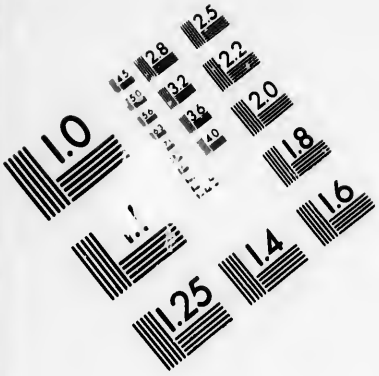

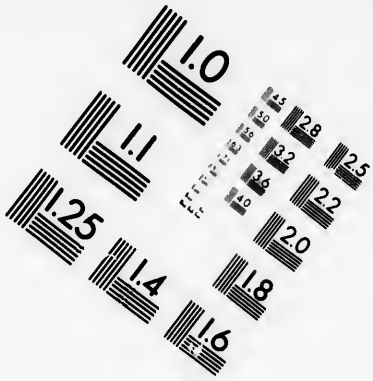

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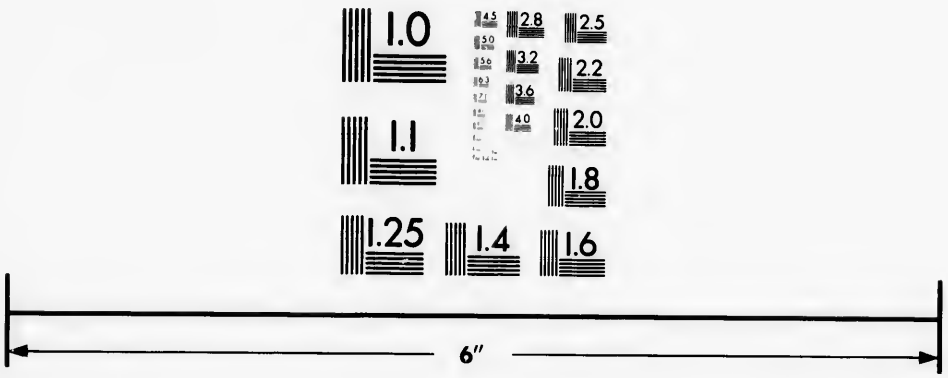

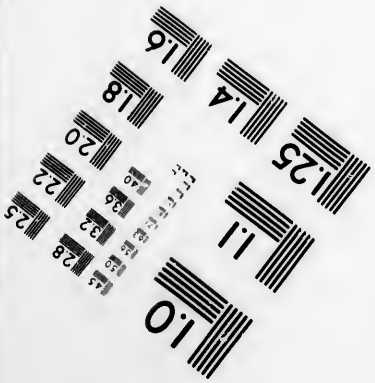

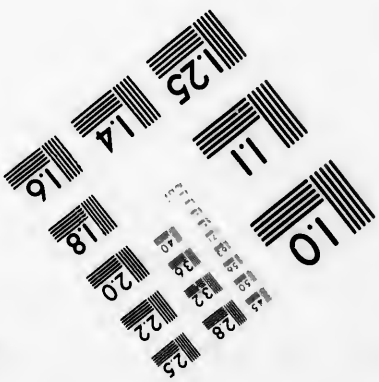

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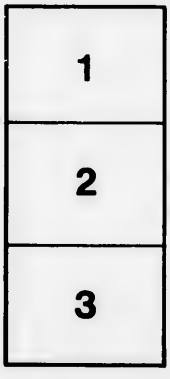

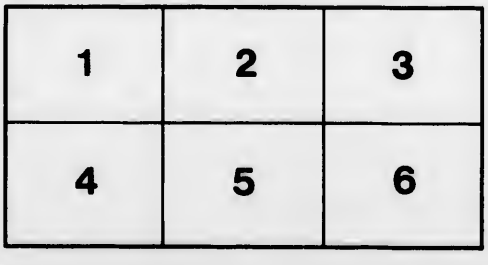

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A HANDBOOK

FOR

MAGISTRATES,

IN RELATION TO

SUMMARY CONVICTIONS AND ORDERS

AND

INDICTABLE OFFENCES.

BY

HON. THOMAS H. McGUIRE,

One of the Justices of the Supreme Court of the North-West Territories.

TORONTO:
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1890.

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TO

HIS HONOUR JOSEPH ROYAL, LL.D.,

Lieutenant-Governor of the North-West Territories,

AS AN

HUMBLE TRIBUTE TO THE HONOURABLE POSITION ATTAINED BY HIM AS A LAWYER, LAWMAKER

AND

ADMINISTRATOR OF THE LAWS,

THIS LITTLE BOOK IS RESPECTFULLY DEDICATED.

PREFACE.

THE following little book was written at the suggestion of many Justices of the Peace who desired some plain and simple guide to the procedure Acts in relation to Summary Convictions and Orders, and their duties in dealing with Indictable Offences. It was not intended to displace the several very valuable but more voluminous works already before the public on the subject of magisterial law. For a large majority of the Justices of the Peace, these larger works contain more information than they are ever likely to need, and the price is to many a stumbling block. The writer has endeavored to use language as free from technical expressions as possible. As magistrates rarely have the Reports, but few references have been made to authorities. While intended only for the assistance of magistrates, it is possible that some members and students of the legal profession may find here hints or reminders of matters which have escaped their attention or their memory.

The device of conveying information by means of maps or charts is of course not original, though so far as I am aware the charts which accompany this book are. They may be found useful by presenting a large field before the eye at a glance.

If these pages shall be instrumental in lessening the perplexities of the painstaking Justice of the Peace and preventing him falling into some mistakes which he might otherwise have made, the writer will feel more than rewarded for such labour as he has been able to expend on it, and the Justice (if he is a purchaser) will, I trust, feel that his money has not been entirely misspent.

M.

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A.

PROCEDURE UNDER SUM. CON. ACT.

The matters with which a J. P. may deal **Summarily** are those commenced either:—

By an "Information" followed by either a — or — By a "Complaint," viz. followed by a

viz.

These are: Offences punishable summarily by imprisonment, fine or penalty. An "Information" is a statement in *writing* (S. 13), but need not in general be on *oath* unless:—
1. Special Act says so.
2. Or if it is intended to issue a warrant in the first instance.

Warrant (D) in the first instance, instead of a summons:— or

SUMMONS to the Deft. S. 13, Form B.

Matters in which a J.P. can make an *Order* for payment of money, &c.

A complaint (unless the special Act requires it), need not be either:
1. In writing—S. 23.
2. Or on oath—S. 24.

How served.

By constable, &c., (S. 14).
1. By delivering it personally to him, or
2. By leaving it with some one for him.
(*a*) At his last or
(*b*) Most usual place of abode.

When deft. has been duly served:—

If the matter of the information has been substantiated on oath. (S. 18.)

If he does NOT attend, then on proof on oath of the service and the truth of the matter in Inf. or Comp.

If he does attend.

J. P. may adjourn and issue a warrant (C), (D). — or — Proceed to the hearing.

Proceedings under Warrant.

How to execute, see ss. 19, 20, 21 and 40. Disposal of prisoner after arrest. S. 40 (F).

The hearing (S. 33) in a public, open Court.

If both parties appear. Then if Deft. personally present, read the charge.

If only *one* side appears: then

If he admits.

If he denies.

If it is the complainant.

If it is the defendant.

S. 17. | S. 39.

Proceed with the trial, S. 39. — or — Adjourn, and issue warrant. (G.)

Dismiss the case. S. 41, 50. — or — Adjourn. S. 42.

Where the trial proceeds, prosecutor calls his witnesses, and the defendant calls his witnesses.

J. P. prepares his decision, makes a *minute* of it. S. 52. Followed by a

S. 53. Conviction, J. 1, J. 2 or J. 3. — or — S. 53. Order, Forms, K. 1, K. 2, K. 2. — or — S. 56. Order of Dismissal (L). Certif.(M). — With or without. Order for costs. S. 59, 61.

In cases under Larceny Act, Malicious Injury to property, in case of first offence. See S, 55.

Serve copy of the Order before distress or arrest. S. 57.

Witnesses.

See Sections 29, 30, 31, 32. Forms of Summons E. 1. Form of Warrant(A), E. 3.

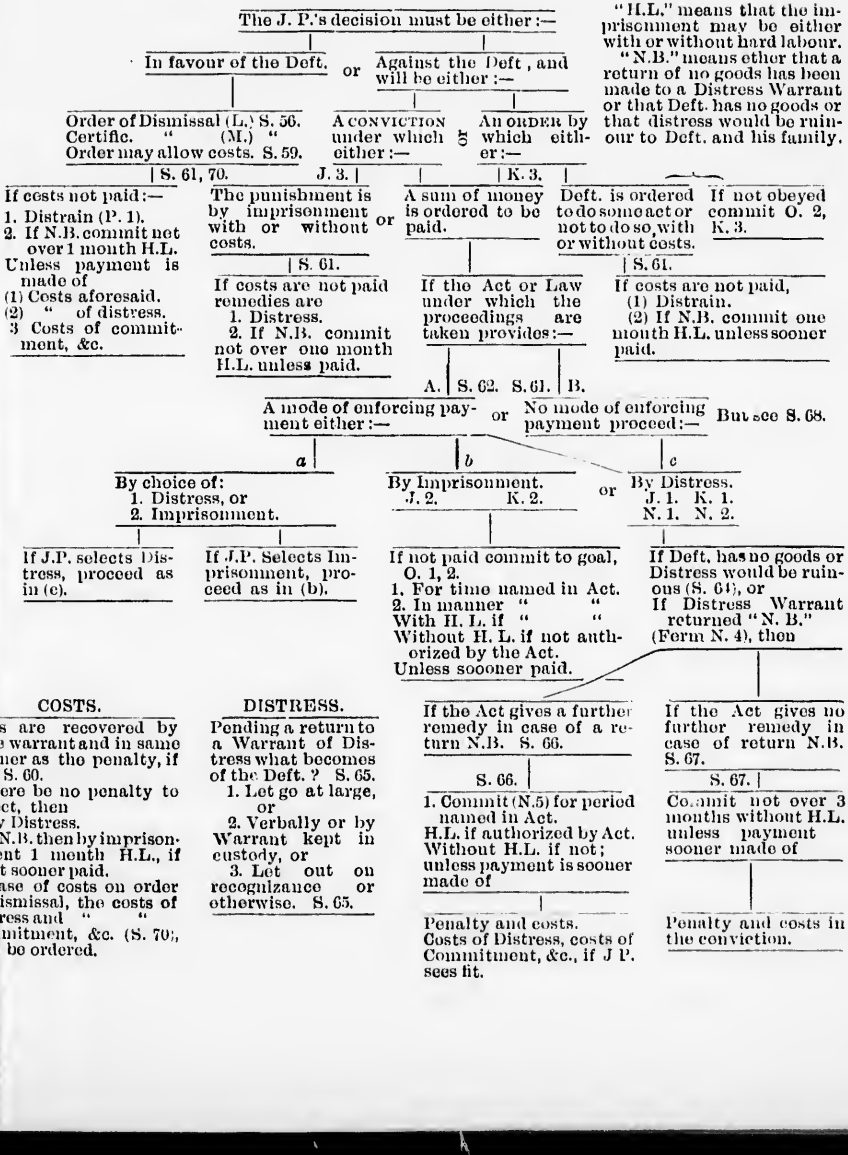
Adjournments.

Not over a week, S. 52.

What is done with Deft. during the adjournment. See S. 48 to 51.

B.

AFTER THE TRIAL.

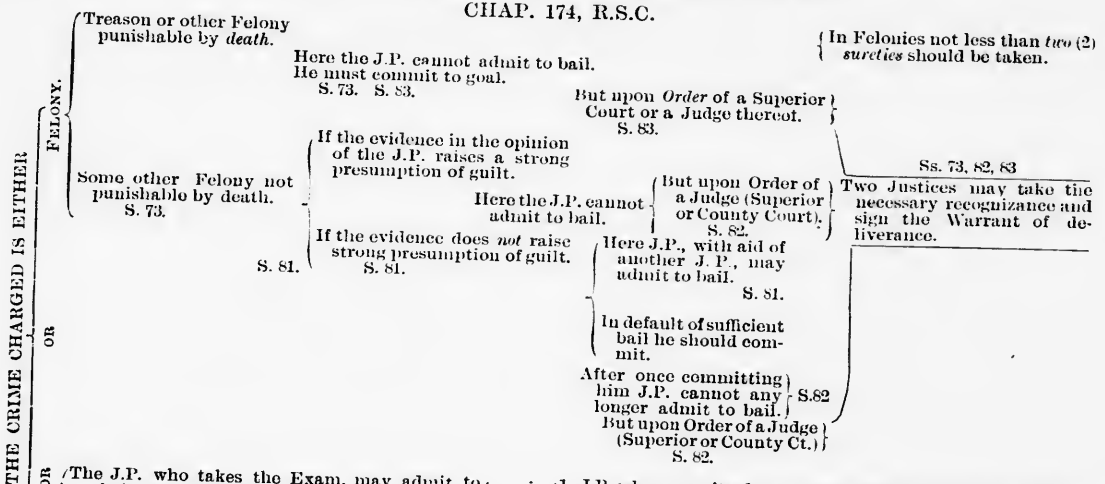


C.

C.

"INDICTABLE" OFFENCES.—BAIL.

CHAP. 174, R.S.C.



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On Page 19, for "Ch. 162," read "Ch. 161" in each case.

" 19, 15th line from top, for "s. 11," read "s. 13."

" 20, 7th " " "s. 9," read "s. 11."

" 21, 3rd " " "s. 11," " "s. 13."

" 24, 16th " " "s. 11," " "s. 13."

" 26, 13th " " "p. 62," " "p. 60."

" 28, 26th " " "18 O. R. 169," read "17 O. R. 458."

" 45, 16th " " "ch. 20, s. 44" " "ch. 178, s. 74."

" 58, 17th " " "M. 4," read "M. 2," and at end of line 22 add "see M. 4."

Page 61, 22nd line from top, for "3 App. Rep." read "8 App. Rep." and add thereafter:

"In this case it is pointed out that in England, by Ch. 35. s. 3, of "1867, the Justice is expressly required to take the depositions of the "witnesses tendered by the prisoner, a provision that might with justice "be introduced into our Act."

Page 74, 16th line, for "Ch. 158," read "Ch. 158*" After line 25 add "Ch. 170* ss. 8, 9, 12."

Page 73, From line 16 strike out "s-s. 1"

" " 19 " "20."

PROCEDURE

UNDER

SUMMARY CONVICTIONS ACT.

INTRODUCTORY OBSERVATIONS.

A Justice of the Peace becomes so either

(1) By virtue of a commission, or

(2) Ex officio by virtue of holding some other office, as mayor, councillor, etc.

In the North-West Territories members of municipal councils are not ex officio J. P.'s.

In the former case he continues to be a justice until he resigns or his commission is cancelled; in the latter only so long as he holds that other office.

We will assume that our justice (by commission) has taken the oaths of allegiance, of office and of property qualification (if any) prescribed by statute, or in the Territories by Ordinance No. 14 of 1889; or, if he is an ex officio justice, that he has taken the oath of office required of such officer; that he has provided himself with the Revised Statutes of Canada, or at least the criminal laws therein, and amendments, and the statutes or ordinances of his own province, and is ready to attend to matters coming before him.

A person now presents himself with a grievance of some kind. The J. P., after hearing his statement, will consider if it is a matter with which a magistrate has any

right to meddle. If it be for a breach of contract or other subject of a civil action, as a rule a justice has no jurisdiction over it. Sometimes, indeed, he can deal with matters which might also be a ground of civil action, but only when some statute or law makes it an offence punishable in some manner, or expressly gives a justice power to deal with it in a summary way. For example, a complaint of non-payment of wages can be dealt with by him, though non-payment of a merchant's account can not. He can deal with the wages case because a statute or ordinance especially gives him that power. If it did not do so, the servant's only remedy would be to sue his master. Again, if my neighbour unlawfully and maliciously pulls down my fence, I may sue him in a civil action for damages, but I may, if I prefer it, lay an "information" before a J. P. who, by Statute (R. S. C. ch. 168, s. 27), has power to fine him a sum equal to the amount of the damage and up to five dollars in addition. If the offender, after conviction, satisfies me for the damage and the costs (if any) the justice may, in case of a *first* offence, let him off the fine (R. S. C. ch. 178, s. 55). But, if my neighbour chooses, he may pay the whole fine, etc., to the J. P., in which case the Crown will be the gainer and I will receive nothing, and I cannot afterwards sue for damages.

So also if my unruly neighbour assaults me, I have three ways of proceeding against him, two of which are given by Statute (R. S. C. ch. 162, s. 36). That section provides that an assault may be punished on "indictment," *i.e.*, by a judge, with or without a jury, or "on summary conviction," *i.e.*, before a J. P. Another Act (R. S. C. ch. 178, s. 73) provides that when making my complaint to the J. P. I can ask him to deal with it in a summary way, which gives him power to so deal with it, subject to

s. 73 s-ss. 2 & 3; but if I do not request him to deal with it summarily, he can then only hear the evidence and, if he thinks it sufficient, commit the offender to be tried by a higher court. If I request him to try it summarily, and he does so, I cannot afterwards adopt my third remedy of suing for the damages by a civil action. (R. S. C. ch. 178, ss. 74, 75.)

In order that a J. P. should have power to deal with a matter, it must be either a "crime" at common law or made so by statute, or some statute, ordinance or by-law must give him power to deal with it in a summary way.

If he has power to deal with it *at all*, that power is either—

I. To try it in a summary way, that is, to hear all the evidence on both sides, and either convict the offender, or make an order against him, or dismiss the case; or

II. To hear the evidence and, if he thinks it sufficient to put the offender on his trial, to commit him for trial at a higher court.

Matters in Class I. come under the head of "summary convictions and orders" and, for sake of brevity, we shall call these "summary matters."

Matters in Class II. are offences, prosecuted by "indictment" and are called "indictable offences."

PART I.

SUMMARY MATTERS.

PART I.

SUMMARY MATTERS.

In this Part we shall confine our attention to "summary matters." These are of two kinds :—

(*a*) Those commenced by an "information."

(*b*) Those commenced by a "complaint."

If judgment is given against the defendant in (*a*) it is called a "conviction"; in (*b*) it is called an "order."

There is no distinct line dividing the matters in which a "conviction" may be made, from those in which there may be an "order." Generally, however, a "complaint" is where the complainant asks for an order on the defendant to pay a sum of money or that he shall do some act or refrain from doing something, as *e.g.* a servant complaining of non-payment of wages. An *information* generally asks that the offender be punished by *fine* or *imprisonment* or both.

If the statute, ordinance or by-law says that the proceedings shall be commenced by an "information," then the prosecutor is called the "informant" and the J. P. may "convict" or make a "conviction"; if, on the other hand, it says that proceedings are to be "on complaint," then the words "complainant" and "order" take the place of "informant" and "conviction." The proceedings in each case bear a strong resemblance to each other. The differences will be noted as we proceed.

Let it be borne in mind that a J. P. never has power to *try* a case summarily unless it has been given him expressly by

(1) Some Act of Parliament,

(2) Some Provincial Act or Territorial Ordinance, or

(3) Some by-law passed by a corporation having, itself, the power to pass such a by-law.

Whenever, therefore, a J. P. is called upon to act *summarily*, he must be satisfied that in one of the foregoing ways he has been given the necessary jurisdiction. If the law says that the matter is punishable on "summary conviction" the J. P. has summary jurisdiction.

There are two questions which the J. P. should be particular to have answered by the informant or complainant.

1. *Where* was the offence, etc., committed? Because unless it was within the territorial jurisdiction of the justice, he cannot deal with it summarily (R. S. C. ch. 178, s. 5).

[NOTE.—Whenever in Part I. a section is referred to without mentioning the chapter, I mean R. S. C. ch. 178, and the words "the territory" will mean the district, county, etc., over which the justice's jurisdiction extends. In the North-West Territories a justice's jurisdiction extends over all the Territories.]

2. *When* was it committed? Because proceedings must be begun within a limited time. This time is fixed either by the statute or law under which proceedings are taken, or if not, then they must be begun within six months except in the N. W. Territories (and part of Saguenay), where the time is *twelve months* (s. 11, as amended by ch. 45 of 1889). The laying of the information or complaint within the time is sufficient.

Having satisfied himself that he has jurisdiction to act summarily, the next thing is to prepare an information or complaint (See Form A. at end of ch. 178). By looking at the statute which deals with the offence or matter he

will see whether it is to be an "information" or a "complaint." The Form (A) is adapted to either.

The important parts of this are,

(1) Name, residence and occupation of the prosecutor, etc.

(2) Place where the offence, etc., was committed.

(3) Date of the laying of the information, etc.

(4) Name, residence and occupation of the defendant, or, if his name is not known, state that fact and give a *description* of him.

(5) Date or approximate date of the offence, etc. "On or about the 10th of May, 1890," or "between the 5th and 20th of May, 1890," will do, if it shows that the proceedings are begun *in time.*

(6) Place where offence, etc., committed—show that it is within the territory of the J. P.

(7) Description of the offence or matter of complaint. This part requires particular care.

It is generally sufficient to follow the language of the statute, etc., which deals with the offence or matter, especially being careful to note such words as "unlawfully," "wilfully," "knowingly," etc., and to deny any exceptions in the enacting clause. For example, if the Act is punishable only when done "without the license by law required" it is necessary to state that it was done "without the license, etc." In liquor prosecutions in the Territories it is often necessary to charge the act as being done "without the written permission of the Lieutenant-Governor, etc." To charge that the defendant used "blasphemous language" is not sufficient without mentioning the *words* used. So, to charge that he did "unlawfully and maliciously

commit damage to real and personal property of A. B." is not sufficient without stating *how* it was done and what the particular property was. It is well, therefore, in every case, even though not *always* necessary, to add to the general statutory description of the offence, a description of *how* it was done, or *on what* it was committed. The justice can never seriously err by stating *more* than may be necessary, provided they are *facts*. A good test of a sufficient description may sometimes be had by asking: "Does it contain everything necessary to make out an offence, etc.?" "Suppose the defendant did all that is charged against him, must he *necessarily* be guilty?"

For example, to charge one with "unlawfully and maliciously destroying a tree belonging to A. B." would not be sufficient under R. S. C. ch. 168, s. 24, because that section says the injury must be to the amount of "twenty-five cents" at least, and unless this is stated, it might be quite true that he had destroyed a tree and yet not be guilty of any offence under section 24, if the tree was worth *less* than twenty-five cents.

If the offence is one against a by-law it should be so stated and should also show the municipality whose by-law it is.

While it is necessary to be particular in describing the offence, defects either of substance or form in the information or complaint or in the summons, are not fatal (s. 28, s.-s. 1).

A variance between an "information" and the evidence as to the *time* or *place* of the offence is not material, provided it appears that the proceedings were begun *in time*, and that the *place* is within the territory of the J. P. (s. 28,

If it appears to the justice that the defendant has been deceived or misled by the error he is entitled to an adjournment on such terms as seems proper (s. 28, s.-s 4).

But a conviction for an *offence different* from that in the information and summons would be bad. If in the course of the trial it is found that the wrong kind of offence was charged an amendment may be made and the information re-sworn. The defendant would be entitled to an adjournment if he desired it.

The description of the offence ought in short to be

1. Distinct and free from ambiguity.
2. Should not be in the alternative, as "that he did a certain thing *or* something else," "that he sold beer *or* ale without license," but if only one offence is charged it may be stated to have been done in *different modes*. See s. 107.
3. Must be for only *one* offence or matter (s. 26).
4. Such that if the charge be proved the defendant must be guilty of an offence or matter within the justice's jurisdiction.

If it is necessary to mention the ownership of any property belonging to *partners*, *joint tenants*, etc., it is sufficient to name *one* of such partners, etc., thus, "the property of John Smith and others." If it is necessary to mention the partners, etc., they may be referred to in the same way. Property of a municipal corporation or of the inhabitants of any territorial division or place may be described as "the property of the inhabitants of ——" (s. 27).

Form A is adapted to be *sworn* to. This is not always necessary. A "complaint" need not be either in *writing*

(s. 23), or on *oath* (s. 24), unless required to be so by the statute under which proceedings are taken. Still there is no harm in having it both in writing and on oath, and it is well, in general, to have it so.

An "information" must be in *writing*, but need not be on *oath*, unless the special Act requires it (s. 24), or unless it is intended to issue a *warrant* in the first instance for the arrest of the offender, in which case it must be on oath (s. 18).

Who should lay the information, etc. ?

A complaint or information may be laid, in general, by any one who knows the facts, but where the statute says that it is to be by the "person aggrieved," that is, the one who has suffered the injury, then no one else but him, or some one on his behalf, can do so. But where the offence is of a public character, and the damages are not to go to the injured party, or where a conviction would not deprive him of the right to sue for damages in a civil action, any one may lay the information, etc.

It may also be laid by the counsel or attorney or other authorized agent of the prosecutor or complainant (s. 26).

If the information is for common assault the justice cannot try the case summarily, unless the prosecutor requests him to do so (s. 73), and this request should, for precaution's sake, be mentioned in the information, thus: "and the informant prays that the justice may proceed summarily," or words of similar effect.

The information or complaint being now laid, the justice must next consider "Is the case one which he can try *alone* or only with the assistance of another justice? Unless the statute dealing with the offence requires the trial to be before *two* justices, *one*, alone, has power to try it (s. 5). In *all*

cases, however, even where the *trial* must be before *two* justices, *one* may do all things *before* the trial or *after* the conviction or order has been signed, such as taking the information, etc., issuing the summons or warrant either for defendant or the witnesses and all necessary warrants of distress and commitment (s. 6), except in cases under the Scott Act, wherever that Act is in force, where by statute it is necessary that two justices should be present when information is laid, though the summons need be signed by only one.

The next step is to secure the attendance of the offender.

If it is likely that he will obey a summons, that may now be issued (Form B. s. 13). The words in that Form :— "before me or such justice or justices . . . as shall then be there," are inserted in case, owing to illness or other cause the justice who issues the summons should not be there. Section 8 provides that the justice who acts *before* or *after* the trial need not be the justice, or one of the justices, present at the trial.

In cases begun by "*complaint*," a summons must first be issued for the defendant, but where an *information* is laid, the justice may, if he thinks fit, issue a *warrant* in the first instance, but in this case it is necessary that the matter of the information be "substantiated upon oath" to his satisfaction, so that if the information was not under oath, the truth of it must now be sworn to (s. 18). A summons or warrant should be under the hand and seal of the J. P., but the absence of a seal will not invalidate the process if it purports to be "under the hand and seal" of the J. P. and he may put on a seal at any time (s. 108).

This warrant will be in the Form D., and the constable executing it must serve each person arrested with a copy

thereof (s. 18). Every warrant must be *signed* and *sealed* by the justice and may be directed as provided in section 19. This section also directs what the warrant shall contain, and the Forms D and C in the schedule to chapter 178, if attention is paid to the wording of them, are so plain as to need no explanation.

We will assume that the justice has chosen to issue a *summons;* the next thing is to have it *served.*

This may be done by "a constable or peace officer or other person to whom it is delivered," in other words, by *any one* to whom the justice hands it for that purpose (s. 14).

The mode of service is,

(1) To deliver it personally to the defendant,

(2) Or to leave it with some one for him at his last or most usual place of abode (s. 14).

If the service is not *personal*, the nature of the summons should be explained to the person with whom it is left. The Act says that "such summons" shall be served by delivery of "the same" so that strictly a "copy" would not be sufficient, but it has been recently held, in *McFarlane* v. *The Queen*, 16 Supreme Ct. Rep. that either a *copy* or a *duplicate* may be served.

The summons, we will suppose, has now been served *personally*, and the person who served it is present (as his duty is, s. 15) at the place and time named in the summons. If the defendant does not then appear either *personally or by counsel or attorney* (s. 42), the person, who served the summons, proves on oath (s. 17) that the summons was duly served, a reasonable time, in the opinion of the justice before the time for appearing; showing "the manner" of

the service, *i.e.*, whether personal or by leaving it with some one for him, *then*, if the matter of the information is substantiated on oath to his satisfaction, the justice may issue a warrant (Form C, s. 17). If the information was sworn to in the first instance, it would seem unnecessary to swear to the truth of it again, yet, as the section is worded, it appears that such is the intention of the statute and the safer course is to act accordingly. What is "a reasonable time" is a matter for the justice and should be construed with due regard for all the circumstances. The justice is, however, not bound to issue a warrant and adjourn until the defendant is brought in. He may proceed with the case *in the absence* of the defendant (s. 39), and dispose of it just as if he had appeared.

Before proceeding in this way, however, the service and *how* it was served, should be sworn to and the justice should be satisfied that a reasonable time has elapsed since the service to enable the defendant to obey it. If the service was not personal, the evidence required to satisfy him must be stronger than where it was served personally. He should have "strong grounds for believing that the summons has come to the defendant (or to his knowledge) and that he is wilfully disobeying it." (*Reg.* v. *Smith*, L. R. 10 Q. B. 604; *R.* v. *Mabee*, 17 O. R.; *Read* v. *Hunter*, 8 C. L. T. 428.) In case of doubt the J. P. should take the other course of issuing a warrant, or he might take the still milder course of issuing another summons.

Let us suppose that he issues a *warrant* (C). Section 19 shows how this may be directed. Sections 20, 21 and 22 deal with the mode of executing it. The warrant is not made returnable (like a summons) at any particular time and may therefore be executed at any time, remaining in

force until executed (s. 20). The arrest may take place anywhere in the territory of the justice, or, in case of fresh pursuit, within seven miles across the border, but beyond that distance, or if not on fresh pursuit, the warrant must be "backed" before it can be executed. "Backing" means the placing on the back of the warrant an endorsement, in the Form N 8, and is obtained by the constable who has the warrant going before a justice of such other territory and making oath to the signature of the justice who issued the warrant. This endorsement authorizes the constable aforesaid and all other persons to whom it was originally directed and all peace officers and constables in the jurisdiction of the justice who backs it, to execute the same by arresting the defendant and taking him before the justice who issued the warrant or some other justice having the same juris iction. "Backing" will not be necessary in the Territories unless the warrant is to be executed in another Province, because the J. P. has jurisdiction in every part of the Territories.

When the defendant has been arrested under warrant (either C or D) he is brought, as soon as conveniently possible, before the justice who has charge of the case or some other justice for the same territory (s. 40).

Now, as the time of the prisoner's arrival is necessarily uncertain, and the prosecutor must have reasonable notice to enable him to be present with his witnesses, what is to be done with the prisoner in the meantime? One of three courses is open: (1) the justice may by *warrant* (Form F) commit him to jail, or (2) he may *verbally* (without warrant) hand him over to the custody of the constable who brought him, or (3) to such other safe custody as he deems fit and in each case must fix a time when the prisoner is to be

brought before him, but this must not be more than a week off (s. 40). A committal which did not fix a time for bringing up the prisoner would be bad. Due notice of this time must be given to the prosecutor.

If on the day fixed the justice finds it necessary to remand the defendant again he may do so, but not for a longer period than a week.

Preparations must now be made for the trial and an important item is the procuring of the attendance of *witnesses.*

WITNESSES.

These may come voluntarily at the request of the parties and in that case the aid of the J. P. is not required.

If, however, either party has reason to fear that the witnesses will not voluntarily attend, the J. P. may issue a *summons* (s. 29, Form E 1) or, in certain cases, a *warrant* (s. 31, E 3) in the first instance.

To obtain a *summons* it is necessary that it should be sworn by a competent witness (s. 29) that the proposed witnesses

(1) Are likely to give material evidence on behalf of the party desiring them;

(2) That they will not voluntarily appear as witnesses at the time and place fixed.

If a *warrant* in the first instance is desired, instead of a summons, in addition to the foregoing, it must be sworn that "it is probable that the witness will not attend without being compelled." The J. P. may then issue warrant E 3, (s. 31, as amended by ch. 45 of 1888) which may be executed *anywhere* in Canada by *any person* to whom it is delivered.

Service of a *summons* on a witness is effected in the same ways as on a defendant and may be served anywhere in Canada (ch. 45 of 1888).

If a witness duly served with a summons, refuses or neglects to obey it, and no just excuse is offered for his disobedience, then on proof on oath that the summons was duly served, a *warrant*, in Form A (ch. 45 of 1888) may issue, under which he may be brought not only to give evidence but also to answer for his contempt in disobeying the summons. When apprehended he may be detained (1) before the justice, or (2) in gaol, or (3) in the custody of the constable, or (4) he may be let go on recognizance, with or without sureties, to appear as a witness and to answer for his contempt. Section 30 as amended by ch. 45 of 1888, says that for the contempt he may be punished by being ordered "to pay the costs incident to the service of the summons and warrant and of his detention in custody" but is silent as to any *fine* or *imprisonment* therefor, whereas the Form (B) given provides, in addition, for a fine or imprisonment or both without, however, indicating the amount of either. That being the case the justice should only (at most) impose the costs in the section mentioned.

Even when the witness has appeared in obedience to a summons or warrant he may refuse to be sworn or give evidence. In either case, in the absence of a sufficient excuse, he may be committed to gaol for a period not exceeding thirty days unless he should in the meantime consent to be sworn or to answer, etc., (s. 32 as amended by ch. 45, 1888).

This section, however, refers only to witnesses who appear on *summons or warrant*, so that witnesses attending *voluntarily* are not within its provisions. They should be

first served with a summons and then if they refused to be sworn, etc., they could be sent to gaol.

Who are competent witnesses?

This question may appropriately be answered briefly here. The rule is that all persons are *competent* (that is, may be received as witnesses), and compellable, (*i.e.*, may be forced to give evidence).

The principal exceptions are as follows:

1. Persons who from extreme *youth*, *disease* of mind or other cause are, in the magistrate's judgment, incapable of *understanding* the obligations of an oath or of *recollecting* the matter in question or of understanding the *questions* or of giving *rational answers*. An exception to this rule is created by statute, ch. 37, s. 11, of 1890, in cases of offences against girls under section 39 or 40 of ch. 162, R. S. C.

2. In criminal proceedings,

   A. The defendant is incompetent, except where by statute he is made, either

      (*a*) Competent to give evidence on his own behalf but cannot be compelled to give evidence, *e.g.*,
      Common assault, ch. 174, R. S. C., s. 216.
      Seduction, ch. 157, R. S. C., s. 6, s-s. 2.
      Wife desertion, ch. 162, R. S. C., s. 19.
      Peace near public works, ch. 151, R. S. C., s. 22.
      Feigned marriage, ch. 162, R. S. C., s. 2, or

      (*b*) Competent and compellable,
      e.g., Canada Temperance Act.

   B. The wife or husband of defendant is incompetent except,

(*a*) Where the charge is one of violence committed by the prisoner on the wife or husband.

(*b*) Where by statute she or he is made,

(1) Competent to give evidence on behalf of defendant, *e.g.*, ch. 151, s. 22, *supra*.
Common assault, ch. 174, s. 216.
Bigamy, etc., ch. 37, s. 9 (of 1890).

(2) Competent to give evidence for or against him, ch. 162, s. 19, wife desertion (as to desertion but not as to fact of the marriage).

(3) Competent and compellable,
e.g., under Canada Temperance Act.

Where the charge is not a crime, *e.g.*, where the justice has power only to make an order, as to pay money, etc., the provisions A and B do not apply, so that the defendant and the wife or husband are competent witnesses in such cases.

The fact that a witness is a criminal or has an interest in the result of the trial is no reason for shutting out his testimony, ch. 174, ss. 214, 215. It may, however, affect the weight of his evidence.

NUMBER OF WITNESSES.

As a rule *one* witness is sufficient.

But in the following cases such evidence must be corroborated by other legal evidence.

1. Perjury.
2. Seduction, R. S. C., ch. 157, s. 6.
3. Forgery, if the witness is the person interested in respect of the forged document, ch. 174, s. 218.
4. Procuring feigned marriages, ch. 161, s. 2.

5. Treason—requires two witnesses.
6. Where young children are permitted to give evidence without being sworn, ch. 37, s. 11, (1890).

We will assume that we have now reached the time and place fixed for the trial.

As we have already pointed out, a single J. P. can try any case except where the special Act, under which the charge is laid, requires that the trial shall be from [illegible]

ERRATA.

Page 20, 7th line from top, for s. 9, read s. 11.
" 21, 3rd " " s. 11, read s. 13.
" 24, 16th " " s. 11, read s. 13.

a single J. P.

He may permit another or other justices to sit with him and take part in the trial, and in that case it requires a *majority* of the magistrates trying the case *to agree* upon a decision. If they are *equally divided*, no decision can be given and the case must be *dismissed*.

It is not necessary that the J. P. who took the information or complaint shall be present at the trial (s. 8).

The room or place of trial must be an open Court to which the public may have access as far as its size will permit (s. 33).

If the defendant does not appear personally or by his counsel or attorney, the justice may either (1) adjourn for the purpose of issuing a warrant for his attendance as already mentioned, (or if the service was not properly made.

(*a*) Where the charge is one of violence committed by the prisoner on the wife or husband.

(*b*) Where by statute she or he is made,

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As we have already pointed out, a single J. P. can try any case except where the special Act, under which the charge is laid, requires that the trial be before two justices, (s. 5).

For example:—A charge of carrying a bowie knife is prosecuted under ch. 148, R. S. C., and there it is provided that it must be "before two Justices of the Peace."

Where *two* justices are necessary, they must *both* be present *together* during the *whole* of the trial (s. 9).

We will suppose that the case in hand is one triable by a single J. P.

He may permit another or other justices to sit with him and take part in the trial, and in that case it requires a *majority* of the magistrates trying the case *to agree* upon a decision. If they are *equally divided*, no decision can be given and the case must be *dismissed*.

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If the defendant does not appear personally or by his counsel or attorney, the justice may either (1) adjourn for the purpose of issuing a warrant for his attendance as already mentioned, (or if the service was not properly made.

in order that he may be properly served), or (2) he may proceed with the trial just as if the defendant had personally appeared, observing however, the precautions already mentioned (p. 15) as to proof of service and the lapse of reasonable time.

If all parties are present, personally or by their lawyers, and ready, the trial may be at once proceeded with (s. 42), though the justice may adjourn (s. 48) for some sufficient reason of his own.

Adjournments must not exceed one week, *e.g.* from Monday *at any hour* till not later than the following Monday *at any hour*, even though it be later in the day, but, *not even by consent* of all parties, may the adjournment exceed one week. (*Reg.* v. *French*, 15 C. L. 80.)

If either party is not ready, owing to absence of witnesses or other good cause, such as some defect in the proceedings (s. 28), upon application to the justice he may adjourn the trial to some future day upon such terms as he deems just and reasonable, *e.g.* the paying of the extra expense for witnesses to which the other side is thus put. If the defendant has been misled by the summons, *e.g.* as to the nature of the charge, he should be allowed an adjournment without terms being imposed on him.

If the defendant appears, or if he is brought by warrant and the prosecutor has had due notice of the day of trial, then if the prosecutor or complainant does not appear, personally or by his lawyer, the justice shall dismiss the case unless for some reason he thinks proper to adjourn (s. 41) upon such terms as he thinks fit.

Whenever an adjournment takes place, either *before* or *during* the hearing of the case, then, if at the time and place appointed, either or both of the parties fail to appear,

the justice may nevertheless proceed with the case just as if all were present or, if it is the *prosecutor* who fails to appear, he may dismiss the case with or without costs, but if it is the defendant who is absent, instead of proceeding he may again adjourn and issue a warrant for his arrest (s. 51, s.-s. 2).

During an adjournment what becomes of the defendant ?

Section 51 provides that he may be

(1) Let go at large,

(2) Or committed by warrant (G) to gaol or to such other safe custody as is fit.

(3) Or let out on recognizance (H), with or without sureties, as the justice decides.

THE TRIAL.

Let us suppose that all parties are present and ready and that the trial has begun. The constable will give notice that the Court is open and see that order is preserved.

If the defendant is personally present the first step is to read to him the information or state its substance (s. 43) and he is asked if he has any cause to show why he should not be convicted or an order made against him, in other words, "Has he any defence ?" If he admits the truth of the information or complaint and shows no sufficient "cause" (*i. e.* reason) why judgment should not be given against him, the justice may convict or make an order.

Now what does this "showing cause" mean when he admits the truth of the charge ?

It may be that the complaint or information states only the truth and yet it may not amount to an offence or matter triable by a justice or may not be contrary to any law,

or the defendant may be able to show that he was justified in doing what is complained of, *e. g.* that he did it in self defence, or because he claims title to some property with respect to which the acts complained of were done. Admitting the truth of the charge simply saves the prosecutor the trouble of proving it and the defendant may at once go into his defence.

If, however, as most frequently happens, the defendant does not admit the truth of the charge, the next step is for the informant or complainant to call his witnesses (including himself if he chooses) to give evidence.

Evidence cannot be taken by affidavit. Witnesses must appear in person and give their testimony orally.

A witness must first be sworn on the New Testament (if he is a Christian) holding the book in his right hand while the oath is administered (except under ch. 37, s. 11, 1890, in case of young children). The form of oath usually employed is as follows: The justice says to the witness, "The evidence which you shall give to the Court touching the matter of this information (or complaint, as the case may be) shall be the truth, the whole truth, and nothing but the truth. So help you God!" and then the witness kisses the book. Quakers and persons of other forms of religious belief who satisfy the justice that they have scruples against taking an oath are permitted to "affirm" in the following form:—"I, (A.B.) do solemnly, sincerely and truly declare and affirm that the evidence which I shall give shall be the truth, the whole truth, and nothing but the truth," and the witness is not required to kiss the book (ch. 174 R. S. C., s. 219).

The prosecutor (or complainant) now calls his first witness, and examines him, that is, puts such questions to him

as he thinks proper (subject as hereinafter explained), or he may have this examination conducted by his lawyer (s. 35).

There are certain rules governing the examination of witnesses which are here stated:

1. A party must not (in general) "lead" his own witness, *i.e.*, he must not put his questions in such a form as to suggest to the witness the answer that is desired, Thus, in an assault case the question "Did you see the defendant strike me on the head with his stick?" is a "leading" question and not allowable. So, if the defendant should ask one of *his* witnesses "Did you not see the prosecutor strike me first?" Both of these questions show that the answer "Yes" is expected and a weak or dishonest witness is thus tempted to give the kind of answer which he knows will please the side which calls him. The justice, however, has a discretion to permit a "leading" question if he thinks proper. On cross-examination these questions would, as a rule, be allowable unless it appeared to the justice that the witness though called by one side, turns out to be really a too willing witness for the other side.

2. The evidence of a witness must be confined to *facts* material to the question in dispute, but on cross-examination this rule is not enforced where the object is to *test the truthfulness* of the witness, or to shake his credit by injuring his character, because while he may have a well-planned but untruthful story as to the matters directly in issue yet if led out from the beaten path into byways and sidetracks he is more likely to expose himself to detection in any falsehoods.

3. *Opinions* of the witness are not evidence, unless in the case of an expert or skilled witness, *e. g.* a medical man, whose opinion may be evidence.

4. A witness must not state the contents of a written or printed paper unless it is first proved that it is lost or destroyed, or is in the possession of the opposite party who improperly refuses to produce it after being properly notified to do so. The best proof of the contents of a document is the document itself and even a *copy*, no matter how carefully examined, will not be evidence except where the witness would be allowed to *tell* its contents.

5. "Hearsay" is not admissible, *i.e.*, a witness must not tell what he has been told by some one, unless it was so told by the party against whom it is offered, or was told while such party was present and within hearing distance. As to confessions by accused persons, see *post* p. 62.

A witness is not bound to answer questions, if the answer would tend to convict him of a crime.

We will now proceed with the examination of the first witness. The answers must be taken down in *writing* (*Reg* v. *Flanigan*, 32 Q. B. 593-9).

As soon as the prosecutor is through with the witness, the defendant (or his lawyer) may "cross-examine" him, either upon the matters on which he has already given evidence or on any other matter connected with the question in dispute, or, (as we have seen) on matters *not* so connected, where the object is to test his truthfulness, etc.

At the end of the cross-examination, the prosecutor may "re-examine" him, but only as to matters on which he has been cross-examined, and not as to matters which should have been asked in the examination in chief. But the justice may allow any questions if he sees fit and he usually does so where, through some oversight, a material question was omitted in the first examination.

Documents may be proved by some one who knows the writing or the signature, or who saw the document executed or used. When so proved they are handed in to the justice as part of the evidence.

DEFENCE.

When the evidence for the prosecutor or complainant is all in it is now the defendant's turn.

Before calling witnesses he may address the magistrate and argue that the case has not been proved, even admitting the truth of all that has been given in evidence, or that the evidence is so contradictory or otherwise of such a character as not to be deserving of belief. The prosecutor or his lawyer may reply to this argument and the justice will either dismiss the case or proceed, as he thinks fit.

If he refuses to dismiss it, the defendant or his lawyer (s. 34) may now call witnesses and the opposite party may cross-examine them, the same rules applying as before.

When all the evidence for the defendant is in, the prosecutor or complainant may call witnesses in reply, but not for the purpose of *strengthening* his original case nor, in general, to prove anything that it was his duty to have proved at first, but only to explain the evidence first offered which by reason of the defendant's evidence seems to require explanation, or to rebut any new facts set up by defendant.

If, however, the defendant called no witnesses or put in no evidence, except as to his general good character, no evidence in reply is admissible (s. 45).

It is not unusual at this stage for the defendant or his lawyer to again address the justice by way of comment on defendant's evidence, and for the other side to reply, and

comment on the evidence given in reply but this is not authorized by the Act (s. 46), although the justice may, of course, permit them to do so if he pleases.

It will be remembered that in dealing with the mode of describing offences, etc., it was pointed out that any exceptions, exemptions, provisoes or conditions in the statute, under which the charge is made, should be *negatived* (*i.e.*, denied).

It is not necessary, however, for the prosecutor to prove these denials: *e.g.*, if the charge is for selling liquor "without a license," it was sufficient to have stated in the information and summons that it was so done "without a license," and it is not necessary to prove that the defendant had no license; it is *his* duty to prove, if he can, that he had one.

THE DECISION.

Having heard all that the parties wish to offer, the justice may now consider his decision (s. 52). He is not required to do this *at once*. He may adjourn for the purpose of preparing his judgment. If so,

1. He must fix a time and place for delivering judgment, giving the parties notice thereof.
2. The adjournment is not limited, like adjournments *during the trial*, to one week, but may be for a longer period. (*Reg.* v. *Hall*, 12 P. R. 142; *Reg.* v. *Alexander*, 18 O. R. 169.)
3. Or he may decide to convict or make an order, and adjourn to make up his mind as to the punishment, etc.

After fixing a *time* he must not *change* it and give judgment on some other day, without attending on the day first

named and again adjourning regularly: a punishment imposed in the absence of the defendant because of an improper change in the day would be bad, though if date changed and defendant knew of it and was *present*, the irregularity would be cured.

If the defendant is in custody it is obvious that justice requires that as little delay as possible should take place in rendering judgment.

If the decision is *in favour* of the defendant, he dismisses the information or complaint, with or without costs, as he sees fit (s. 59) and, if so required, makes an order of dismissal (s. 56, Form L), and gives the defendant a certificate of dismissal (Form M), which is a protection to the defendant against any further summary proceedings for the same matter. If *costs* are allowed they must be calculated and the amount mentioned in the order of dismissal (s. 60).

If the decision is *against* the defendant, the justice first makes a "minute" or memorandum thereof (s. 53) and from this he can at leisure prepare a conviction or order.

The "minute" is merely a short statement in writing in any form of words, but giving *in full* the substance of his judgment, because the conviction or order, which is the formal record, is to be based on this "minute" and must not differ from it or it will be liable to be quashed. The following would be a sufficient minute:—"I find the defendant guilty of the assault herein charged against him and adjudge him to pay a fine of $10 and costs $3.50."

In case of an *order* it is necessary before issuing a warrant of distress or of commitment *to serve a copy* of this "minute" on the defendant and such copy is to be no part of the warrant (s. 57). It is not necessary to do this in case of a *conviction*.

In some cases (*e.g.* ch. 168, s. 59) the justice has power to impose a penalty which includes the damages sustained by the prosecutor. Now, if several persons joined in the commission of an offence of this kind and each is ordered to pay a penalty including the damages, it might happen that the prosecutor would get paid several times over the amount of his loss. To prevent this, section 54 provides that in such case the aggrieved party shall be paid only the amount of his damages as ascertained by the justice and the costs (if any) ordered, and the residue of the penalties is to be applied as other penalties are.

In cases under the Acts respecting larceny, malicious injury to property and the protection of the property of seamen in the navy, if it is a *first* offence, the justice may discharge the offender on his making satisfaction to the aggrieved party for the damages and costs, or either of them, as fixed by the justice. This relieves the defendant from any further penalty (s. 55).

COSTS.

The justice has power to award costs *in all cases* to be paid by the *unsuccessful* party. It is entirely a matter of discretion. If he decides to allow costs he must ascertain and *state* the amount in the conviction or order, or order of dismissal. These costs in proceedings under Dominion Statutes are fixed by Tariff W to be found at end of chapter 45, Dominion Statutes for 1889, and no costs but those there provided can be allowed in prosecutions under ch. 178, R. S. C. It will be observed that Tariff W does not provide for payment of witnesses, consequently in proceedings for matters under a Dominion Statute witness fees cannot be allowed. In the Territories, in proceedings under Territorial Ordi-

nances, costs will be according to chapter 42, Rev. Ordinances.

We will suppose that the defendant has been found guilty and sentenced to a fine of $10 and costs amounting to $3.50.

ENFORCING PAYMENT, ETC.

The next step is to enforce obedience to the decision. This brings us to the most difficult part of our journey, a bit of road that branches out in various directions and requires the most careful and deliberate perusal of the signboards and directions provided in the Act or law under which proceedings were taken and in certain sections of chapter 178, R. S. C.

The first thing to look at is the particular Act or law creating the offence, etc., for the purpose of seeing whether it provides a mode of enforcing obedience—that is—payment.

The usual modes—in fact the only ones now employed—are *Distress* and *Imprisonment*, with or without hard labour.

"Imprisonment" may be directed either (1) as a mode of punishment for the offence, or (2) as a mode of enforcing payment. In the former case the defendant must go to gaol and stay there for the period ordered; in the latter, he may pay and thus avoid punishment, or if he does not pay and is sent to gaol for not doing so he can get out before the end of the time as soon as he pays (s. 98).

This distinction is important and should be kept distinctly in mind.

If the Act dealing with the offence or matter itself provides that, if the money is not paid, the offender shall be

imprisoned, and if it makes no mention of distress then imprisonment is the *only* mode of enforcing payment.

If it says that the money may be levied by distress and sale of the defendant's goods and that if there are no sufficient goods he may be imprisoned, then the conviction or order may direct accordingly and sections 62, 63, 64, 65 and 66 provide for the procedure.

If it merely directs distress and mentions no further remedy then section 67 must be looked at.

If it gives no remedy or mode of enforcing payment then sections 62 and 67 apply. Sections 60 to 70 are devoted to the various methods of enforcing payment of moneys ordered to be paid, but the provisions therein are all subject to any special provisions in the special Acts dealing with the offence or matter. Section 62 provides that where a conviction or order directs payment of money and the Act authorizing such conviction or order either (1) authorizes a distress and sale of the defendant's goods, or (2) does not mention any mode of enforcing payment, then in either of these cases, a distress warrant (Form N 1, in case of a *conviction*, or N 2, in case of an *order*) may be issued to levy the amount mentioned and the costs of distress. If the constable to whom the distress warrant is directed finds goods belonging to the defendant within the jurisdiction of the justice who issued the warrant he levies thereon and sells sufficient to pay the amount in the warrant and the costs of distress, and if there be not enough goods to satisfy the whole amount and there are goods in another territory over which the justice who issued the warrant has not jurisdiction, he can get the warrant "backed" (s. 63) by going before a justice of that territory and proving, on oath, the signature of the justice who issued the warrant, whereupon such other

justice will endorse it in the Form N 3, and then levy may be made on the goods in that territory for the whole or any balance of the money in the warrant mentioned and costs. In the Territories "backing" is never necessary if the process is to be executed anywhere in the Territories. He should make a "return" of what he has done to the justice who issued the warrant.

If he can find "no goods" on which to levy he should make a "return" accordingly (Form N 4). If he finds some goods, but not enough in his opinion to satisfy the warrant, he must consider whether he ought to take his chances of making the money out of the goods or declining to go on with the distress and returning that he can find no sufficient goods, because the defendant's goods cannot be sold for part of the penalty and costs, and the defendant sent to gaol for the balance, so if defendant has paid part it must be returned to him before he can be sent to gaol for non-payment of the rest: *Brown* v. *Sinden*, 17 Ont. App. Rep. 173.

Where the goods are not sufficient they ought not to be taken, but a return of "no goods" made, and then (s. 66) the justice to whom the return is so made, may issue a warrant of commitment (N 5) requiring the constable to convey the defendant to gaol. If the Act or law authorizing the conviction or order provides imprisonment in case of a distress warrant being returned "no goods," then the commitment shall specify the period of imprisonment not exceeding that mentioned in such Act. If the Act says that "hard labour" may be imposed, then the justice may, if he sees fit, direct "hard labour," but if the Act is silent on that point then the imprisonment cannot be *with hard labour* (s. 66).

If the Act does not provide for imprisonment at all, in case of "no goods," then s. 67 provides that imprisonment may be ordered but not exceeding three months, and "hard labour" cannot in this case be imposed: *Reg.* v. *Tucker*, 16 O. R. 127.

If a justice is satisfied either from the admission of the defendant or otherwise that he has no goods or that to issue a distress would be ruinous to the defendant and his family, he need not issue a distress warrant but may proceed to commit to gaol just as if a return of no goods had been made (s. 64).

Neither section 66 nor 67 says that the Justice who issues the warrant of commitment shall be guided in fixing the *time* or *manner* of imprisonment by the conviction or order.

The imprisonment here imposed is only as a mode of enforcing payment, consequently if the defendant at any time pays up the amounts named in the warrant of commitment he must be let out (s. 98).

What should these be? In cases under section 66 they will be (1) the amounts named in the conviction or order, (2) the costs of the distress, and (3) the costs of commitment and conveying the defendant to gaol (if the justice sees fit to order these last costs), *the amount thereof being computed and mentioned in the warrant.* It has been decided that under section 67 the costs of commitment and conveying to gaol cannot be imposed (*Reg.* v. *Ferris*, 18 O. R. 476).

Now let us apply these remarks to the case in which we have supposed the defendant has been fined $10 and $3.50 costs for, say, a common assault. Looking at ch. 162,

R. S. C., s. 36, we find that it does not mention *any mode* of enforcing payment of the fine.

Let us here draw attention to a frequent error arising out of sections worded like this one. It says the defendant is liable to a *fine*, not exceeding $20 and costs, *or*, to two months' *imprisonment*. Observe that it does not say that *in default of payment* he shall be imprisoned; this imprisonment is not provided as a mode of coercing the defendant into paying the fine. The section means this: two modes of punishment are presented; for the choice of the magistrate; he may (1) *fine* or he may (2) *imprison*; if he fines it shall not exceed $20 and costs; if he imprisons, the term must not exceed two months; but he cannot impose *both* fine *and* the imprisonment there mentioned. If he *fines* and the fine is not paid and the defendant has no goods, imprisonment may follow, but that is by virtue of section 67 (ch. 178), but he can get his release in this case at any time by payment, whereas the imprisonment mentioned in section 36, ch. 162, could not be ended by any payment.

But to return—we see that "no mode" of enforcing payment is given in section 36, ch. 162. The justice under section 62 (ch. 178), can therefore issue a distress warrant, or under section 64 if satisfied as there stated, he need not issue a warrant, and in this case or in case of a return of "no goods," may commit him to gaol (s. 67) for a period not exceeding three months without hard labour unless payment sooner made of the fine and costs.

But suppose the justice who convicted had, instead of a fine, imposed *imprisonment* for, say, one month. Section 36 says it may be "with or without hard labour," so the justice may direct the imprisonment in either way. He

can also direct payment to the prosecutor of his *costs* and by section 61 he can enforce payment of these by distress and in default of distress may commit to gaol (J 3), with or without hard labour, for a period not exceeding one month, which will begin to run from the completion of the month originally imposed. The imprisonment for non-payment of the costs may, however, be put an end to by payment at any time (s. 98).

Let us take another illustration—a case where the Act authorizes a *fine* and, in default of payment, *imprisonment*, but does not mention distress—say under section 6, ch. 158, R. S. C. Here the Act *does* provide a mode of enforcing payment, viz., up to two months' imprisonment, but this imprisonment takes place only in case the fine is not paid. Since the Act here *does* provide a mode of enforcing payment sections 62 and 67 do not apply, and as the Act itself says nothing about "distress," no distress warrant can issue (*Reg.* v. *Sparham*, 8 O. R. 570). The justices may also impose costs and as section 60 says that costs are to be recoverable in the same way as the *fine*, and as the only mode of recovering the *fine* provided is *imprisonment*, that is also the only mode of enforcing payment of the *costs*, so the defendant will have to stay in gaol the time fixed unless he sooner pays both *fine* and *costs*.

Section 53 directs that convictions and orders shall be drawn up in one of the forms given in the schedule to ch. 178. J 1, J 2 and J 3, are forms of *convictions;* K 1, 2, 3, of *orders*.

J 1 and K 1 correspond as nearly as possible and are to be used where a fine or sum of money (1) is to be paid, and if not paid, (2) to be recovered by distress, and if no distress, (3) imprisonment. These forms are not con-

sistent with sections 66, 67, because those sections authorize the justice who commits in default of distress to fix the time and mode of imprisonment without reference to the conviction or order. It has been held, however, that a conviction in the form given is not on that account bad.

J 2 and K 2 also correspond closely being used where the conviction or order directs (1) payment of a fine or sum of money and if not paid (2) imprisonment, but not distress.

Form J 2 is apt to mislead because near the end it uses the words "and the costs and charges of conveying to gaol." These are not in brackets as they are in Form O 1. The use of brackets is to indicate that these words are to be inserted or not according to circumstances and not in all cases, and that these costs cannot be imposed unless the Act under which the conviction or order is made, or some other Act, expressly authorizes them: (*Reg.* v. *Hamilton*, 1 N. W. T. Rep.; see also *Reg.* v. *Wright*, 14 O. R. 668). There is no statute which does authorize the imposition of these costs in cases to which Form J 2 is applicable. The form is taken from the English Act where section 23 makes provision for it, but this section has not been incorporated into our Act.

J. 3 is where the conviction imposes as a punishment imprisonment, (but no fine), with or without costs.

K 3 is an order directing some Act to be done, and if not done that imprisonment shall follow the disobedience. It also provides for costs (if ordered) and their recovery by distress, and if no distress, by imprisonment, not exceeding one month (s. 61). This latter imprisonment is to commence at the end of the imprisonment imposed for disobedience, and may be terminated by payment of the costs.

The only remaining case to be noticed is the form of order of dismissal and for recovery of costs, if ordered. The form given is L and it provides for distress (P 1), and in default of distress, for imprisoment (P 2), not exceeding one month, with or without hard labour (s. 61), and by section 70 the justice may require payment of the costs of distress and also of the costs of committing and conveying defendant to gaol.

By some Acts, *e.g.*, the Vagrant Act, either fine *or* imprisonment *or* both may be imposed. If the justices impose *both* modes of punishment then the conviction should be one made up of parts of both J 3 and J 1 or J 2, according to the mode of recovering the fine, which is given; selecting J 1 if distress can be ordered, and J 2 if *not;* the part which deals with the imprisonment awarded as punishment can be adapted from J 3.

Under the Vagrant Act (ch. 157, s. 8, s-s. 2), no mode of enforcing payment is provided so by section 62 (ch. 178) the fine may be recovered by distress and the forms to be looked at are J 1 and J 3.

An effort has been made to indicate at a glance the mode of enforcing convictions and orders by giving a tabular view or Chart (B) of the various steps and it is believed by the writer that any one who has a general knowledge of the subject or such as can be gained by a perusal of these pages will be assisted by the charts in taking the various steps in each case. There is one observation which seems, however, proper to make and that is, that no book or map can dispense with the exercise of care and ordinary intelligence, in the applications of the instructions to the various cases; in the perusal of the statutes and ordinances affecting each matter, and the forms given in the schedule to chapter 178

and amending Acts. These forms will generally suggest, if carefully read, the material matters necessary to be set forth, although the writer does not by any means desire to be understood as vouching for their absolute correctness.

In proceedings under the Larceny Act, the Act respecting "malicious injuries to property," and "the property of seamen in the navy," it is provided by section 68 that if the penalty is not paid immediately or within the time named by the justice, then unless where otherwise specially directed, namely, in those Acts themselves, the J. P. may commit the offender to gaol (without first issuing a warrant of distress), either with or without hard labour. If the fine with costs exceeds $25, the imprisonment may be up to three months, or if less than $25, then not exceeding two months. The form of conviction will therefore be J. 2, and of commitment O 1. This forms an exception to sections 62 and 67, because the cases referred to in section 68 are where no mode of enforcing payment is provided.

The imprisonment under a warrant of commitment is to be calculated from the earliest moment of the day of the arrest under the warrant—the prisoner should be released on the morning after the expiry of the sentence. *Reg.* v. *Scott*, 2 U. C. L. J., N. S. 324; *Ex parte, Foulkes*, 15 M. W., *Bowdler's case*, 12 Q. B., 612.

JOINT OFFENCES.

If several persons join in the commission of an offence they may be proceeded against by *one* information and there may be one conviction of all, or separate convictions of each. But the *fine* imposed must not be *joint*, that is, *one* fine imposed on *all* would be bad. If the offence is in its nature *single*, *e.g.*, killing a pigeon (since it can be killed but

once), here each of the offenders cannot be fined the whole penalty named in the Act—only one penalty can be imposed, but in the conviction it must be *apportioned* so that *each* may know what he has to pay. The costs must also be apportioned (*Parsons, qui tam* v. *Crabbe*, 31 C. P. (Ont.) p. 151). If, however, the offence is of such a nature that the guilt of each of the joint offenders may be separate and distinct from that of the others, or if the Act dealing with the offence declares that "*each*" or "every" person committing the offence shall pay a certain penalty, then each of the offenders may be fined the whole or any part of that penalty, but the costs must still be apportioned among the offenders, the conviction showing the penalty and the amount of costs each must pay. And in that part of the conviction which imposes imprisonment in default of distress or payment, care must be taken that it does not subject any of the defendants to imprisonment for non-payment of any part of the penalty and costs except that payable by himself, as he ought not to be imprisoned for the default of some other defendant.

SECOND OFFENCES.

By some statutes a heavier penalty or a different mode of punishment is provided for a repetition of the same kind of offence. The defendant must have been convicted for the first offence before he can be charged with the second, and for the second before being charged with the third. If it is intended to proceed as for a second or third offence the information and summons must so state in order that the defendant may have notice of the intention to prove that he has been already convicted for a previous offence against the same law. On the trial no evidence of the former conviction should be gone into until the present charge has

been proved and then, but not before, evidence of the former conviction or convictions can be gone into. These may be proved by copies of them certified by the Clerk of the Court or other proper officer in whose office they are. If the proof is satisfactory the conviction should show that the defendant has been found guilty not only of the present offence, but also that he was proved to have been previously convicted as charged in the information and that his present conviction is for a second or third offence. If the evidence fails to show a previous conviction the defendant may be found guilty of the present offence just as if no previous conviction had been charged. The Statutes generally provide that the "second" offence must be one *committed after* the conviction for the first offence.

WAIVER.

An appearance by defendant to a defective summons or one issued on a defective information or complaint or even where no information or complaint exists, is a waiver of the defect or omission and the justice may proceed, provided he would otherwise have jurisdiction. But if the matter be one over which the justice has *no jurisdiction*, no appearance or consent by the defendant can give him power to deal with it. In *Reg.* v. *Hughes*, L. R. 4 Q. B. D. 614, no information had been laid, the justice signing a warrant brought to him by the prosecutor. The trial took place before two other justices, the defendant appearing and calling a witness in his defence. The conviction was held good, though the justice who issued the warrant could have been sued for damages for his illegal act.

MARRIED WOMEN—CHILDREN—IDIOTS.

Married women are not responsible for crimes committed in presence of their husbands if it appears that they may

have acted under fear or pressure from their marital lords —but otherwise where they appear to have acted voluntarily.

A child under seven years old cannot be convicted of crime; if over seven and under fourteen, it may be convicted provided it be proved that it had sufficient capacity to know that the act was wrong.

Idiots and lunatics cannot be convicted of crime.

AIDERS AND ABETTORS.

Every one who aids, abets, counsels or procures the commission of an offence may be prosecuted either where the principal offender could be convicted or where such act of aiding, etc., took place (s. 12, ch. 178, R. S. C). And see R. S. C. ch. 145.

SEVERAL OFFENCES.

An information or complaint must not be for more than *one* matter (s. 26), but in charging the one offence it may be described as committed in different *modes* (s. 107).

RETURNS OF CONVICTIONS.

Section 99, chapter 178, R. S. C. requires every justice to make a quarterly "return" (Form V) of all *convictions* (not including orders) made by him under Dominion Statutes. If two or more justices join in a conviction they must also join in making the return. The return must show what moneys were received and what was done therewith, and if moneys are paid in subsequent to any return they must be included in the next return (s. 100). Neglect to obey these sections is punishable by a penalty of $80 (s. 101).

In Ontario, "returns" are provided for by chapter 76, Rev. Stat., and such returns must include convictions under

Provincial Acts and where made by more than one justice must be "immediate," under penalty of $80 for disobedience.

In the Territories, chapter 44, R. O., requires a quarterly return to the Lieutenant-Governor of "all proceedings" and also payment to him of all "fines" received during the preceding quarter. A penalty of $100 may be the consequence of disobedience.

The "returns" here mentioned do not call for the convictions themselves—they are simply schedules giving short particulars as indicated by the forms.

But by section 85 chapter 178, R. S. C., all convictions and orders under Dominion Acts must be transmitted to the Court, to which an appeal will lie, before the time for hearing such an appeal and that, too, whether any notice of appeal has been given or not. If an appeal has been taken and a deposit of money made with the justice, he must also transmit such deposit to the Clerk of the Court. Justices, especially in the Territories, should therefore transmit their convictions and orders at once to the Clerk of the Court.

APPEALS.

When notice of appeal has been duly given and the proper recognizance entered into, proceedings under the conviction or order appealed from should be stayed until the appeal is disposed of. If the appeal succeeds the justice cannot, of course, do anything further, but if it fails, then the justice will proceed subject to the judgment of the Appellate Court.

STATING A CASE.

By the recent Act (ch. 37 of 1890 D) a new duty is imposed on justices, viz., that of "stating a case." Section

24 provides that either party, whether prosecutor or complainant or defendant, may question a conviction, order or other proceeding of a justice on the ground that it is erroneous in point of law, or is in excess of jurisdiction, but not on other grounds such, for example, as that it is against the evidence or weight of evidence. The mode of questioning it under this section is to apply to the justice to "state a case."

The "case" will set forth (1) "the facts of the case" and (2) "the grounds on which the proceeding is questioned" and will be signed by the justice. The procedure governing the application for, and the stating of the case is to be provided by rules and orders passed by the Courts in their respective Provinces. Such rules and orders have been made by the Supreme Court of the North-West Territories and will be found in the appendix.

The party making the application is called the "appellant" and he is required to enter into a recognizance as prescribed by sub-section 4. On this being done and the proper fees paid to the justice the appellant is entitled to have a case stated and delivered to him and, if he is in custody, to be liberated.

The justice may refuse to state a case if in his judgment the application is "frivolous," but not otherwise. In case he refuses to state a case the appellant may apply to the Court or a Judge in Chambers for an order requiring him to do so. The justice must, of course, obey any order made on such application.

When the case is stated and delivered to the appellant the Court or Judge before whom it comes for consideration is given large powers of affirming, reversing or modifying,

or may remit the matter to the justice with its or his opinion.

After disposal of the matter by the Court if the conviction, etc., has been affirmed, amended, etc., the justice whose proceeding was so questioned, or any other justice with the same jurisdiction, may proceed to enforce it (s.-s 10) just as if it had originally been as it now is.

MISCELLANEOUS HINTS.

A justice of the peace ought not to act in any case in which from relationship to any of the parties, or a pecuniary interest in the result, or from having advised or instigated the prosecution, he is likely to be biased in his judgment. If he is in doubt, he ought perhaps to decide not to act.

He may dismiss an assault case if it seems to him to have been very trivial, even though the defendant may be technically guilty (ch. 20, s. 44, R. S. C).

A justice may often save much bitterness between neighbours who have commenced proceedings before him by suggesting to them an amicable adjustment of the cause of contention and affording them an opportuity for arriving thereat.

SUMMARY OFFENCES.

A list of offences that may be summarily dealt with by one, or more than one J. P. will be found at p. 72, *et seq.*

PART II.

INDICTABLE OFFENCES.

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INDICTABLE OFFENCES.

In this part we shall review the proceedings before a J. P. in respect of those offences with which he has no power to deal summarily—but can only enquire whether the persons charged therewith should be required to stand their trial by a competent Court.

These proceedings are regulated either

By the Acts dealing with the particular offences,
or by chapter 174, R. S. C.,
or partly by both.

IS IT AN "INDICTABLE" OFFENCE?

When a matter is brought before a J. P. he must consider whether it is an "indictable" or a "summary" offence. Common assault may be either—if the prosecutor desires it tried summarily the J. P. may so try it, but if it turns out to have been accompanied by an attempt to commit a felony or if from any other cause the J. P. thinks it ought not to be tried summarily he must treat it as an "indictable" offence,—so also if any question arises as to title to any lands, tenements, etc., or as to any bankruptcy or insolvency proceedings or any execution under the process of a Court of justice.

In any of these cases his jurisdiction to deal with the matter in a *summary* manner is taken away and his only power is to treat it as an indictable offence.

If on the other hand the prosecutor does not wish the complaint for assault tried by the J. P. summarily and if

he does not request the justice to so try it the case must be treated as an indictable offence.

If the J. P. decides that the matter brought before him is an indictable offence or one which must be treated by him as such he must next ascertain whether it is one within his territorial jurisdiction.

WHERE WAS THE OFFENCE COMMITTED? WHERE IS THE OFFENDER NOW?

The offence must either

(1) Have been committed within the territory of the J. P., or

(2) The offender must *be* or *reside* (or be suspected of being or residing) within such territory at the date of the information, or

(3) Be one of the cases soon to be referred to.

That is to say—if the offence is not charged as having been committed within the territory of the J. P., he will still have jurisdiction, if the offender *is* or *resides* [or it is so suspected] within the territory of the J. P.

In this respect his jurisdiction in indictable cases is wider than in summary matters as in the latter he can only deal with matters happening within his territory.

By " territory " is meant the area of country over which a J. P. has jurisdiction. In the Territories a Justice of the Peace has jurisdiction over the whole of these Territories. In the other Provinces he has jurisdiction only over the county, district or other place over which his commission gives him jurisdiction or for which he is *ex-officio* a J. P.

Besides the cases where the offence happened or the offender is or resides, etc., within the territory of the J. P.,

there are other cases in which he has jurisdiction over indictable offences

(*a*) If a thief has in possession or brings into his territory property stolen, embezzled, etc., either out of Canada (*e.g.*, in the United States) or in some other part of Canada (s. 21, 22, R. S. C., ch. 174).

(*b*) In cases of murder and manslaughter, if the act causing death was committed in his territory though the death took place out of Canada or beyond the sea, or *vice versa*, if the death occurred in the territory of the J. P., from an act committed abroad (s. 9).

(*c*) If the crime was committed *on*, or *within a mile* of the *boundary* of his territory, or if it is uncertain whether the place is within this territory or if the crime was *begun* in one territory and *completed* in another, a justice of either territory may deal with it (s. 10).

(*d*) If the crime was committed in a railway train, vessel, etc., on a journey through several territories (s. 11), or on a highway or canal or river between territories (s. 12), a justice of any of such territories may deal with it.

(*e*) In unorganized tracts and provisional districts in Ontario (see s. 14).

(*f*) Perjury, bigamy and offences against sections 53, 54 and 55 of the Larceny Act (s. 16).

(*g*) Accessories (s. 17).

(*h*) Forgery (s. 18).

(*i*) Kidnapping, if any person kidnapped were carried through the territory (s. 19).

(*j*) A receiver of stolen goods, if he has or had the property in the territory or if the thief could be tried in such territory (s. 20).

(*k*) Counterfeiters uttering coin in different places (s. 23).

The foundation of a justice's right to deal with any particular case is—

AN "INFORMATION" OR "COMPLAINT," (FORM A).

Without an "information" he has no jurisdiction. An "information" is a statement in writing and *under oath* (s. 38), except where by the special Act under which the complaint is made, it may be without oath. But in all cases, without exception, if a *warrant* is to be issued in the first instance, the complaint must be under oath (s. 38).

Looking at Form (A) we see that it states, in the margin the Province and district in which the J. P. acts. In the Territories the district need not be mentioned, because the J. P. has jurisdiction throughout the whole of the Territories.

It then commences with "The information and complaint of C. D." (the prosecutor). His residence and occupation are to be stated, also the *date* of the information, the *name* of the J. P., and the *place* for which he is such J. P. In the Territories he will describe himself as "a Justice of the Peace in and for the North-West Territories of Canada."

Then come the words "who saith that A. B." (the offender), on (date of offence), at (place of the offence), did (here give a description of the offence).

If the reader will turn to the second schedule at the end of ch. 174, R. S. C., he will find forms of indictments suitable to different offences and these will be a guide to him in preparing a description of the offence. Or he may look at the statute which deals with the offence and from that get a description. It may frequently be prudent, and sometimes it is necessary, to state the *manner* in which the offence was committed. Care should be taken not to omit the words "feloniously," "wilfully," "fraudulently," "knowingly," "maliciously," "corruptly," etc., wherever any of these is or are used in the Act dealing with the offence. If the crime is a felony then it should be described as done "feloniously."

Defects in the information summons or warrant, however, are not fatal (s. 58), nor is a difference between the statements therein and the facts as shown by the evidence. If the defendant has been thereby misled he is entitled to an adjournment if he demands it (s. 59).

If the offence concerns *property* and it is necessary to mention the *ownership* of it, if it belongs to *partners* or several persons, the name of *one* of the owners is all that need be given, thus, "the property of John Smith and others" is sufficient.

BRINGING UP THE ACCUSED.

If the accused be already in custody (having been arrested under sections 24 to 29, ch. 174, R. S. C., without a warrant), no summons or warrant need be issued. On an information being laid, a verbal order to the person having him in custody to bring him before the J. P. is sufficient.

But if the accused is *not* in custody then the next step after the "information" is to issue either a summons (Form C) or a warrant (Form B). The J. P. must decide which of these should be employed, having regard to the gravity of the offence; the probability of the accused obeying a summons and also, perhaps, the probability of his being guilty, judging from the character and statements of the prosecutor.

If a *summons* is issued it will be addressed to the accused, will describe the offence, and inform him *when* and *where* he is to appear.

It will be served by a constable or peace officer

(1) By delivering it personally to the accused, or if this cannot conveniently be done,

(2) By leaving it for him with some person, at his last or most usual place of abode (s. 41). In this case the nature of the summons should be explained to the person with whom it is so left.

The constable who serves it will attend at the time and place named in the summons so as to prove the service if necessary (s. 42).

If, after issuing a summons as above and before the time for appearing, the justice should become satisfied that a warrant ought to be issued, he may issue a warrant (B), without waiting to see if the accused will obey the summons (s. 31).

If the accused disobeys the summons, the J. P. may, on proof on oath of the service, now issue a warrant (Form D) to bring him under arrest (s. 43).

If, however, for good reasons the J. P. thinks it necessary that, instead of a summons, a warrant should issue in the

first instance, he may grant a warrant (Form B. s-s. 30, 38, 40), provided the information was in writing and under oath.

Warrants may be granted on Sundays or other statutory holidays (s. 37), and are *signed* and *sealed* by the J. P., but the absence of the *seal* will not invalidate the warrant or summons, provided it is therein declared to be under the "hand and seal" of the J. P. (s. 45). For mode of addressing the warrant see section 44.

A warrant is not made returnable at any particular time, that is, it is not necessary to mention in it, *when* the accused is to be brought before the J. P. (s. 46), and so it stands good until executed.

The accused may be arrested in the territory of the J. P. who signs the warrant, or, in case of fresh pursuit, at any place not over 7 miles across the border. Otherwise it will be necessary to get the warrant "backed" (s. 49), that is, the constable who has the warrant must go before a J. P. for the place where the accused is, prove the signature of the J.P. who issued it and obtain an indorsement (Form I) on the warrant signed by this other J. P. It may now be executed by the constable who brought it or by any of the constables mentioned in the indorsement. A warrant issued in the North-West Territories may be executed anywhere *therein* without being "backed."

When the accused is arrested under a "backed" warrant he may be brought before either the J. P. who first issued it or other J. P. for the same place, or before a J. P. for the territory in which the offence was committed as stated in the warrant (s. 49), or if the prosecutor or any of his witnesses happens to be in the territory where the arrest takes place, the accused may be taken before the J. P. who

"backed" the warrant or some other J. P. for the same territory, provided the justice who backed the warrant so directs (s. 50). This permits a person arrested in, say, Ontario, under a warrant issued in the North-West Territories being brought before a J. P. for the county in Ontario in which he was arrested instead of bringing him back to the Territories. But the committal if any will not be to a gaol in Ontario but to a gaol for the territorial division wherein the offence is alleged to have been committed (s. 86).

APPEARANCE OF THE ACCUSED.

We will now suppose that the accused has appeared before the J. P., whether in obedience to a summons or by virtue of a warrant or otherwise.

The room where the examination takes place is *not* an *open Court*, (as in the case of summary trials). No person can be there except the prosecutor, the accused, and the witnesses, without the consent of the J. P. (s. 57), but the practice is, and it would seem also to be his duty, not to shut out the public unless he thinks by so doing the ends of justice will be better answered. He can, consequently, exclude counsel or attorneys of either the prosecutor or accused, but this is not the usual practice and would be justifiable only under very exceptional circumstances.

It is not necessary that the J. P. who takes the examination should be the same who took the information or issued the summons or warrant. Any other J. P. for the same territory, then present, may take the examination.

WITNESSES.

If the witnesses for the prosecution will not attend voluntarily, the J. P. may grant a summons, provided some

competent person makes oath that such proposed witnesses are (1) *within Canada* and (2) will *not* voluntarily attend as witnesses (s. 60). The summons will be in form (L). There does not appear to be any right to a summons or other process to compel the attendance of witnesses *for the accused.*

Instead of a summons, a warrant (L 3), may issue, provided the J. P. is satisfied (in addition to the facts above required to be sworn to) on oath that (3) the proposed witness will probably not attend unless compelled (s. 62).

If, where a summons was issued and served either personally or by being left at his residence with some one for him, the witness fails to attend, then, on proof of the service, a warrant (L 2, s. 61) may issue. Either of these warrants may be "backed" (see *ante* p. 55).

If a witness attends, on summons or warrant, but refuses to be examined on oath or to take the oath, or having taken the oath, refuses to answer questions, *without just excuse*, the J. P. may by warrant (L 4) commit him to gaol or other confinement for a period not exceeding 10 days unless in the meantime he consents to be examined or sworn or answer as the case may be (s. 63). A witness may refuse to answer questions the answers to which might tend to convict himself of a crime, so also a husband is not usually obliged to give evidence against his wife or a wife against her husband (see *ante* p. 19).

It will be noted that section 63 applies only where the witness has attended in obedience to a *summons* or *warrant* so that, before he can be committed to gaol it would be necessary to issue a summons or warrant and have it served or executed, and then if he still refused to swear, etc., he could be proceeded against as above.

If the parties are not ready to proceed with the examination, owing either to absence of witnesses or any other reasonable cause, the J. P. then present, may adjourn and remand the prisoner, by warrant (M) from time to time, but not longer than *eight clear days* at any one time (s. 64), that is, he can remand him from any hour on the 10th to any hour on the 18th, and on the 18th he can again remand to any hour on the 26th, or to some earlier day. If the remand is not to exceed *3 days*, it need not be in *writing*—a verbal order will be sufficient (s. 65); if for a longer period it must be by warrant (M).

Notwithstanding a remand, the J. P. may, if the circumstances justify it in his opinion, order the accused to be brought before him *sooner* (s. 66).

When the accused is remanded, instead of being kept in custody he may be let out on bail (s. 67) on entering into a recognizance (M 4) either with or without sureties in such amount as the J. P. thinks proper. If the accused should not appear at the time appointed any justice then present may certify on the back of the recognizance the fact of his failing to appear, and send it to the Clerk of the Court, or other proper officer, to be further dealt with.

A warrant would of course also issue to arrest and bring the accused before the J. P., but no provision is expressly made in the Act for this, nor is any form of warrant given, but Form B could be altered to suit the case, by reciting the facts of the accused having appeared, been remanded, given bail and failed to appear.

THE EXAMINATION.

Let us suppose that all parties are now ready and that the examination is about to proceed.

It is a common but erroneous practice to ask the accused whether he is *guilty or not.* There is no authority for this question, and, if asked, he need not answer it.

The first proceeding is the examination of witnesses (s. 69), and this must in all cases, *without exception*, take place *in presence* of the accused, and he must have permission to question the witnesses produced against him after they have given evidence for the prosecution.

The witnesses are "those who know the facts and circumstances," and before being asked any questions they must be sworn or make affirmation. See form of oath, etc., *ante* p. 24.

Their evidence must be taken down in writing either by the J. P. himself or by some one acting as his clerk, and the evidence so taken down must be read over to each witness at the close of his examination and, after such corrections are made as he requires, must be signed by him.

The mode of examining witnesses and some principal rules of evidence have already been touched upon in Part I. and need not be repeated here.

The statements of the witnesses are called "depositions," and are commenced in accordance with Form N, a careful reading of which will clearly show the mode of taking down evidence.

As soon as each witness has given his evidence for the prosecution the prisoner or his lawyer, if one is present and permitted by the J. P. to act, may cross-examine him, and the answers given must be taken down in the same way as his previous answers.

When the witness has signed his deposition the J. P. usually certifies that the above "deposition of A. B. was

taken and sworn before me at on the day and year first above mentioned " and signs it, but this is not actually necessary because *one* certificate at the end and stating that all " the above depositions of A. B., C. D. and E. F. were taken, etc.," will be sufficient (See Form N).

When the examination of all the witnesses against the prisoner is concluded the depositions are to be read to him (s. 70) and the J. P. then asks him the following question : " 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 evi- " dence against you at your trial."

Whatever he then says must be taken down (See Form O) and read to him, and after being corrected as he may desire, is signed by the J. P. and kept among the other papers.

If any promise has been made to the prisoner by the prosecutor or any one in authority over him to induce him to confess, or any threat made to him with the same object in view, the J. P. should, before the prisoner makes any statement, in addition to the above warning, inform and give him clearly to understand that he has nothing to hope for from any promise of favour and nothing to fear from any such threat, but that anything he says may be given in evidence against him at his trial, notwithstanding any such promise or threat (s. 71).

The previous confessions or admissions or other statements of the accused may be proved like any other fact, but if it appears that any promise of favour or any threat was made to him by the prosecutor or any one in authority, as *e.g.* a constable or person having him in charge or by

his master or mistress in some cases, any confession made after such promise or threat is not admissible, unless in the meantime he had been shown that such promise or threat is of no effect and that he must place no reliance thereon. Statements made by him while his mind was left under the influence of such promise or threat are not evidence. The warning given in section 71 is intended to remove the impression so made on his mind. A very slight promise or hope of favour is sufficient to prevent confessions made thereafter being admissible. In one case a statement by the constable in charge of the prisoner that "it would be better for him to tell the truth," was held sufficient to prevent the prisoner's statement being admitted against him and also to exclude a lengthy and detailed confession of his crime made while in gaol several days afterwards to a newspaper reporter.

EVIDENCE FOR THE DEFENCE.

It is not usual to hear witnesses for the defence, and strictly speaking no evidence for the defence can be considered in the same way as it would in a summary case. Yet the J. P. cannot refuse to hear such witnesses as the accused chooses to offer. (See *Re Phipps*, 3 App. Rep. Ont.)

There are two reasons for this: one is that the J. P. can bind over the witnesses to appear at the trial and the accused should, in justice, be enabled, as well as the Crown, to secure the attendance of witnesses. Besides, the depositions before the J. P. may, under certain circumstances, be used at the trial. The other reason is that the witnesses for the accused may give evidence which so explains that given for the prosecution as to deprive it of the weight and significance it would otherwise have. In so far, how-

ever, as the witnesses for the defence simply contradict those for the prosecution, the J. P. must not decide which are to be believed for that would be to *try* the case ; in that event he should disregard the evidence for the prisoner in considering whether he should commit for trial.

At the close of the case against the accused he may, or if he has a lawyer, the latter may, point out any reasons why the accused should be discharged—such, for example, as that the evidence, even if true, does not reasonably make out a case against him, or that it is so contradictory or otherwise unsatisfactory as not to warrant a committal. If the J. P. thinks that for the reasons just given or because of the extreme improbability of the charge coupled with the bias or interest of the witnesses in prosecuting the prisoner or from their known bad character or for other reasons appearing, the evidence is not such as would likely convince a jury, or is not worthy of credence, he will be justified in discharging the prisoner. If, however, it becomes apparent to the J. P. in the course of the examination that all the evidence which might be given at the trial is not before him, as it sometimes happens that on the score of expense or from other causes all the witnesses are not produced before the J. P. who may be present at the trial, this would be a circumstance for his consideration in deciding whether to commit or not. A conscientious magistrate will consider fairly and fully all the circumstances and decide accordingly, bearing in mind always that the accused is deemed innocent until there is reasonable proof against him, and that in cases where a reasonable doubt exists the accused is entitled to the benefit thereof—he may, and in some cases he should, take time to read over the depositions carefully before giving judgment. If not prepared to decide at once

he may remand the prisoner to a time and place to be then fixed, the prisoner in the meantime being kept in custody or let out on bail, as already mentioned. On the day and at the place appointed the prisoner being again present the J. P. will give judgment.

If he decides to dismiss the charge he will order the prisoner to be forthwith liberated as far as that charge is concerned (s. 73). No formal order is necessary. He usually makes a note of the dismissal at the foot of the depositions.

If, on the contrary, he thinks the evidence sufficient to put the prisoner upon his trial, he may proceed as follows:

A. BEFORE COMMITMENT.

1. If the crime charged is treason or felony punishable by *death*, he must commit the prisoner to gaol to await his trial: in this case bail cannot be taken except on an order from a Superior Court Judge (s. 83).

2. If the crime is any other FELONY (not punishable by death) then whether the prisoner should be admitted to bail or not depends on whether the J. P. thinks the evidence against him *strong* or *weak*. If it raises a strong presumption of guilt then the J. P. should by warrant (P) commit him to gaol (s. 73). He should keep a copy of this warrant (s. 93). If it does *not*, in his opinion, raise a strong presumption of guilt, then he, jointly with another J. P., should admit to bail (s. 81). The sureties must be to the satisfaction of the two J. P.'s and they must both join in taking the recognizance (S) and in giving notice to the sureties (Form S 2, s. 81).

3. If the offence is a *misdemeanour* then, no matter whether the evidence is strong or weak, the J. P. *can* and

must admit to bail, if sufficient sureties are offered, and he can do this alone without the aid of a second J. P. (ss. 73 and 81). The recognizance will follow Form S.

In felonies there should be two sureties at least, in misdemeanours one may be sufficient.

In either of the above cases if no sufficient bail be forthcoming the prisoner must be committed to gaol. Unreasonably high bail must not be required. Each surety may be required to justify, *i.e.*, to make affidavit that he is worth sufficient property over and above his debts and other sums for which he is already bail, out of which the amount for which he proposes to be surety can be made if necessary.

B. AFTER COMMITMENT.

4. Once the prisoner is finally committed to gaol, if the charge be a *felony* he cannot be admitted to bail except on the order of a Judge. (*a*) If the charge be treason or felony punishable with *death*—it must be an order from a Superior Court Judge (s. 83). (*b*) In other felonies the order may be that of either a Superior or County Court Judge (s. 82).

On such order being granted two justices may take the necessary recognizance with sufficient sureties (Form S) in the amount fixed by the Judge's order and the justices shall then issue a warrant of deliverance (S 3) directed to the keeper of the gaol and send or cause it to be lodged with such gaoler. The Judge's order is to be attached to the warrant (ss. 82, 84).

5. If the crime charged is a *misdemeanour*, the J. P. who committed the prisoner for trial, may at any time before the first day of the sitting of the Court at which the

accused is to be tried, admit him to bail, without any Judge's order (s. 73), or he may certify on the back of the warrant of committal the amount of bail required and then any other J. P. for the same territory may admit to bail in that amount.

By section 82, any Judge (Superior or County Court) may also make an order for bail in misdemeanours, but in that case it requires *two* justices to take the recognizance and grant the warrant of deliverance, etc., and the order should fix the amount of the bail.

COMMITTING TO GAOL.

If the J. P. decides to commit he must prepare and sign and seal a warrant (P).

To what gaol is he to commit him? That depends on where the offender can be *tried*. The rule is that offenders must be tried in the territorial division in which the crime is charged as having been committed, or in which by the provisions of the statute it is to be deemed as if committed. For example by section 11 (R. S. C., ch. 174), a crime committed in a railway train may be treated as if committed in any district, county or place through which the train passed in the course of the journey during which the crime took place, and the prisoner may be tried in any such district, county or place. Again, by section 16, persons charged with perjury, bigamy, or with an offence under sections 53, 54 or 55 of the Larceny Act, may be tried either where the crime was committed or where he has been apprehended or is in custody. Sections 8 to 23 (ch. 174, R. S. C.), make provision for the place of trial of a variety of crimes, reference to which may be made wherever the crime has not been entirely committed within the territorial jurisdiction of the J. P.

The committal will be to the gaol for the territory of the J. P. if the trial can take place in such territory, if not, then to a gaol the place where the offence is alleged to have been committed (s. 86). In the Territories offences committed, or which by law may be *deemed* as committed, in any of the judicial districts can be tried in such district and the prisoner should be committed to a gaol in that district.

Whenever a person is brought before a J. P. charged with an offence committed in a place *outside* of the territorial jurisdiction of the J. P., and the J. P. thinks the evidence sufficient, he may commit him to gaol for the place where the crime is alleged to have been committed (s. 86), or may admit him to bail as already mentioned and subject to the rules as to bail hereinbefore given.

He shall also bind over the prosecutor (if he appeared before him) and the witnesses, by recognizance as hereinafter described (s. 86).

But if, in such a case, the J. P. does *not* think the evidence sufficient to put the accused on his trial, *he cannot discharge* him (s. 87), but shall by warrant (U) order him to be taken before some justice having jurisdiction for the place where the crime was committed. He shall also bind over the witnesses he examined, and shall deliver the information, depositions and recognizances along with warrant (U) to a constable to be delivered to the J. P. before whom the accused is to be taken.

This J. P. on receiving these papers is to treat them as if taken before himself. He may take the examinations of other witnesses and may deal with the matter as if it had originally been before him. If he decides to commit he will send all the depositions and recognizances to the

Clerk of the Court, or other proper officer, where the accused ought to be tried (s. 87).

The constable who brought the accused before him should prove on oath the signature of the J. P. who signed the warrant (U), and will be entitled to a receipt from the J. P. to whom he delivers the accused, for the prisoner and the several papers (s. 89) and is then also entitled to his fees (ss. 88, 90).

TRANSMITTING DEPOSITIONS, ETC.

When a J. P. commits a prisoner for trial he should before or at the opening of the trial Court, deliver or send to the proper officer of such Court all the papers in the matter (s. 77). In the Territories this officer is the Clerk of the Court; in Ontario, the County Attorney.

BINDING WITNESSES.

In order to secure the attendance at the trial of the prosecutor and witnesses examined before him, the J. P. should compel them to enter each into his own recognizance to appear at the trial Court to prosecute and give evidence or to give evidence (in the case of the witnesses). See Form Q.

This is a *duty* imposed upon the J. P., and is not a matter of discretion, except when the prosecutor or witness is a married woman or person under 21 years, in which cases the J. P. has a discretion (s. 75).

If a witness refuses to enter into recognizance he may be sent to gaol by warrant (R) until the trial, unless in the meantime he enters into the recognizance (s. 78), but if after sending him to gaol the J. P. discharges the accused, he should by order (R 2, s. 79) release the witness. These

sections do not apply to the *prosecutor* unless he is also a *witness*.

If a J. P. dismisses a charge, the prosecutor may in certain cases (see s. 80) require that his recognizance to prosecute be taken, and when taken, it must be sent by the J. P. to the same officer to whom he would have sent the depositions in case of committal.

If the J. P. receives notice from a prisoner whom he has committed, or from his counsel, that he intends applying for bail to a Judge, he must (s. 93) send to the Clerk of the Court, etc., a certified copy (under his hand and seal) of all the papers, depositions, etc., in the matter, together with a copy of the warrant of committal, if any, all put up in a sealed envelope and certified on the outside by the J. P. that it contains the papers and proceedings in the case. This is then handed to the person applying for it. Refusal to comply renders the J. P. liable to a fine (s. 94).

SEARCH WARRANTS.

On oath (K) of a competent witness before a J. P. that there is reasonable cause to suspect that any property, on or with respect to which larceny or other felony has been committed, is in any house or other place, the J. P. may issue a search warrant (K 2) to search the place or places mentioned, and if such property is found to bring it *and the person or persons* in possession of the house or place where same was found before him or some other J. P. for the same territory (s. 51).

So also if the witness proves on oath that there is reasonable cause to suspect that any person has property in his possession or premises in respect to which any offence under

the Larceny Act or chapter 171, R. S. C., has been committed, a warrant may be granted to search therefor (s. 52).

Section 53 provides for search warrants in case of gold or silver alleged to be unlawfully deposited or held—and the restoration of such ore, if found, to the owners—and appeals from the decision of the J. P.

Section 54 provides for the case of lumber, timber, etc., belonging to and marked with the trade-mark of a lumberman and suspected to be unlawfully kept in a mill, boom, etc.

Sections 55 and 56 provides for search for tools, etc., used in forgery of bank notes, etc., and counterfeiting, and the destruction of them.

When on search under a warrant property is found and the person in possession is brought before a J. P. he may on an information being laid proceed against the accused as in other cases.

SURETIES TO KEEP THE PEACE.

A J. P. has, by virtue of his commission, power to bind over to keep the peace, persons who, by

(1) Threats, or

(2) Other acts amounting to a threat

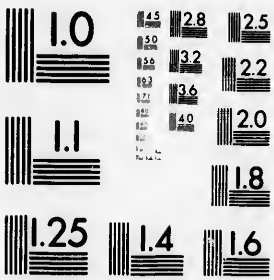
have put the complainant in fear of some injury to himself or to his wife or children, but not to his goods and chattels.

On p. 2198, R. S. C., is given a form of "complaint" to be made under oath. It will be noticed that three things must be stated:

(1) The threatening language—giving the exact words.

(2) That from these threats the complainant fears bodily injury.

IMAGE EVALUATION TEST TARGET (MT-3)



6"

2.8
2.5
3.2
2.2
3.6
2.0
1.8
1.1
1.0

(3) That he does not make the complaint from malice or ill-will.

The justice should be satisfied that the threats used reasonably justify the fear of bodily injury. He may then issue a warrant to bring the party before him. No special form of warrant is given, but Form D, p. 2151, may be adapted by substituting the word "complaint" for "information" wherever it occurs and stating at the proper place the threats used (giving the words) and that the complainant by reason thereof is afraid that the said A. B. will do him (or his wife or children if such be the fact) some bodily injury and requires the said A. B. to be required to find sureties to keep the peace and be of good behaviour towards him.

On the party appearing before the justice, the complaint should be read to him and he is then asked to show cause (*i. e.* give any reasons he has) why he should not be bound over. He cannot call witnesses or give evidence to deny that he used the threats alleged but may show that his language has been misunderstood and does not really contain any threat such as to create fear of bodily injury, or he may show that the complainant is actuated by malice or ill-will. Unless he can satisfy the justice on one or other of these matters he may be ordered to enter into a recognizance either himself alone or with two sufficient sureties to appear at the next court of general sessions (or, in N. W. T., at the next sittings of court.

The form of recognizance is given at p. 2199. The blank near the end may be filled up with "six months" or "twelve months," or other reasonable term in the discretion of the justice. The form of commitment is

found on page 2200, and should show the date of the threats and that the complainant was thereby put in fear of bodily injury.

In N. W. T. the imprisonment may be to the next sittings of the Supreme Court at the nearest place of holding such Court. S. 32, ch. 181, p. 2195, provides for bringing a person so committed, after two weeks, before a Judge who may order his discharge or make such other order as he sees fit.

SUMMARY TRIALS OF CERTAIN OFFENCES.

In order to admit of a speedy trial and disposal of certain criminal charges which are ordinarily included under the class of indictable offences—provision has been made by several statutes for the trial of these by either one or two justices, (as well as by other tribunals or functionaries with which we have here nothing to do).

One of these statutes is the "Summary Trials Act," ch. 176, R. S. C. This empowers two justices of the peace to try certain offences, a list of which is given in section 3 of that Act. In some of these the jurisdiction of the justices to try is absolute without the consent of the accused (s. 4), but in the majority his consent must first be obtained.

Before examining the witnesses the justices should put this question to the accused, "Do you consent that the charge against you shall be tried by us or do you desire that it shall be sent for trial by a jury [or by a Judge] at the (naming the Court at which it could soonest be tried)?" (s. 8). If he consents then the justices may proceed to try and finally dispose of the charge. If he does not consent they can only treat it as an indictable matter and commit for trial, mentioning in the warrant of committal that he elected to be tried by jury (s. 15). Sections 10 and 11 specify the punishments imposable under this Act. Section 12 gives the justices an option to deal summarily with larcenies, etc., where the value of the property exceeds $10. This option is to be exercised after hearing the evidence against the prisoner as for an indictable offence. If they think that the punishment which they can impose is adequate they may instead of committing him for trial, if they think the evidence sufficient for that purpose, put

the charge into writing and having read it to the accused ask him (as in s. 8) if he consents to be tried by them summarily, telling him also that he is not obliged to plead or answer (that is, go into his defence) before them, but if he does not consent that he will be committed for trial.

Section 28 provides that if a person is charged before a justice with any offence mentioned in this Act he may send him for trial before two justices or other the nearest tribunal which under this Act can try the matter.

This Act provides its own procedure and the provisions of chapters 174 and 178 R. S. C. do not apply except under s. 28.

Several sections of chapter 164 (The Larceny Act) give power to one J. P. to try summarily certain offences thereunder, viz :—

Stealing dogs, birds, etc., s. 9, s-s. 1.
Killing or taking pigeons, s. 10.
Stealing or destroying trees, s. 19, s-s. 1, 2.
Receiving stolen goods in certain cases, s. 20, 84.
Stealing or destroying fences, s. 21.
Having stolen trees in possession, s. 22.
Having stolen vegetables in possession, s. 23, s-s. 1, & s. 24.

So also in chapter 168 (malicious injuries to property) the following sections give summary powers :—

Negligently setting fire, s. 11, s-s. 2.
Damaging trees, etc., s. 24, s-s. 1, 2.
Damaging garden stuff, s. 25, s-s. 1.
Damaging vegetables not in garden, s. 26.
Damaging fences, s. 27.
Damaging dogs, birds, etc., s. 45.
Attempts to injure telegraphs, s. 41.
Other malicious injuries, s. 59.

The following list contains all the other sections in the Dominion Criminal Statutes conferring summary trial powers on justices. Those sections marked with a * require *two* justices—in all the other cases one J. P. may act :—

Ch. 145, s. 8, aiders and abettors.
Ch. 147, s. 14, affrays.
Ch. 148, ss. 2 to 8, *carrying firearms.
Ch. 149, seizure of arms.
Ch. 151, ss. 4, 5, 6, 14, 15, 16, peace near public works.
Ch. 152, s. 1, peace at public meetings.
Ch. 153, ss. 2, 3, 4, 5, 9, prize fights.
Ch. 155, s. 10, *aiding escape from prison.
Ch. 156, s. 2, offences against religion.
Ch. 157, s. 8, *vagrants.
Ch. 158, ss. 6, 7, gaming houses.
Ch. 159, ss. 2, 3, lotteries.
Ch. 160, s. 3, s-s. 2, gambling in cars, etc.
Ch. 162, s. 29, 30, 31, leaving dangerous holes unguarded,
s. 36, assaults.
Ch. 166*, ss. 7, 8, 9, 15, fraudulent marking.
Ch. 167, s. 18*, s. 26, uttering defaced coin.
s. 28, s. 29*, s. 30*, s. 33, unlawfully coining copper or brass.
Ch. 169, s. 4*, s. 6, army and navy.
Ch. 171, ss. 2, 3, seamen's property.
Ch. 172, ss. 2 and 3*, ss. 4, 5, 12, cruelty to animals.
Ch. 173*, ss. 10, 12, 15, 19 (2), intimidation.
Ch. 177, ss. 3*, 31, juvenile offenders.
Ch. 45*, of 1887, ss. 8, 9, 12.
Ch. 46, " " s. 1*, liquor on H. M. ships.
Ch. 47, " " s. 2*, imitation notes.
Ch. 49, " " threats and intimidation.

APPENDIX.

RULES OF COURT

In relation to stating a case under sec. 28, chap. 37 of 53 Vic.

Promulgated by the Supreme Court of the North-West Territories.

1. An application to a justice of the peace to state and sign a case under sub-section 2 of said section 28 shall be in writing and be delivered to such justice or left with some person for him at his place of abode within four days after the making of the conviction order, determination or other proceeding questioned. Such application shall state the grounds upon which the proceeding is questioned.

2. Within four days after such application has been so delivered or left for him the justice shall state and sign and deliver to the appellant, a case setting forth the facts of the case and the grounds on which the proceeding is questioned stating :—

(*a*) The substance of the information or complaint.

(*b*) The names of the prosecutor (or complainant) and the defendant.

(*c*) The date of the proceeding questioned.

(*d*) The evidence (if any) in full as taken before the J. P.

(*e*) The substance of the conviction order, determination or other proceeding questioned.

(*f*) The grounds on which the same is questioned.

(*g*) The grounds upon which the justice supports the proceeding questioned if the justice sees fit to state any.

3. But the justice shall not deliver said case until after the appellant shall have entered into a recognizance and paid the fees as provided by sub-section (4) of said section 28.

4. In the event of the justice declining or refusing to state a case the appellant may apply to the Court in banc for a rule as provided by sub-section 6 of said section.

(*a*) Or the appellant may in such event apply to a Judge sitting in Chambers in the judicial district in which the justice resides upon affidavit of the facts for a summons calling upon the justice and the respondent to show cause why such case should not be stated, and such Judge may on the return thereof make such order with or without payment of costs as to him seems meet, and the justice being served with such order shall state a case accordingly upon the appellant entering into such recognizance and paying the fees to the justice as provided in said sub-section 4.

5. Within twenty days after the delivery to the appellant of a case stated by a justice the appellant shall deliver the same or cause it to be delivered,

(*a*) To the Registrar of the Court in banc, or

(*b*) [If he desires the matter to be heard or determined by a Judge in Chambers] to the Clerk of the Court of the judicial district in which the justice resides, provided that upon sufficient cause for the delay being shown the Court or Judge as the case may be, may hear and determine the matter although the case was not delivered within said twenty days.

6. The Judge shall have power, if he thinks fit, to cause the case to be sent back for amendment and thereupon the same shall be forthwith amended in accordance with any directions given by the Judge and transmitted when amended to the Clerk of the Court aforesaid and judgment shall thereafter be given.

7. An order of a Judge to whom a case stated has been transmitted under section 28 shall have the same effect as a rule absolute made by the Court under sub-section 7 of section 28 and the provisions of sub-section 10 of said section shall apply where the decision is that of a Judge in the same way as in case of a decision by the Court, and any order of the Judge may be enforced by process issued out of the Court in and for the judicial district aforesaid.

8. In so far as these rules do not expressly make provision whenever a case stated is brought before a Judge, as hereinbefore provided, the provisions of said section 28 as to such a case when before the Court shall, *mutatis mutandis*, be applicable to the proceedings on a case before the Judge, and the recognizance in such case shall be conditioned to prosecute the appeal without delay and to submit to the judgment of the Judge and to pay such costs as are by him awarded.

A justice when delivering a case stated to the appellant shall enclose the same and the recognizance in an envelope sealed and marked on the outside with a statement of what it contains.

Slight deviation from strict compliance with these rules shall not invalidate any proceeding or thing if the Court or Judge sees fit to allow the same, either with or without requiring the same to be corrected.

FEES.

The following and no others shall be the fees payable on proceedings under said section 28 and the foregoing rules :

To the justice for preparing and stating a case when not exceeding ten folios of 100 words each.....$1.00
For each folio in excess of 10 folios..... .05
To the Registrar or Clerk of the Court (as the case may be) for receiving, filing and entering a case and attending on the argument and judgment..... 2.00
To the Registrar or Clerk on every process or order... .50

ADVOCATES.

To the advocate on argument..... ..... 2.00
To be increased by the Court or the Judge (as the case may be) to a sum not exceeding.....$10.00

This item is intended to cover all costs taxable to the advocate.

COSTS UNDER SUB-SECTION 6, SECTION 28.

Affidavit of service (including attendance and fee to commissioner)..... ..... .50
All necessary affidavits (except affidavit of service)... 1.00
If over five folios, for each additional folio..... .15
(This fee to include attendance to have sworn and commissioner's fee).

Advocate attending Court or Judge for rule or summons..... 1.00
for drawing rule or summons..... .50
copy of rule or summons... ..... .25
attending to serve rule, summons, order, or other document..... ..... .25
counsel fee on return of rule or summons..... 2.00

To be increased by Court or Judge to a sum not over..... 5.00
drawing rule absolute or order..... 1.00
If exceeding five folios, each additional folio .15
Where service of any process or paper made through the Sheriff's office mileage to be allowed one way per mile..... .20
fee on each rule, summons or order, to advocate 1.00
fee on each rule, summons or order, to Registrar or Clerk..... .50

Affidavits may be sworn before any Judge, Notary Public or Justice of the Peace.

Recognizance.—Drawing and completing and delivery to justice, including all attendances and oath.....$1.00

Dated June 10th, 1890.
" July 16th, 1890.

(Sgd.) Hugh Richardson, J.,
James F. Macleod, J.,
Chas. B. Rouleau, J.,
E. L. Wetmore, J.,
Thos. H. McGuire, J.

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