT FATAL. (*New*).

613. (*As amended in 1898*). No count shall be deemed objectionable or insufficient on any of the following grounds ; that is to say :

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

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

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

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

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

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

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

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

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

These are extended re-enactments of various clauses of the Procedure Act, c. 174, R. S. C. ss. 112, 114. 116, 117, 130. S-s. (*c*) assumes that it is necessary in some cases to allege an intent to defraud. *See post*, under s. 617, for the case where particulars have been ordered.

INDICTMENTS FOR HIGH TREASON.

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

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

This should apply only to ss. 65 & 69. It is erroneously made to apply to all the sections of part IV.

INDICTMENTS FOR LIBEL.

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

2. A count for libel may charge that the matter published was written in a sense which would make the publishing criminal, specifying that sense with-

out any prefatory averment showing how that matter was written in that sense. And on the trial it shall be sufficient to prove that the matter published was criminal either with or without such innuendo.

See form of indictment for a defamatory libel under s. 611, *ante*.

INDICTMENTS FOR PERJURY AND OTHER OFFENCES. (*New*).

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

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

3. No provision hereinbefore contained in this part as to matters which are not to render any count objectionable or insufficient shall be construed as restricting or limiting in any way the general provisions of section six hundred and eleven. R. S. C. c. 174, ss. 107, 108. 14-15 V. c. 100, ss. 20, 21 (Imp.).

See R. v. Dunning, 11 Cox, 651; and R. v. Hare, 13 Cox, 174. *See* forms of indictments for false pretenses and for perjury in form FF of schedule 1, under s. 611, *ante*. The sections on perjury are 145, *et seq.* on false pretenses, 358, *et seq.*; for conspiracies *see* under s. 527; Howard v. R., 10 Cox, 54, cannot now be followed.

PARTICULARS. (*New*).

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

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

See R. v. Hamilton, 8 Russ. 173, and Greaves' *note* where particulars were ordered by the court: R. v. Stapylton, 8 Cox, 69; R. v. Hodgson, 3 C. & P. 422; R. v. Bootyman,

5 C. & P. 300. Any bill of particulars may itself be amended at the trial under s. 723. An application for particulars should be made before the trial, but the court has full discretionary powers in the matter: s-s. 3, s. 723.

INDICTMENT UNDER SECTION 361.

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

This enactment is useless. It was in the original statute of 1869, because there the offence was made one of obtaining money under false pretenses. But now s. 361 does not contain such an enactment, and does not require an intent to defraud.

INDICTMENTS IN CERTAIN CASES. (*Amended*).

619. An indictment shall be deemed sufficient in the cases following:

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

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

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

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

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

Sub-sections (*a*) & (*b*) are taken from the Imperial Act, 7 Geo. IV. c. 64, s. 14. Formerly, where goods stolen were the property of partners, or joint-owners, all the partners or joint owners must have been correctly named in the indictment, otherwise the defendant would have been acquitted.

The word "*parceners*" refers to a tenancy which arises when an inheritable estate descends from the ancestor to

several persons possessing an equal title to it: Wharton, Law Lexicon.

It must be remembered that the words in s. 619, s-s. (*a*) are, "*another or others;*" and if an indictment allege property to belong to A. B. and *others*, and it appears that A. B. has only one partner, it is a variance.

The prisoner was indicted for stealing the property of G. Eyre "and *others*," and it was proved that G. Eyre had only one partner; it was held, *per* Denman, Com. Serj., that the prisoner must be acquitted: Hampton's Case. 2 Russ. 303. So where a count for forgery laid the intent to be to defraud S. Jones "and *others*," and it appeared that Jones had only one partner, it was held that the count was not supported: R. v. Wright, 1 Lewin, 268.

In R. v. Kealey, 2 Den. 68, the defendant was indicted for the common law misdemeanour of having attempted, by false pretenses made to J. Baggally and others, to obtain from the said J. Baggally and others one thousand yards of silk, the property of the said J. Baggally and others, with intent to cheat the said J. Baggally and others of the same. J. Baggally and others were partners in trade, and the pretenses were made to J. Baggally; but none of the partners were present when the pretenses were made, nor did the pretenses ever reach the ear of any of them. It was objected that there was a variance, as the evidence did not show that the pretenses were made to J. Baggally and others; but the objection was overruled by Russell Gurney, Esq., Q.C., and, upon a case reserved, the conviction was held right.

Greaves, in note (*a*), 2 Russ. 304, says on this case: "It is clear that the 7 Geo. IV. c. 64, s. 14 (s. 619 *ante*) alone authorizes the use of the words 'and others;' for, except for that clause, the persons must have been named. There the question really was, whether that clause authorized the use of it in this allegation. The words are, 'whenever it shall be necessary to mention, *for any purpose whatsoever*,

any partners, etc.,' ('if it be necessary *for any purpose* to mention,' etc., s. 619, *ante*). Now it is plain that the prisoner had applied to Baggally to purchase the goods of the firm, and the inference from the statement in the indictment is that he had actually made a contract for their purchase, and, if that contract had been alleged, it must have been alleged as a contract with the firm, and it was clearly correct to allege an attempt to make a contract as made to the firm also."

Now such a variance as mentioned in Hampton's and Wright's cases, *ubi supra*, would not be fatal, if amended: 3 Burn, 25; *see* s. 723 *post;* and R. v. Pritchard, L. & C. 34; R. v. Vincent, 2 Den. 464; R. v. Marks, 10 Cox, 367.

It is not necessary that a strict legal partnership should exist. Where C. & D. carried on business in partnership, and the widow of C., upon his death, without taking out administration, acted as partner, and the stock was afterwards divided between her and the surviving partner, but, before the division, part of the stock was stolen; it was holden that the goods were properly described as the goods of D. and the widow: R. v. Gaby, R. & R. 178.

And where a father and son carried on business as farmers; the son died intestate, after which the father continued the business for the joint benefit of himself and the son's next of kin; some sheep were stolen, and were laid to be the property of the father and the son's next of kin, and all the judges held it right: R. v. Scott, R. & R. 13.

In an indictment for stealing a Bible, a hymn-book, etc., from a Methodist chapel, the goods were laid as the property of John Bennett and others, and it appeared that Bennett was one of the Society, and a trustee of the chapel: Parke, J., held that the property was correctly laid in Bennett: R. v. Boulton, 5 C. & P. 537.

In R. v. Pritchard, L. & C. 34, it was held that the property of a banking co-partnership may be described as the

property of one of the partners specially named and others, under the clause in question. *See* s. 620, *post*, as to bodies corporate, and the property under their control: R. v. Beacall, 1 Moo. 15.

On s-s. (*c*), it has been held that if a person employed by a trustee of turnpike tolls to collect them lives in the toll house rent free, the property in the house, in an indictment for burglary, may be laid in the person so employed by the lessee, he having the exclusive possession, and the toll house not being parcel of any premises occupied by his employer: R. v. Camfield, 1 Moo. 42.

PROPERTY OF BODY CORPORATE.

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

This clause is not in the English statutes. It was held in England, without this clause, that when goods of a corporation are stolen they must be laid to be the property of the corporation in their corporate name and not in the names of the individuals who comprise it: R. v. Patrick and Pepper, 1 Leach, 253.—So in R. v. Freeman, 2 Russ. 301, the prisoner was indicted for stealing a parcel, the property of the London and North Western Railway Company. The parcel was stolen from the Lichfield Station, which had been in the possession of the company for three or four years, by means of their servants, but no statute was produced which authorized the company to purchase the Trent Valley Line; an Act incorporating the company was, however, produced. It was held that, as a corporation is liable in trover, trespass and ejectment, they might have an actual possession though it might be wrongful, which would support the indictment.

In R. v. Frankland, L. & C. 276, it was held: 1st. That the incorporation of a private company must be proved by legal and documentary evidence; 2nd. That partners in a

company not incorporated might be proved to be such by parol evidence; 3rd. That Thomas Bolland and others, who were described in the indictment as the owners of the property embezzled, being partners in a company not incorporated, the indictment was supported by proof that the money was the property of the company.

By s. 613, *ante*, no count is objectionable on the ground that it does not contain the name of the person injured, or defrauded, or that it does not state the owner of any property therein described, or that it does not name any one with precision.

INDICTMENTS FOR STEALING ORES, ETC.

621. In an indictment for any offence mentioned in section three hundred and forty-three or three hundred and seventy-five of this Act, it shall be sufficient to lay the property in Her Majesty, or in any person or corporation, in different counts in such indictment; and any variance in the latter case, between the statement in the indictment and the evidence adduced, may be amended at the trial; and if no owner is proved the indictment may be amended by laying the property in Her Majesty. R. S. C. c. 174, s. 124.

See under ss. 343 & 375, *ante*.

OFFENCES AS TO POSTAGE STAMPS, ETC.

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

See interpretation clause, s. 3.

INDICTMENTS UNDER SECTIONS 319-321.

623. In every case of theft or fraudulent application or disposition of any chattel, money or valuable security under sections three hundred and nineteen (e) and three hundred and twenty-one of this Act, the property in any such chattel, money or valuable security may, in any warrant by the justice of the peace before whom the offender is charged, and in the indictment preferred against such offender, be laid in Her Majesty, or in the municipality, as the case may be. R. S. C. c. 174, s. 126.

INDICTMENTS AS TO MAIL BAGS, ETC.

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

2. The property of any chattel or thing used or employed in the service of the post office, or of moneys arising from duties of postage, shall, except in the cases aforesaid, be laid in Her Majesty, if the same is the property of Her Majesty, or if the loss thereof would be borne by Her Majesty, and not by any person in his private capacity.

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

See ss. 3 and 4, *ante*, for interpretation of terms.

STEALING BY TENANT OR LODGER.

625. An indictment may be preferred against any person who steals any chattel let to be used by him in or with any house or lodging, or who steals any fixture so let to be used, in the same form as if the offender was not a tenant or lodger, and in either case the property may be laid in the owner or person letting to hire. R. S. C. c. 174, s. 127. 24-25 V. c. 96, s. 74 (Imp.).

See s. 322, *ante*.

JOINDER OF COUNTS. (*New*).

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

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

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

4. Provided that, unless there be special reasons, no order shall be made preventing the trial at the same time of any number of distinct charges of

theft not exceeding three, alleged to have been committed within six months from the first to the last of such offences, *whether against the same person or not.*

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

The proviso in s-s. 1 is new as statutory law, though in practice no count for any other offence was joined to a count for murder: *see* Theal v. R., 7 S. C. R. 397. The last words of s-s. 4 are also new law. Sub-section 5 extends to all offences a rule that applied exclusively to misdemeanours.

See form EE under s. 610, p. 673, *ante.*

In R. v. Jones, 2 Camp. 131, Lord Ellenborough said: "In point of law there is no objection to a man being tried on one indictment for several offences of the same sort. It is usual, in felonies, for the judge, *in his discretion*, to call upon the counsel for the prosecution to select one felony, and to confine themselves to that; but this practice has never been extended to misdemeanours."

In R. v. Benfield, 2 Burr. 980, an information against five for riot and libel had been filed, on which three of them were acquitted of the whole charge, and Benfield and Saunders found guilty of the libel. It was objected that several distinct defendants charged with several and distinct offences cannot be joined together in the same indictment or information, because the offence of one is not the offence of the others. But it was determined that several offences may be joined in one and the same indictment or information, if the offence wholly arises from such a joint act as is criminal in itself, without any regard to any particular default of the defendant which is peculiar to himself; as, for instance, it may be joint for keeping a gaming house, or for singing together a libellous song, but not for exercising a trade without having served an apprenticeship, because each trader's guilt must arise from a defect peculiar to himself, and 2 Hawk. 140 was said to be clear and express in this distinction.

In Young's case, 1 Leach, 511, Buller, J., said: "In misdemeanours the case in Burrow, R. v. Benfield, 2 Burr.

980, shews that it is no objection to an indictment that it contains several charges. The case of felonies admits of a different consideration; but even in such cases, it is no objection in this stage of the prosecution (writ of error). On the face of an indictment every count imports to be for a different offence, and is charged as at different times; and it does not appear on the record whether the offences are or are not distinct. But, if it appear before the defendant has pleaded or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in the challenge of the jury; for he might object to a juryman trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed. I did it at the last sessions at the Old Bailey, and hope that, in exercising that discretion, I did not infringe on any rule of law or justice. But, if the case has gone to the length of a verdict, it is no objection in arrest of judgment. If it were it would overturn every indictment which contains several counts."

In the case of R. v. Heywood, L. & C. 451, this decision in *Young's case* was followed by the court of crown cases reserved, and it was held, that, although it is no objection in point of law to an indictment that it charges the prisoner with *several different* felonies in different counts, yet, as matter of practice, a prisoner ought not, in general, to be charged with different felonies in different counts of an indictment; as, for instance, a murder in one count, and a burglary in another, or a burglary in the house of A. in one count, and a "distinct" burglary in the house of B. in another, or a larceny of the goods of A. in one count, and a "distinct" larceny of the goods of B. at a different time in another, because such a course of proceeding is calcu-

lated to embarrass the prisoner in his defence. And where it has been done, and an objection is taken to the indictment on that ground before the prisoner has pleaded or the jury are charged, the judge *in his discretion may* quash the indictment, or put the prosecutor to elect. But it is no objection in arrest of judgment, or on a writ of error. *See* s. 734 *post*. Thus, where an indictment charged the prisoner in three several counts with three several felonies in sending three separate threatening letters, Byles, J., compelled the prosecutor to elect upon which count he would proceed: R. v. Ward, 10 Cox, 42. And since different judgments are required, it seems that the joinder of a count for a felony with another for a misdemeanour, would be holden to be bad upon demurrer, or after a *general* verdict, upon motion in arrest of judgment: 1 Starkie, Cr. Pl. 43; 1 Stephen's Hist. 291. But now under s. 626, *ante*, that is not so.

So in R. v. Ferguson, Dears. 427, where the prisoner, having been indicted for a felony and a misdemeanour in two different counts of one indictment, and found guilty, not *generally*, but of the felony only, the prisoner moved in arrest of judgment, against the misjoinder of counts, the judge reserved the decision, and Lord Campbell, C.J., delivering the judgment of the court of Crown cases reserved said: "There is really no difficulty in the world in this case, and I must say that I regret that the learned recorder, for whom I have a great respect, should have thought it necessary to reserve it. The question is, whether the indictment was bad on account of an alleged misjoinder of counts. The prisoner was convicted on the count for felony only, and it is the same thing as if he had been convicted upon an indictment containing that single count; and it is allowed that there was abundant evidence to warrant that conviction. There is not the smallest pretense for the objection, that the indictment also contained a count for misdemeanour, and it does not admit of any argument."

So in R. v. Holman, L. & C. 177, where the prisoner was charged in an indictment by one count for embezzlement and the other for larceny as a bailee. At the close of the case for the prosecution it was objected that the indictment was bad for misjoinder of counts, and that the objection was fatal, although not taken till after plea pleaded and the jury had been charged; and, upon the court proposing to direct the counsel for the prosecution to elect on which count he would proceed, the prisoner's counsel further contended that the indictment was so absolutely bad that the election of counts was inadmissible.

The court directed the counsel for the prosecution to elect on which count he would proceed, reserving, at the request of the prisoner's counsel, the points raised by him as above stated for the consideration of the court for Crown cases reserved. The counsel for the prosecution elected to proceed on the second count, and upon that count the prisoner was convicted, and the conviction affirmed.

Where the defendant was indicted, in several counts, for stabbing with intent to murder, with intent to maim and disable, and with intent to do some grievous bodily harm, it was holden that the prosecutor was not bound to elect upon which count he would proceed, notwithstanding the judgment is by the statute different, being on the first count capital, and on the others transportation: R. v. Strange, 8 C. & P. 172; Archbold, 70.

When the enactment contained in s. 713, *post*, was in force in England, 7 Wm. IV. and 1 V. c. 85, s. 11, a prisoner was charged in one indictment with feloniously stabbing with intent—first, to murder; second to maim; third, to disfigure; fourth, to do some grievous bodily harm; to which was added a count for a common assault. The case was far advanced before the learned judge was aware of this, and at first he thought of stopping it; but as it was rather a serious one he left the case, without noticing the last count, to the jury, who (properly as the

learned judge thought upon the facts) convicted the prisoner; and the counsel for the prosecution then, being aware of the objection of misjoinder, requested that the verdict might be taken on the last count for felony, which was done accordingly; and this was held right by all the judges: R. v. Jones, 2 Moo. 94.

Here, in Canada, now, there is no objection to a count for a common assault, in an indictment for any offence where, under s. 713, the jury may find a verdict for the assault. But, of course, such a count is not necessary, as the jury may, in that case, convict of the assault without its being alleged in the indictment: *see* 1 Bishop's Cr. Proc. 446.

In any case not falling under s. 713 the prosecutor may be ordered to proceed on one of the counts only. If the defendant does not take the objection and allows the trial to proceed the conviction will be legal, if a verdict is taken *distinctly* on one of the counts. If a verdict is given of guilty generally, without specifying on which of the counts, the conviction will be held bad on motion in arrest of judgment, or in error. For how could the court know what sentence to give if it is not clear what offence the jury have found the prisoner guilty of. But s-s. 5 of s. 626 would seem to alter the law in this respect: *see* 1 Starkie, Cr. Pl. 43; R. v. Jones, 2 Moo. 94; R. v. Ferguson, Dears. 427; O'Connell v. R., 11 Cl. & F. 155.

Though in law the right to charge different felonies in one indictment cannot be denied, yet, in practice the court, in such a case, will always oblige the prosecutor to elect and proceed on one of the charges only: Dickinson's Quarter Sessions, 190.

But the same offence may be charged in different ways, in different counts of the same indictment, to meet the several aspects which it is apprehended the case may assume in evidence, or in which it may be seen in point of law, and it is said in Archbold, p. 72: "Although a prose-

cutor is not, in general, permitted to charge a defendant with different felonies in different counts, yet he may charge the same felony in different ways in several counts in order to meet the facts of the case; as, for instance, if there be a doubt whether the goods stolen, or the house in which a burglary or larceny was committed, be the goods or house of A. or B., they may be stated in one count as the goods or house of A., and in another as the goods or house of B.: *see* R. v. Egginton, 2 B. & P. 508; R. v. Austin, 7 C. & P. 796. And the verdict may be taken generally on the whole indictment: R. v. Downing, 1 Den. 52. But, inasmuch as the word 'felony' is not *nomen collectivum* (as 'misdemeanour' is: *see* Ryalls v. R., 11 Q. B. 781, 795), if the verdict and judgment, in such case, be against the defendant for 'the felony aforesaid,' it will be bad unless the verdict and judgment be warranted by each count of the indictment": Campbell v. R., 11 Q. B. 799, 814; *see* 1 Bishop's Cr. Proc. 449.

In R. v. Sterne, 1 Leach, 473, 2 East P. C. 701, the defendant was charged in two counts with two distinct felonies on the same facts, and found guilty of a third one that was included in those charged. In R. v. Audley (Lord), 3 St. Tr. 401, the prisoner was tried at the same time upon three indictments for three different felonies: *see* also R. v. Kershaw, 1 Lewin, 218; R. v. School, 26 U. C. Q. B. 212.

Indictments for misdemeanours may contain several counts for different offences, and, as it seems, though the judgments upon each be different: Young v. R., 3 T. R. 98, 105, 106; R. v. Towle, 2 Marsh. 466; R. v. Johnson, 3 M. & S. 539; R. v. Kingston, 8 East, 41; and *see* R. v. Benfield, 2 Burr. 980; R. v. Jones, 2 Camp. 131; Dickinson's Q. S. 190; Starkie's Cr. Pl. 43; R. v. Davies, 5 Cox, 328. Even where several different persons were charged in different counts with offences of the same nature, the court held that it was no ground for a demurrer, though it might be for an application to the discretion of the court to quash the

indictment: R. v. Kingston, 8 East, 41. Where two defendants were indicted for a conspiracy and a libel, and at the close of the case for the prosecution, there was evidence against both as to the conspiracy but against one only as to the libel, the judge then put the prosecutor to elect which charge he would proceed upon: R. v. Murphy, 8 C. & P. 297. On an indictment for conspiracy to defraud by making false lists of goods destroyed by fire, one set of counts related to a fire in June, 1864, and another to a fire in November, 1864. The prosecution was compelled to elect which charge of conspiracy should be first tried, and to confine the evidence wholly to that in the first instance: R. v. Barry, 4 F. & F. 389. And on an indictment against the manager and secretary of a joint-stock bank, containing many counts, some charging that the defendants concurred in publishing false statements of the affairs of the bank, and others that they conspired together to do so, the prosecutors were put to elect on which set of counts they would rely: R. v. Burch, 4 F. & F. 407.

If there be several offenders that commit the same offence, as if several commit a robbery, or burglary, or murder, they may be joined in one indictment. And for separate offences of the same nature several persons may be indicted in the same indictment if they are indicted *separaliter*, severally, so that twenty persons may be indicted for keeping twenty different disorderly houses; 2 Hale, 173. In fact, formerly, in the criminal courts, there was only one indictment against all the prisoners; the jury at the end of the day retired and considered all the cases they had heard during the day, and then gave all the verdicts in the different cases together; *per* Denman, C.J., in R. v. Newton, 3 Cox, 492; and *per* Alderson, B., in R. v. Downing, 1 Den. 52.

Counts for different misdemeanours on which the judgment is of the same nature may be joined in the same indictment, and on such counts judgment may, and indeed

ought to be, separately entered: R. v. Orton, 14 Cox, 436, 546; R. v. Bradlaugh, 15 Cox, 217.

Counts for different misdemeanours of the same class may be joined in the same indictment: R. v. Abrahams, 24 L. C. J. 325.

Although, in general, it is not permitted to include two different felonies under different counts of an indictment, yet the same offence may be charged in different ways in different counts of the same indictment. Thus, in the first count the accused may be charged with having stolen wood belonging to A., and in another with having stolen wood belonging to B.: R. v. Falkner, 7 R. L. 544.

If an assault is on two or more persons, or if by one act any one steals various articles, whether belonging to the same person or the property of two or more persons, or kills or wounds more than one, the offence may be charged as one in the indictment, in the same count: R. v. Benfield, 2 Burr. 980; form in 3 Chit. 823. Though it may also, perhaps, be charged in different indictments; *see* cases under s. 632 *post*. *See* R. v. Devett, 8 C. & P. 639; R. v. Giddins, Car. & M. 634; R. v. Fuller, 1 B. & P. 180; Latham v. R., 9 Cox, 516.

Sub-section 4 of s. 626 is a reproduction of ss. 111 & 134, c. 174, R. S. C. 24 & 25 V. c. 96, ss. 6, 71 (Imp.).

The word "month" therein means a calendar month: Interpretation Act, c. 1, Rev. Stat.

Section 202, c. 174, R. S. C. has not been re-enacted, so that the indictment, now, must charge three acts of stealing. That s. 202 allowed the proof of three acts of stealing where the indictment charged only one.

The effect of this legislation is to restrain the power of the court with respect to the doctrine of election. The court cannot, unless there be special reasons, put the prosecutor to his election where the indictment charges three acts of larceny within six months. But on the other hand, the

court is not bound to put the prosecutor to his election in other cases, but is left to its discretion, according to the old practice.

By means of a secret junction pipe with the main of a gas company, a mill was supplied with gas, which did not pass through the gas meter, and which was consumed without being paid for. This continued to be done for some years. *Held*, on an indictment for stealing 1,000 cubic feet of gas on a particular day, the entire evidence might be given, as there was one continuous act of stealing all the time, and that s. 6 of the Imperial Larceny Act, s. 202, of c. 174, R. C. S. as to the prosecutor electing on three separate takings within six months, did not apply: R. v. Firth, 11 Cox, 234.

An indictment charged an assistant to a photographer with stealing on a certain day divers articles belonging to his employer. It did not appear when the articles were taken, whether at one or more times, but only that they were found in the prisoner's possession on the 17th of January, 1870, and that one particular article could not have been taken before March, 1868, but the prosecution abandoned the case as to this article: *Held*, that this was not a case in which the prosecutor should be put to elect upon which taking to proceed: R. v. Henwood, 11 Cox, 526.

When it appears by the evidence that the felonious receiving was one continuous act during a certain period of time, extending over two years, the court will not compel the prosecutor to elect, even if it be proved that some of the articles received by the accused were so received at divers fixed dates extending over more than six months, and on more than three occasions: R. v. Suprani, 13 R. L. 577, 6 L. N. 269.

It seems that, where three acts of larceny are charged in separate counts there may also be three counts for

receiving: R. v. Heywood, L. & C. 451. There is no doubt of that under this Code.

Greaves says: "It frequently happened before this statute passed, that a servant or clerk stole sundry articles of small value from his master at different times, and in such a case it was necessary to prefer separate indictments for each distinct act of stealing, and on the trial it not seldom happened that the jury, having their attention confined to the theft of a single article of small value, improperly acquitted the prisoner on one or more indictments. The present section remedies these inconveniences, and places several larcenies from the same person in the same position as several embezzlements of the property of the same person, so that the prosecutor may now include three larcenies of his property committed within the space of six calendar months in the same indictment": Lord Campbell's Acts, by Greaves, 19.

The indictment need not charge that the subsequent larcenies were committed within six months after the commission of the first: R. v. Heywood, L. & C. 451. And it is not necessary, now, that the three acts of stealing should be from the same person.

JOINDER OF DEFENDANTS—SEPARATE TRIALS.

Two parties accused of the same offence on the same indictment are not entitled as of right to a separate defence either in felonies or misdemeanours: R. v. McConohy, 5 R. L. 746.

In R. v. Littlechild, L. R. 6 Q. B. 293, it was held that it is in the discretion of the court to grant a separate trial or not.

In R. v. Gravel (*Montreal, Q. B. March, 1877,*) for subornation of perjury, separate trials were refused, Ramsay, J. In R. v. Bradlaugh, 15 Cox, 217, for libels, separate trials were granted. Where several persons are jointly indicted the judge will not allow a separate trial on the

ground that the depositions disclose statements and confessions made by one prisoner implicating another which are calculated to prejudice the jury, and that there is no legal evidence disclosed against the other prisoner: R. v. Blackburn, 6 Cox, 333.

The prosecution has always a right to a separate trial: 1 Bishop, Cr. Proc. 1034; 2 Hawk. c. 41, par. 8.

See, on the question, 1 Chit. C. L. 535; 1 Starkie, Cr. Pl. 36; 1 Bishop, Cr. Proc. 463, 1018; 1 Wharton, 433; R. v. Payne, 12 Cox, 118; O'Connell v. R., 11 Cl. & F. 155.

For conspiracy and riot there can be no severance of trial: 1 Wharton, 434; Starkie's Cr. Pl. 26, *et seq.*

Each count must by itself disclose an offence, and the allegations in one count cannot help the other counts: R. v. Samuels, 16 R. L. 576.

ACCESSORIES AFTER THE FACT AND RECEIVERS. (*Amended*).

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

2. When any property has been stolen any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive offences in the same indictment, and may be tried together, whether the person by whom the property was so obtained is or is not indicted with them, or is or is not in custody or amenable to justice. R. S. C. c. 174, ss. 133, 136 & 138. 24-25 V. c. 96, ss. 6, 91 & 93 (Imp.).

See ss. 63, 314, 531, & 532, *ante*; also, ss. 715, 716, & 717, *post*, as to trial of receivers. This enactment does not seem to apply to the receiving of property obtained by false pretenses.

AFTER A PREVIOUS CONVICTION.

628. In any indictment for any indictable offence, committed after a previous conviction or convictions for any indictable offence or offences or for any offence or offences (and for which a greater punishment may be inflicted on that account), it shall be sufficient, after charging the subsequent offence, to

state that the offender was at a certain time and place, or at certain times and places, convicted of an indictable offence, or of an offence or offences, as the case may be, *and to state the substance and effect only, omitting the formal part of the indictment and conviction, or of the summary conviction, as the case may be, for the previous offence*, without otherwise describing the previous offence or offences. R. S. C. c. 174, s. 130

See s. 676, *post*, as to trial, and s. 694 as to proof.

This clause is taken from s. 116 of the English Larceny Act, 24 & 25 V. c. 96, s. 37 of the English Coin Act, 24 & 25 V. c. 99, and of s. 9, 34 & 35 V. c. 112. The words in *italics* are not in s. 116 of the English Larceny Act but are in s. 37 of the Coin Act. They clearly take away the necessity, before existing, of setting out at length the previous indictment, etc., and of giving in evidence a copy of that indictment.

"The proceedings on the arraignment and trial are to be as follows; (*see* s. 676, *post*):

"The defendant is first to be arraigned on that part only of the indictment which charges the subsequent offence; that is to say, he is to be asked whether he be guilty or not guilty of that offence. If he plead not guilty, or if the court order a plea of not guilty to be entered for him, then the jury are to be charged in the first instance to try the subsequent offence only. If they acquit of that offence the case is at an end; but if they find him guilty of the subsequent offence, or if he plead guilty to it on arraignment, then the defendant is to be asked whether he has been previously convicted as alleged, and if he admit that he has he may be sentenced accordingly; but if he deny it, or stand mute of malice, or will not answer directly to such question, then the jury are to be charged to try whether he has been so previously convicted, and this may be done without swearing them again, and then the previous conviction is to be proved in the same manner as before this Act passed."

"The proviso as to giving evidence of the previous conviction if the prisoner gives evidence of his good character remains unaltered": Greaves' *note*.

See R. v. Martin, 11 Cox, 343; R. v. Thomas, 13 Cox, 52; R. v. Harley, 8 L. C. J. 280; form of indictment under s. 337, p. 379 *ante*, and Greaves' *note*, in 2nd edit. of this work, p. 754.

In R. v. Clark, Dears. 198, it was held that any number of previous convictions may be alleged in the same indictment, and, if necessary, proved against the prisoner; by the aforesaid section this is undoubtedly also allowed.

In R. v. Fox, 10 Cox, 502, upon a writ of error by the Crown to increase the sentence, the Irish court of criminal appeal perceived that it appeared from the record that the provisions of s. 116 of the Larceny Act, under which the indictment had been tried, as to the arraigning of the prisoner, etc., had been neglected, and, thereupon, quashed the conviction.

In R. v. Spencer, 1 C. & K. 159, it was held that the indictment need not state the judgment, but the introduction of the words given in italics *supra*, in clause 628, seems to require the statement of the judgment. It will certainly be more prudent to allege it.

The certificate, s. 694, must state that judgment was given for the previous offence and not merely that the prisoner was convicted: R. v. Ackroyd, 1 C. & K. 158; R. v. Stonnell, 1 Cox, 142; for the judgment might have been arrested, and the statute says the certificate is to contain the substance and *effect* of the indictment and conviction for the previous offence; until the sentence there is no perfect conviction.

At common law a subsequent offence is not punishable more severely than a first offence; it is only when a statute declares that a punishment may be greater after a previous conviction that this clause 628 applies. So in an indictment for a misdemeanour, as for obtaining money by false pretenses, a previous conviction for felony cannot be charged: R. v. Garland, 11 Cox, 224. And then this clause does not prevent the prosecution from disregarding, if it chooses, the

fact of a previous conviction and from proceeding as for a first offence. But the court cannot take any notice of a previous conviction, unless it were alleged in the indictment and duly proved on the trial, for giving a greater punishment than allowed by law for the first offence: R. v. Summers, 11 Cox, 248; R. v. Willis, 12 Cox, 192.

To complete the proof required on a previous conviction charged in the indictment, when the prisoner does not admit it, it must be proved that he is the same person that is mentioned in the certificate produced, but it is not necessary for this to call any witness that was present at the former trial; it is sufficient to prove that the defendant is the person who underwent the sentence mentioned in the certificate: R. v. Crofts, 9 C. & P. 219; 2 Russ. 322.

By s. 676, *post*, it is enacted that if upon such a trial for a subsequent offence, the defendant gives evidence of his good character, it shall be lawful for the prosecutor to give in reply evidence of the previous conviction before the verdict on the subsequent offence is returned, and then the previous conviction forms part of the case for the jury on the subsequent offence.

It has been held on this proviso that if the prisoner cross-examines the prosecution's witnesses, to show that he has a good character, the previous conviction may be proved in reply: R. v. Gadbury, 8 C. & P. 676.

This doctrine was confirmed in R. v. Shrimpton, 2 Den. 319, where Lord Campbell, C.J., delivering the judgment of the court, said: "It seems to me to be the natural and necessary interpretation to be put upon the words of the proviso in the statute, that if, whether by himself or by his counsel, the prisoner attempts to prove a good character, either directly, by calling witnesses, or indirectly, by cross-examining the witnesses for the Crown, it is lawful for the prosecutor to give the previous conviction in evidence for the consideration of the jury." In the course of the argument Lord Campbell said that, however, he would not admit

evidence of a previous conviction if a witness for the prosecution, being asked by the prisoner's counsel some question which has no reference to character, should happen to say something favourable to the prisoner's character.

It is said in 2 Russ. 354: "It is obvious, that where the prisoner gives evidence of his good character the proper course is for the prosecutor to require the officer of the court to charge the jury with the previous conviction, and then to put in the certificate and prove the identity of the prisoner in the usual way. If the prisoner gives such evidence during the course of the case for the prosecution then this should be done before the case for the prosecution closes; but if the evidence of character is given after the case for the prosecution closes then the previous conviction must be proved in reply." *See* s. 952, *post*, as to punishment in certain cases.

PRELIMINARY OBJECTIONS TO INDICTMENT. (*Amended*).

629. Every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded, and not afterwards, *except by leave of the court or judge before whom the trial takes place*, and every court before which any such objection is taken may, if it is thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared; and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of this Act. R. S. C. c. 174, s. 143.

The words in italics are new and, it seems, relate to an objection taken at the *trial*, and must be read in connection with s. 723, *post*. S. 733, *post*, gives the right to move in arrest of judgment when the indictment (*as amended, when amended*) does not charge an indictable offence. "Indictment" defined, s. 3, and includes pleas: *see* R. v. Creighton, 19 O. R. 389. When should a motion to quash be made? R. v. Chapple, 17 Cox, 455. That case, however, only applies to defects that are cured by verdict: *see* R. v. Howes, 5 Man. L. R. 339.

"It may be observed, that as the power to amend is vested entirely in the *discretion* of the courts, a case can-

not be reserved under the 11 & 12 V. c. 78 (establishing the court of Crown cases reserved), as to the propriety of making an amendment, as that statute only authorizes the reservation of 'a question of law.' If, however, a case should arise in which the question was, whether the court had *jurisdiction* to make a particular amendment—in other words, whether a particular amendment fell within the terms of the statute, there the court might reserve a case for the opinion of the judges as to that point, as that would clearly be a mere question of law": Lord Campbell's Acts, by Greaves, p. 2.

The Imperial statute, from which this clause is taken, reads as follows:

"Every objection to any indictment for any *formal* defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictment *before the jury shall be sworn*, and not afterwards; and every court before which any such objection shall be taken *for any formal defect* may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared": 14 & 15 V. c. 100, s. 25.

Greaves says on this clause: "Under this section all formal objections *must* be taken before the jury are sworn. They are no longer open upon a motion in arrest of judgment or on error. By the common law many formal defects were amendable: *see* 1 Chit. 297, and the cases there cited; and it has been the common practice for the grand jury to consent, at the time they were sworn, that the court should amend matters of form. The power of amendment, therefore, given in express terms by this section, seems to be no additional power, but rather the revival of a power that had rarely, if ever, been exercised of late years."

A motion for arrest of judgment will always avail to the defendant for defects apparent on the face of the indictment, when these defects are such that thereby no offence in law appears charged against the defendant: R. v. Lynch, 20 L. C. J. 187; s. 733, *post*. Such an indictment cannot be aided by verdict, and such defects are not cured by verdict. As said in R. v. Waters, 1 Den. 356: "There is a difference between an indictment which is bad for charging an act which as laid is no crime and an indictment which is bad for charging a crime defectively; the latter may be aided by verdict, the former cannot."

If the indictment charges no offence there can be no waiver of the objection to it. It is void. Even where a statute requires the objection to be taken at an early stage, or not at all, a conviction on such a defective indictment cannot be sustained. *See* R. v. Montminy, p. 677, *ante*.

Defects in matters of substance are not amendable, so if a material averment is omitted the court cannot allow the amendment of the indictment by inserting it, for the very good reason that if there is an omission of a material averment, of an averment without which there is no offence known to the law charged against the defendant, then, strictly speaking, there is no indictment; there is nothing to amend.

In a criminal charge *there is no latitude of intention* to include anything more than is charged; the charge must be explicit enough to support itself. *Per* Lord Mansfield, in R. v. Wheatly, 2 Burr. 1127.

The court cannot look to what the prosecutor intended to charge the defendant with; it can only look to what he has charged him with. And this charge, fully and clearly defined, of a crime or offence known to the law, the indictment as returned by the grand jury must contain. If the indictment as found by the grand jury does not contain such a charge, the defect is fatal; if the grand jury has not charged the defendant with a crime it will not be

allowed, at a later period of the case, to amend the indictment so as to make it charge one. (Subject now to amendments at the trial under s. 723, *post.*)

It must not be forgotten that when the clerk of the court, on the grand jury returning the bill, asked them to agree that the court should amend matters of form in the indictment, the grand jury gave their assent, but on the express condition that no matter of substance should be altered. Who are the accusers on an indictment? The grand jury, and to their accusation only has the prisoner to answer. This accusation cannot be changed into another one, at any time, without the consent of the accuser: 1 Chit. 298, 324. And if they have brought against the prisoner an accusation of an offence not known in law the court cannot turn it into an offence known in law by *adding* to the indictment.

This section, though the word "formal" is not in it as in the English Act, must be interpreted as obliging the defendant to demur or move to quash before joining issue for defects apparent on the face of the indictment, *which the court has the power to amend.* In cases where the court has not the power to amend the defect or omission the motion for arrest of judgment will avail to the defendant as heretofore. And this clause itself supposes cases where the court has not the power to amend, when it says that: "No motion in arrest for judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority *of this Act,*" giving it clearly to be understood that a "motion for arrest of judgment shall be allowed for any defect in the indictment which could not have been taken advantage of by demurrer or amended under the authority *of this Act,*" leaving the question reduced to: *What are the amendments allowed under the authority of this Act?* Which can be, it seems, very easily answered. Of course this clause has no reference to the amendments allowed *on*

the trial, by s. 723, *post*. Then the only other clause in the Act relating to amendments is this s. 629. And it does not authorize amendments in matters of substance or material to the issue. For instance, heretofore if the word "feloniously" in an indictment for felony had been omitted the court could not allow its insertion. This would have been *adding* to the offence charged by the grand jury, and a change of its nature and gravity. *See* note (*a*) by Greaves, 1 Russ. 935; R. v. Gray, L. & C. 365.

And in an indictment intended to be for burglary the word "burglariously," if omitted, could not have been inserted by amendment. It would have been charging the defendant with burglary, when the grand jury had not charged him with that offence. And in England, in an indictment intended to be for murder, if it is barely alleged that the mortal stroke was given feloniously, or that the defendant *murdered*, etc., without adding *of malice aforethought*, or if it only charges that he *killed* or *slew* without averring that he *murdered* the deceased, the defendant can only be convicted of manslaughter: 1 East, P. C. 345; 1 Chit. 243; 3 Chit. 737, 751. And why? Because the offence charged is manslaughter, not murder. And the court has not the power by any amendment to try for *murder* a defendant whom the grand jury has charged with *manslaughter*.

And even in the case of a misdemeanour, on an indictment for obtaining money by false pretenses, if the words "*with intent to defraud*" are omitted in the indictment there is no offence charged, and the court cannot allow their insertion by amendment: R. v. James, 12 Cox, 127, *per* Lush, J. *See* now form under s. 611, *ante*. So if a statute makes it an offence to do an act "wilfully" or "maliciously" the indictment is bad if it does not contain these words: R. v. Bent, 1 Den. 157; R. v. Ryan, 2 Moo. 15; R. v. Turner, 1 Moo. 239; it does not charge the defendant with a crime. An amendment which alters the

nature and quality of the offence will not be made: R. v. Wright, 2 F. & F. 320.

And whether the defendant takes advantage of an objection of this nature, or not, makes no difference. Nay, even after verdict, even without a motion in arrest of judgment, the court is obliged to arrest the judgment if the indictment is insufficient: R. v. Wheatly, 2 Burr. 1127; 1 Chit. 303; R. v. Turner, 1 Moo. 239; R. v. Webb, 1 Den. 338; *see* also Sill's Case, Dears. 132.

These omissions are not *defects* in the sense of this word as used in this section; they make the indictment no indictment at all, or, at least, the indictment charges the defendant with no crime or offence.

On these principles the Court of Queen's Bench, in Quebec, decided R. v. Carr, 26 L. C. J. 61.

In that case the indictment was under s. 10, of c. 20, 32 & 33 V., now s. 232, *ante*, for an attempt to murder. A verdict of guilty was given, but the court being of opinion that the indictment was defective on its face, and that words material to the constitution of the offence charged were omitted therein, granted a motion to arrest the judgment and quash the indictment, though the prosecutor invoked s. 32 of the Act then in force, now s. 629, *ante*, and contended that the prisoner was too late to take the objection.

Section 629 leaves the law of amendments what it is at common law. It leaves to the judge the discretion of allowing or refusing the amendment, and in matter of substance no such amendment can be allowed. An irregularity may be amendable, but a nullity is incurable, and it has been held that the court itself, *ex proprio motu*, will refuse to try an indictment on which plainly no good judgment can be rendered: R. v. Tremearne, R. & M. 147; R. v. Deacon, R. & M. 27.

The ruling in the case of R. v. Mason, 22 U. C. C. P. 246, is not a contrary decision. The concluding remarks

of Gwynne, J., show that the court in that case did not hold that no arrest of judgment or reversal on error should, *in any case*, be granted for *any* defect *whatever* in the indictment apparent on the face thereof. What can be gathered from these remarks, taken together with those of Hagarty, C.J., is, that it was there held that the objections taken would not have been good grounds of demurrer, or that if they had been raised by demurrer the court would have had the power to amend the indictment in such particulars, and that, therefore, the defendant was too late to raise these objections after verdict. And this ruling was perfectly right.

As remarked, *ante*, if the defect is one which the court could amend the objection must be taken *in limine litis*; a plea of not guilty may then be a waiver of the right to take advantage of such a defect. But if the indictment is defective in a matter of substance a plea of not guilty is no waiver. Nay, more, a plea of guilty is no waiver, and does not prevent the defendant from taking exceptions in arrest of judgment to defects apparent on the record: 1 Chit. 431; 2 Hawk. 466; R. v. Brown, 24 Q. B. D. 357. The court, as said before, cannot allow an amendment adding, for instance, to the offence charged, or having the effect to make the indictment charge an offence where none, in law, was charged, or to change the nature of the offence charged by the grand jury, and the statute obliges to demur or move to quash before plea only for objections based on *amendable* defects.

It is true, as remarked by one of the learned judges in R. v. Mason, that the last part of this clause of our statute, taking away, in express words, the motion in arrest of judgment, is not in the Imperial statute; but it will be seen, *ante*, that Mr. Greaves, who framed the English clause, is of opinion that even without these words it has the same effect; the words, *and not afterwards*, in the English Act, cannot be interpreted otherwise: *see* s. 738, *post*.

Another difference between the two Acts consists in the words, *before the defendant has pleaded*, in the Canadian Act, instead of, *before the jury shall be sworn*, in the English one. This is not an important change, however. In all cases a demurrer must be pleaded before the plea of "not guilty," though the same may not strictly be said of the motion to quash: R. v. Heane, 9 Cox, 433. And the judge may allow a plea of "not guilty" to be withdrawn in order to give the defendant his right to demur or move to quash for any substantial defect. *See* cases under s. 657, *post*.

Greaves' Note, MSS., on the foregoing remarks as contained in first edition: "I altogether concur in the remarks on the omission of 'formal' before 'defect' in the 14 & 15 V. c. 100, s. 25. If construed according to the terms under the new clause a man might be hanged for what was really no crime, because he was too ignorant to perceive the defect in the *statement of the offence* in due time."

If the indictment does not charge any offence the court cannot amend it so as to make it charge an offence: R. v. Norton, 16 Cox, 59; *see* R. v. Flynn, 2 P. & B. (N.B.) 321.

Indictments may be signed by the clerk of the crown, or by a counsel prosecuting for the crown "for and in the name of the Attorney-General of the province": R. v. Grant, 2 L. C. L. J. 276; R. v. Downey, 13 L. C. J. 193; R. v. Ouellette, 7 R.L. 222; R. v. Regnier, Ramsay's App. Cas. 188.

A defective indictment may be quashed on motion as well as on demurrer: R. v. Bathgate, 13 L. C. J. 299: *see* R. v. Ryland, L. R. 1 C. C. R. 99; R. v. Belyea, James (N.S.) 220.

Everything that is necessary to constitute the offence must be alleged in the indictment: R. v. Bourdon, 2 R. L. 713. *See* Bishop, 1 Cr. Proc. 98, 124.

On an indictment for defrauding a bank the indictment was amended by adding the words "a body corporate": R. v. Paquet, 2 L. N. 140.

Defendant was indicted as mistress of a certain girl called *Marie*. At the trial the indictment was amended by striking out that she was such mistress, and inserting the girl's right name: R. v. Bissonette, 23 L. C. J. 249. *See* also R. v. Leonard, 3 L. N. 138.

An indictment for perjury, based on an oath alleged to have been made before the "judge of the general sessions of the peace in and for the said district" instead of "before the judge of the sessions of the peace in and for the city of Montreal," may be amended after plea: R. v. Pelletier, 15 L. C. J. 146.

It is not a misjoinder of counts to add allegations of a previous conviction for misdemeanour as counts to a count for larceny; and the question, at all events, can only be raised by demurrer or motion to quash the indictment, under 32 & 33 V. c. 29, s. 32, s. 629, *ante*. And where there has been a demurrer to such allegations as insufficient in law, and judgment in favour of the prisoner, but he is convicted on the felony count, a court of error will not re-open the matter on the suggestion that there is a misjoinder of counts: where a prisoner arraigned on such an indictment pleads "not guilty" and is tried at a subsequent assize when the count for larceny only is read to the jury: *Held* no error, as the prisoner was given in charge on the larceny count only: R. v. Mason, 22 U. C. C. P. 246.

Defendant was convicted on an indictment charging him with feloniously receiving goods of three different persons (naming them) knowing the same to have been feloniously stolen: *held*, that the defendant, having pleaded to the indictment, could not, in arrest of judgment, object that it was bad as charging him with receiving goods not alleged to have been feloniously stolen, as the defect was aided by the verdict under the Act of 1869, c. 29, s. 32, and the fact of three different offences being charged in the indictment, if objectionable at all, could not be taken advantage of after verdict. An order for an extra jury panel under R. S. (N. S.)

3d Ser., c. 92, s. 37, is valid although not signed by a majority of the judges: R. v. Quinn, 1 R. & G. (N. S.) 139.

An indictment charged that the prisoner did steal, take and carry away, etc., without charging that it was done feloniously. Before pleading the prisoner's counsel moved to quash the indictment. After argument the presiding judge allowed the indictment to be amended, under 32 & 33 V. c. 20, s. 32, s. 629, *ante*, by adding the word "feloniously." The prisoner was found guilty upon the amended indictment.

Held, on a case reserved, that the indictment without the word *feloniously* was bad and that it was not amendable under the said section: R. v. Morrison, 2 P. & B. (N. B.) 682; *see* R. v. Flynn, 2 P. & B. (N. B.) 321.

TIME TO PLEAD.

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

See ss. 757, 758, 759, *post*, on special enactments for Ontario.

Formerly, it was always the practice in felonies to try the defendant at the same assizes: 1 Chit. C. L. 483; but it was not customary nor agreeable to the general course of proceedings, unless by consent of the parties, or where the defendant was in gaol, to try persons indicted for misdemeanours during the same term in which they had pleaded not guilty or traversed the indictment: 4 Blacks. 351.

Traverse took its name from the French *de travers*, which is no other than *de transverso* in Latin, signifying *on the other side;* because as the indictment on the one side chargeth the party, so he, on the other side, cometh in to discharge himself.

The word *traverse* is only applied to an issue taken upon an indictment for a misdemeanour; and it should rather seem applicable to the fact of putting off the trial till a following sessions or assizes, then to the joining of the issue; and therefore, perhaps, the derivation is from the meaning of the word *transverto*, which, in barbarous Latin, is to go over, *i. e.*, to go from one sessions, etc., to another, and thus it is that the officer of the court asks the party whether he be ready to try then, or will traverse over to the next sessions, etc., but the issue is joined immediately by pleading not guilty: 5 Burn, 1019.

To *traverse* properly signifies the general issue or plea of *not guilty:* 4 Stephens' Comm. 419.

To *imparl* is to have license to settle a litigation amicably, to obtain delay for adjustment: Wharton's Law Lexicon, *verbo* "*imparl.*"

The above s. 630 is taken from the 60 Geo. III. & 1 Geo. IV. c. 4, ss. 1 & 2, and the 14 & 15 V. c. 100, s. 27.

On the 14 & 15 V. c. 100, s. 27, Greaves says:—

"This section is intended wholly to do away with traverses, which were found to occasion much injustice. A malicious prosecutor could formerly get a bill for any frivolous assault found by the grand jury, and cause the defendant to be apprehended during the sitting of the court; and then he was obliged to traverse till the next session or assizes, as he could not compel the prosecutor to try the case at the sessions or assizes at which the bill was found. This led to the expense of the traverse-book and sundry fees, which operated as a great hardship on the defendant, not unfrequently an innocent person. Again, the defendant,

in many instances, has been able to turn his right to traverse into a means of improperly putting the prosecutor to expense and inconvenience. The intention of the section is to abolish traverses altogether, and to put misdemeanours precisely on the same footing in this respect as felonies. In felonies, the prisoner has no right to postpone his trial, but the court, on proper grounds, will always postpone the trial. Under this section, therefore, no defendant in a case of misdemeanour can insist on postponing his trial; but the court in any case, upon proper grounds being adduced, not only may, but ought to, order the trial to be postponed. If, therefore, a witness be absent, or ill, or there has not been reasonably sufficient time for the defendant to prepare for his defence, or there exist any other ground for believing that the ends of justice will be better answered by the trial taking place at a future period, the court would exercise a very sound discretion in postponing the trial accordingly."

There are several cases in which, upon a proper application, the court will put off the trial. And it has been laid down that no crime is so great, and no proceedings so instantaneous, but that the trial may be put off if sufficient reasons are adduced to support the application; but to grant a postponement of a trial on the ground of the absence of witnesses, three conditions are necessary; 1st, the court must be satisfied that the absent witnesses are material witnesses in the case; 2nd, it must be shown that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses; and, 3rd, the court must be satisfied that there is a reasonable expectation that the attendance of the witnesses can be procured at the future time to which it is prayed to put off the trial: R. v. D'Eon, 3 Burr. 1514.

But if an affidavit is given that, on cross-examination, one of the absent witnesses for the prosecution who has been bound over to appear can give material evidence for

the prisoner, this is sufficient ground for postponing the trial, without showing that the defence has made any endeavour to procure this witness's attendance as the prisoner was justified in believing that, being bound over, the witness would be present: R. v. Macarthy, Car. & M. 625.

In R. v. Savage, 1 C. & K. 75, the court required an affidavit stating what points the absent witness was expected to prove, so as to form an opinion as to the witness being material or not.

The party making an application to postpone a trial, on the ground of the absence of a witness, is not bound in his affidavit to disclose all that the absent witness can testify to, but he must show that the absent witness is likely to prove some fact which may be allowed to go to the jury; he must also show the probability of having the witness at a later term: R. v. Dougall, 18 L. C. J. 85.

The court will postpone until the next assizes the trial of a prisoner charged with murder, on an affidavit by his mother that she would be enabled to prove by several witnesses that he was of unsound mind, and that she and her family were in extreme poverty, and had been unable to procure the means to produce such witnesses, and that she had reason to believe that if time were given to her the requisite funds would be provided: R. v. Langhurst, 10 Cox, 353.

But the affidavit of the prisoner's attorney, setting forth the information he had received from the mother, is insufficient: *Idem.*

Upon an indictment for a murder recently committed the court will postpone the trial, upon the affidavit of the prisoner's attorney that he had not had sufficient time to prepare for the defence, the affidavit suggesting the possibility of a good ground of defence: R. v. Taylor, 11 Cox, 340.

If the application is made by the defendant, he shall be remanded and detained in custody until the next assizes or sessions; but where the application is made by the prosecutor, it is in the discretion of the court either, on consideration of the circumstances of each particular case, to detain the defendant in custody, or admit him to bail, or to discharge him on his own recognizance: R. v. Beardmore, 7 C. & P. 497; R. v. Parish, 7 C. & P. 782; R. v. Osborn, 7 C. & P. 799; R. v. Bridgman, Car. & M. 271. But, as a general rule, after a bill has been found, if the offence be of a serious nature, the court will not admit the prisoner to bail: R. v. Chapman, 8 C. & P. 558; R. v. Guttridge, 9 C. & P. 228; R. v. Owen, 9 C. & P. 83; R. v. Bowen, 9 C. & P. 509; 5 Burn, 1032.

The production of fresh evidence on behalf of the prosecution (not known or forthcoming at the preliminary investigation, and not communicated to the defence a reasonable time before the trial) may be a ground for postponing the trial, on the request of the defence, if it appears necessary to justice: R. v. Flannagan, 15 Cox, 403.

On the finding of an indictment for perjury application was made for defendant to appear by counsel and plead: *Held*, that he should submit to the jurisdiction of the court, and appear himself, before he can be allowed to take any proceedings therein: R. v. Maxwell, 10 L. C. R. 45.

AUTREFOIS ACQUIT, ETC. (*Amended*).

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

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

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

4. In any plea of *autrefois acquit* or *autrefois convict* it shall be sufficient for the accused to state that he has been lawfully acquitted or convicted, as

the case may be, of the offence charged in the count or counts to which such plea is pleaded, indicating the time and place of such acquittal, or conviction. R. S. C. c. 174, s. 146.

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

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

632. On the trial of an issue on a plea of *autrefois acquit* or *convict* the depositions transmitted to the court on the former trial, *together with the judge's and official stenographer's notes if available*, and the depositions transmitted to the court on the subsequent charge, shall be admissible in evidence to prove or disprove the identity of the charges. *See* ss. 694 & 726, *post*.

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

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

The words in italics in the fifth line of s-s. 5 of s. 631 and in the second line of s. 632 are new. Section 633 seems open to a construction that would make it an extension of the law. Sections 799, 821, 866 & 969, *post*, contain enactments on acquittals or convictions in special cases as a bar to all further proceedings for the same cause.

Sub-section 4 of s. 631 is taken from the 14 & 15 V. c. 100, s. 28, of the Imperial Statutes.

It is a sacred maxim of law that "*nemo bis vexari debet pro eadem causa*," no man ought to be twice tried, or

brought into jeopardy of his life or liberty more than once, for the same offence.

"This enactment very properly," says Greaves, Lord Campbell's Acts, 31, "abbreviates the form of pleas of *autrefois acquit* and *autrefois convict*, and renders it unnecessary to set forth the previous indictment, and to make the many averments of identity, and so forth, which were requisite before the passing of this statute."

These pleas are of the class called special pleas in bar; such pleas may be pleaded *ore tenus*.

The following is the form of a plea of *autrefois acquit*, when drawn up in answer to the whole of the indictment:

"And the said J. S., in his own proper person cometh into court here, and having heard the said indictment read, saith, that our said Lady the Queen ought not further to prosecute the said indictment against the said J. S., because he saith that heretofore, to wit, at (describe the court correctly) he, the said J. S., was lawfully acquitted of the said offence charged in the said indictment and this he, the said J. S., is ready to verify. Wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified": Archbold, 132.

If there is more than one count in the indictment it is better to plead to each: R. v. Westley, 11 Cox, 139. By s. 3, *ante*, the word *indictment* includes *pleas*, so that all the rules as to amending indictments apply to pleas. The defendant might before the Code plead over to the indictment, in felonies, at the same time as pleading such special pleas, but now, under s-s. 3 of s. 631, that cannot be done.

The jury must first determine the plea of former acquittal or conviction. The prisoner has the right of challenge in the usual way: 2 Hale, P. C. 267*d*; R. v. Scott, 1 Leach, 401. *See* remarks, *post*, under s. 667, as to challenges. If the verdict is in favour of the prisoner, and finds the plea

proved, the prisoner is discharged, and the trial is at an end. If, on the contrary, the jury find the plea "not proved" and the prisoner then pleads not guilty, they are charged again, if both the prosecutor and the accused do not ask for another jury, this time to inquire of the second issue, *i. e.*, on the plea of not guilty, and the trial proceeds as if no plea in bar had been pleaded: 1 Chit. 461; 2 Hale, 255; R. v. Knight, L. & C. 378. They then need not be sworn *de novo* to try this second issue: R. v. Key, 2 Den. 347. But if both the accused and the prosecutor do not consent to have the same jury a new jury has to be chosen to try the issue of not guilty; another and quite separate trial then takes place: s-s. 6, s. 667; R. v. Roche, 1 Leach, 134. Formerly, when such pleas contained the first indictment, with the judgment, etc., detailed at full length, the prosecutor could demur to it, and then the court pronounced on that demurrer without the intervention of a jury; but now, with the general form allowed by the statute, the prosecutor meets the plea with a general replication, entered only when the record is made up, after trial, though not necessarily actually pleaded, and the issue must be determined by a jury: *see* R. v. Connell, 6 Cox, 178; Archbold, 133; *note* by Greaves, 2 Russ. 161; R. v. Tancock, 13 Cox, 217.

This replication and the *similiter*, (as to which *see* s. 734, *post*,) when so entered upon the record, may be as follows:

"And hereupon A. B., who prosecutes for our said Lady the Queen in this behalf, says that by reason of anything in the said plea of the said J. S. above pleaded in bar to the present indictment, our said Lady the Queen ought not to be precluded from prosecuting the said indictment against the said J. S., because he says that the said J. S. was not lawfully acquitted of the said offence charged in the said indictment, in manner and form as the said J. S. hath above in his said plea alleged; and this he, the said A. B.,

prays may be inquired of by the country. And the said J. S. doth the like."

For a form of plea of *autrefois acquit* or *autrefois convict* to one count only of the indictment *see* Lord Campbell's Acts, by Greaves, 88; R. v. Connell, 6 Cox, 178; R. v. Bird, 5 Cox, 11.

When any one is indicted for an offence and acquitted he cannot afterwards be indicted for the same offence, provided the first indictment were such that *he could have been lawfully convicted on it;* and if he be thus indicted a second time he may plead *autrefois acquit*, and it will be a good bar to the indictment. And an acquittal in a foreign country by a competent tribunal is a bar to an indictment for the same offence in this country: Hutcheson's Case, *note* to R. v. Roche, 1 Leach, 134.

The true test by which the question, whether such a plea is a sufficient bar in any particular case, may be tried is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first: R. v. Bulmer, 5 L. N. 92; R. v. Sheen, 2 C. & P. 634: R. v. Bird, 2 Den. 94; R. v. Drury, 3 C. & K. 193; R. v. Miles, 17 Cox, 9; Ryley v. Brown, 17 Cox, 79; though in R. v. Gilmore, 15 Cox, 85, some doubt has been thrown on the accuracy of that proposition.

Thus, an acquittal upon an indictment for burglary and larceny may be pleaded to an indictment for a larceny of the same goods, because upon the former indictment the defendant might have been convicted of the larceny. But if the first indictment were for a burglary, with intent to commit a larceny, and did not charge an actual larceny, an acquittal on it would not be a bar to a subsequent indictment for the larceny: 2 Hale, 245; R. v. Vandercomb, 2 Leach 716; because the defendant could not have been convicted of the larceny on the first indictment. An acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter, because the

defendant could be convicted of the manslaughter on the first indictment. So, an acquittal upon an indictment for manslaughter is, it seems, a bar to an indictment for murder, for they differ only in degree: 2 Hale, 246; 1 Chit. 555. S-s. 2 of s. 633 is now conclusive on the point.

Now, also, no one can, after being acquitted on an indictment for any offence, be indicted for an attempt to commit it, for he might have been convicted of the attempt on the previous indictment: s. 711, *post*. An acquittal for the murder of a child is a bar to an indictment for concealing the birth of the same child, because by s. 714, *post*, the defendant upon the first indictment might have been found guilty of concealing the birth: R. v. Ryland, *note* by Greaves, 2 Russ. 55.

So a person acquitted of an offence including an assault, and for which assault the defendant might have been convicted under s. 713, *post*, cannot be subsequently indicted for this assault: R. v. Smith, 34 U. C. Q. B. 552.

So, also, a person indicted and acquitted on an indictment for a robbery, cannot afterwards be indicted for an assault with intent to commit it. But now a person indicted for larceny and acquitted may afterwards be indicted on the same facts for obtaining by false pretenses, and a person indicted for obtaining by false pretenses and acquitted may afterwards be prosecuted for larceny on the same facts, as ss. 196-198 of c. 174 R. S. C. have not been re-enacted: R. v. Henderson, 2 Moo. 192 and Greaves *note* to it, 2 Russ. 55; Stephens Hist. Cr. L. 162; 2 Taylor, Ev. Pars. 15, 16; R. v. Adams 1 Den. 38. If a man be indicted in any manner for receiving stolen goods, he cannot afterwards be prosecuted again on the same facts. This rule is equally applicable though the first indictment be against the defendant jointly with others, and the second against him alone, and upon the first indictment the prisoner has been acquitted, and the others found guilty, because he might have been convicted on the first: R. v.

Dann, 1 Moo. 424. *See* R. v. O'Brien, 15 Cox, 29, Warb. Lead. Cas. 229, and R. v. Miles, *Id.* 230. R. v. Gilmore, 15 Cox, 85, cannot be followed in Canada, because under s. 713, *post*, the defendant, in such a case, may be convicted upon a first charge of the offence subsequently charged in that case.

But the prisoner must have been put in jeopardy on the first indictment. If by reason of some defect in the record, either in the indictment, the place of trial, the process, or the like, the defendant was not lawfully liable to suffer judgment for the offence charged against him in the first indictment, as it stood at the time of the verdict, he has not been in jeopardy, in the sense which entitles him to plead the former acquittal or conviction in bar of a subsequent indictment: R. v. Drury, 3 C. & K. 193; R. v. Green, Dears. & B. 113.

"In general," says Starkie, Cr. Pl. 320, "where the original indictment is insufficient no acquittal founded upon that insufficiency can be available, because the defendant's life was never really placed in jeopardy, and therefore the reason for allowing the plea entirely fails."

And 1 Chit. Cr. L. 454, says: "And hence we may observe that the great general rule upon this part of the subject is, that the previous indictment must have been one upon which the defendant could legally have been convicted, upon which his life or liberty was not merely in imaginary but in actual danger, and consequently in which there was no material error . . . Upon the same principle, where the defendant was acquitted merely on some error of indictment, or variance in the recitals, he may be indicted again upon the same charge, for the first proceedings were merely nugatory. Thus, if an indictment for larceny lay the property in the goods in the wrong person the party may be acquitted, and afterwards tried on another, stating it to be the property of the legal owner."

And even now, that an amendment is allowed in such a case, and that the court, on the first indictment, might have substituted the name of the legal owner for the wrong one first alleged, if the indictment was not, in fact, so amended, the plea of *autrefois acquit* cannot be sustained; the indictment must be considered as it was, not as it might have been made; the court was not bound to amend, and the indictment to be considered is the indictment upon which the jury in the first case gave their verdict: R. v. Green, Dears. & B. 113; though it may be contended that the wording of s-s. 5 of s. 631 may now make a change in this respect.

An abortive trial without verdict cannot be pleaded as an acquittal; the acquittal, in order to be a bar, must be by verdict on a trial. Thus if after the jury are sworn, and the prisoner given in charge to them, the judge, in order to prevent a failure of justice by a refusal of a witness to give his evidence, or by reason of the non-agreement of the jury to a verdict, or by reason of the death or such illness of a juryman as to necessitate the discharge of the jury before verdict, does so discharge them without coming to a verdict, in all these and analogous cases the prisoner must be tried again: R. v. Winsor, 10 Cox, 276, 7 B. & S. 490; R. v. Charlesworth, 1 B. & S. 460; 1 Burn, 348; 2 Russ, 62, *note* by Greaves; R. v. Ward, 10 Cox, 573.

A previous summary conviction for an assault is not a bar to an indictment for manslaughter of the party assaulted, dead since, founded upon the same facts: R. v. Morris, 10 Cox, 480; R. v. Friel, 17 Cox, 325.

A person was acquitted of an assault with intent to murder, but was convicted of an assault with intent to do grievous bodily harm, and the prosecutor, having subsequently died, he was indicted for murder, and it was held right: R. v. Salvi, 10 Cox, 481, *note*. *See* The Queen v. Rozan, 2 Mauritius Decisions 35.

And these two cases cannot be questioned. There can never be the crime of murder till the party assaulted dies; the crime has no existence, in fact or law, till the death of the party assaulted. Therefore, it cannot be said that one is tried for the same crime when he is tried for assault during the life, and tried for murder after the death, of the injured party. That new element of the injured person's death is not merely a supervening aggravation but it creates a new crime; *per* Lord Ardmillan, in Stewart's Case, (Scotland), 5 Irvine, 310. S. 638, *ante*, will probably be held not to apply where the aggravation results from facts subsequent to the first indictment.

A man steals twenty pigs at the same time, can he be charged with twenty larcenies of one pig, in twenty different indictments? After verdict on the first indictment can he maintain a plea of *autrefois acquit* or *autrefois convict* in answer to the subsequent indictments?

It may be said that, in principle, a man who steals twenty pigs, at the same time, commits but one larceny, but one criminal act. Suppose a man steals a bag containing three bushels of potatoes, could he be charged with three larcenies of one bushel each, in three different indictments, or with two larcenies in two indictments, one of the bag, and one of the potatoes? Or if a man steals ten pounds in ten one pound notes, can he be charged in ten different indictments with ten different larcenies of one pound?

Then A., at one shot, murders B. and C., though the shot was directed at B. only; has he committed one murder or two murders? If he is tried for the murder of B. and acquitted, can he plead *autrefois acquit* to an indictment charging him with the murder of C.? Of course not. He is guilty of two murders.

In all these cases there has been only one criminal act, only one actual execution of a criminal design, only one guilty impulse of the mind; yet, it appears to be settled that

where *several chattels* are stolen at the same time, an acquittal on an indictment for stealing one of them is no bar to an indictment for stealing another of them, although it appear that both were taken by the same act: 8th Rep. Cr. L. Comm., 5th July, 1845.

"And thus it hath happened," says Hale, vol. 2, p. 245, "that a man acquitted for stealing the horse hath yet been arraigned and convicted for stealing the saddle, though both were done at the same time." And in R. v. Brettel, Car. & M. 609, 2 Russ. 60, it was held that where the prisoner had been convicted of stealing one pig, he might be tried for stealing another pig at the same time and place; but as the prisoner was undergoing his sentence upon the conviction already given against him, the Judge (Cresswell, J.) thought that the second indictment should be abandoned, and this was done.

Erle, J., in R. v. Bond, 1 Den. 517, seemed to be of opinion that *one* act of taking could not be *two* distinct crimes. He said: "I do not think it necessary in a plea of *autrefois convict*, to allege the identity of the specific chattel charged to be taken (under the old form of such pleas). Suppose the first charge to be taking a coat; the second, to be taking a pocket-book; *autrefois convict* pleaded: parol evidence showing that the pocket-book was in the pocket of the coat. I think that I would support the plea because it would show a previous conviction for the *same act of taking*."

But a *note* by Greaves, 2 Russ. 60, thinks this dictum erroneous, and the reporter, in Denison, in a foot note to the case says: "*Quære*, whether a plea of *autrefois acquit* or *convict* would be supported by mere proof of the *same act of taking?* Suppose a purse stolen containing ten sovereigns, five belonging to A., five to B. Two indictments preferred one charging prisoner with a theft from A., the other with a theft from B.; a conviction of the theft from A. If the same act of taking were the gist of the crime, he

could plead *autrefois convict* to the indictment of stealing from B. It seems that, to support a plea of *autrefois convict or acquit*, there must be proof of '*a taking of the same thing from the same party at the same time.*'"

If, according to this note, in the case where ten sovereigns are stolen at one and the same time, in the same purse, five belonging to A., five to B., two crimes have been committed by one act, it follows that in the case of the stealing of a bag containing potatoes, if the bag belongs to A., and the potatoes to B., two larcenies may be charged, one of the bag and one of the potatoes. *See* R. v. Champneys, 2 M. & Rob. 26.

The proof, on a plea of this nature, lies on the defendant, and he is to begin: Archbold, 133; 2 Russ. 62, *note* by Greaves.

In order to prove a formal acquittal or conviction, if it took place at a previous session or in a different court, the prisoner must produce the record regularly drawn up: R. v. Bowman, 6 C. & P. 101, 337. But if it took place at the same assizes, the original indictment, with the notes of the clerk of the court upon it, are sufficient evidence: R. v. Lea, 2 Moo. 9 (called R. v. Parry, in 7 C. &. P. 836).

But *see* ss. 694, 726, 865 & 866 *post*. If any issue of fact as to identity of charges, or of persons, etc., is raised it must be tried by a jury as in R. v. Lea, 2 Moo. 9. *See* s. 690, *post*.

Conviction for unlawfully taking girl of sixteen out of possession of her father not a bar under *autrefois convict* to indictment for seduction of same girl: R. v. Smith 19 O.R. 714.

Greaves' MSS. *note*:—"The next question is, supposing the judges of C. C. R. were to hold that evidence had been improperly received or rejected, and simply determined to arrest or reverse the judgment, could the prisoner be indicted *de novo*, and tried and convicted for the same

offence? And it is perfectly clear that he could. Nothing, except a verdict of guilty or not guilty on a valid indictment, and a lawful and still existing judgment on such verdict can afford a bar to another prosecution for the very same offence. *See* my *note*, 2 Russ. 69 *et seq.* R. v. Winsor, 6 B. & S. 143-7-190; 2 Hale, 246; Vaux's Case, 4 Rep. 44."

"I have said on a *valid indictment*. Now an indictment may be either actually valid or valid as against the crown in some cases; for a very material distinction exists between an acquittal and conviction upon a bad indictment. If *autrefois acquit* be pleaded and the former indictment is bad upon the face of it, the plea fails, because the judgment may and is to be supposed to have been upon that defect, as it is simply *quod eat sine die* (3 Inst. 214, 2 Hale, 248, 394). But if a prisoner be convicted and sentenced on an insufficient indictment a plea of *autrefois convict* will be good unless the judgment has been reversed: 2 Hale, 247; for the judgment could only be given on the verdict. So if a special verdict be found, and the court erroneously adjudges it to be no felony, *autrefois acquit* is a good plea as long as that judgment is unreversed on error: 2 Hale, 246. And in the case of an acquittal, if the judgment has been *quod eat inde quietus*, as the ancient form is in case of acquittal upon not guilty pleaded, that could never refer to the defect of the indictment, but to the very matter of the verdict, and the prisoner could not be indicted again until the judgment had been reversed on error: 2 Hale, 394."

"Whenever a plea of *autrefois acquit* or *convict* in the short form allowed by the 14 & 15 V. c. 100, s. 28, is pleaded, if the former indictment, or other part of the record be bad on the face of it, the question arises whether the replication should not set out the record and conclude with a demurrer. If the objection was the only answer to the plea, it would seem to be the better course. A jury might in such

a case err, as they certainly did in R. v. Lea, 2 Moo. 9, where, against the direction of the judge, and without any reasonable evidence, they found for the prisoners, and it was held that the verdict could not be set aside. A judge might also decide erroneously against the crown; and, if a verdict passed for the prisoner, there would be great doubt whether any remedy existed. A case could not be reserved under the Act, for there would not be any conviction, and error would not be available, for the former record could not appear on the subsequent record, and there is grave doubt as to a special verdict in such a case. But if judgment were given against the crown on such a replication as I have suggested, error might remedy the mischief."

634. PLEA OF JUSTIFICATION IN CASE OF LIBEL.

See ante, under s. 302, p. 305.