

## CHAPTER XIV.

MISLEADING JUSTICE—PERJURY—FALSE SWEARING—  
SUBORNATION.

## ARTICLE 135.

## \* PERJURY DEFINED.

<sup>1</sup> PERJURY is an assertion upon an oath duly administered in a judicial proceeding, before a competent Court, of the truth of some matter of fact, material to the question depending in that proceeding, which assertion the assertor does not believe to be true when he makes it, or on which he knows himself to be ignorant.

<sup>2</sup> In this definition, the word "oath" includes every affirmation which any class of persons are by law permitted to make in place of an oath.

<sup>3</sup> The expression "duly administered," means administered in a form binding on his conscience, to a witness legally called before them, by any Court, judge, justice, officer, commissioner, arbitrator, or other person, who by the law for the time being in force, or by consent of the parties, has authority to hear, receive, and examine evidence.

<sup>4</sup> The fact that a person takes an oath in any particular form is a binding admission that he regards it as binding on his conscience.

<sup>5</sup> The expression "judicial proceeding," means a proceeding

\* See 3 Hist. Cr. Law, pp. 240-50.

<sup>1</sup> 3rd Inst. 167; 1 Hawk. P. C. 429-435; 3 Russ. Cr. 1, &c., and see note, 5th Report, C. L. C. 23. Draft Code, s. 119.

<sup>2</sup> Many statutes to this effect have been passed. See in particular 32 & 33 Vict. c. 68, s. 4; 33 & 34 Vict. c. 49; and see statutes as to particular religious bodies collected in 3 Russ. Cr. 28-9.

<sup>3</sup> 14 & 15 Vict. c. 99, s. 16, passed to remove doubts in the question by whom an oath might be administered, 3 Russ. Cr. 3. As to using a form binding on the witness's conscience see 1 & 2 Vict. c. 105; *Omichund v. Barker*, 1 Sm. L. C. 455.

<sup>4</sup> *Ides v. Hoare*, 2 B. & B. 232.

<sup>5</sup> Illustrations (2), (3), (4).

which takes place in or under the authority of any Court of justice, or which relates in any way to the administration of justice, or which legally ascertains any right or liability.

<sup>1</sup> A proceeding may be judicial although the person accused in it was brought before the Court by which the proceeding is held by an irregular warrant.

<sup>2</sup> The word "fact" includes the fact that the witness holds any opinion or belief.

<sup>3</sup> The word "material" means of such a nature as to affect in any way, directly or indirectly, the probability of anything to be determined by the proceeding, or the credit of any witness, and a fact may be material although evidence of its existence was improperly admitted.

#### *Illustrations.*

(1.) A swears that certain goods are of a certain value.

<sup>4</sup> A is entirely ignorant upon the subject. A is guilty of perjury whether the goods are of that value or not.

The goods are not of that value, and A knows it. A has committed perjury.

<sup>5</sup> The goods are of that value, but A believes that they are not. A has committed perjury.

The goods are not of that value, but A believes that they are. A has not committed perjury.

(2.)<sup>6</sup> A proceeding before a local marine board sitting under the Merchant Shipping Act, 1854, and having power to suspend or cancel the certificates of the masters and mates of ships, is a judicial proceeding.

(3.)<sup>7</sup> An inquiry before a sheriff as to the amount of damages is a judicial proceeding.

(4.)<sup>8</sup> An inquiry before a justice of the peace as to making a man find sureties for the peace is a judicial proceeding.

(5.)<sup>9</sup> A swears that he thinks that certain words are in his handwriting. The jury find that he did not think so. A commits perjury.

<sup>1</sup> *R. v. Hughes*, L. R. 4 Q. B. D. 614.

<sup>2</sup> Illustration (5).

<sup>3</sup> Illustrations (6), (7).

<sup>4</sup> *R. v. Maubey*, 6 T. R. 637.

<sup>5</sup> *Gurney's Case*, 3 Inst. 166.

<sup>6</sup> *R. v. Tomlinson*, L. R. 2 C. C. R. 49.

<sup>7</sup> 1 Hawk. P. C. 430.

<sup>8</sup> *Ibid.*

<sup>9</sup> *R. v. Schlesinger*, 10 Q. B. 670.

(6.)<sup>1</sup> A, a witness under cross-examination, denies an imputation which goes to his credit only. B is improperly permitted to contradict A. B swears falsely. B commits perjury on a material fact.

(7.)<sup>2</sup> A falsely swears that he has examined a paper, alleged to be a copy, with an original will, in order to make the copy admissible. The paper is not put in evidence, and it would not have been admissible if it had been tendered. A commits perjury on a material fact.

## ARTICLE 136.

## SUBORNATION OF PERJURY.

<sup>3</sup> Subornation of perjury is procuring a person to commit a perjury, which he actually commits in consequence of such procurement.

## ARTICLE 137.

## PUNISHMENT OF PERJURY AND SUBORNATION.

<sup>4</sup> Perjury and subornation of perjury are misdemeanors, and every one who commits either is liable, upon conviction, to any term of penal servitude, or imprisonment with or without hard labour, not exceeding seven years.

## ARTICLE 138.

## FALSE SWEARING.

<sup>5</sup> Every one commits a misdemeanor, who swears falsely before any person authorized to administer an oath upon a matter of public concern, under such circumstances that the false swearing if committed in a judicial proceeding would have amounted to perjury.

<sup>1</sup> *R. v. Gibbon*, L. & C. 109. In the later case of *R. v. Tyson*, L. R. 1 C. C. R. 107, *R. v. Gibbon* was followed, but the facts are not so strong. See, too, *R. v. Mullany*, L. & C. 593.

<sup>2</sup> *Philpott's Case*, 2 Den. C. C. 309.

<sup>3</sup> If the perjury is not committed, the crime is incitement: see Article 47. See also 1 Hawk. P. C. 433, c. 87, s. 10. Draft Code, s. 119.

<sup>4</sup> The punishment at common law was whipping, imprisonment, fine, and pillory. By 2 Geo. 2, c. 25, s. 2, seven years transportation or imprisonment with hard labour was added. By 3 Geo. 4, c. 114, hard labour was again authorized, I know not why. By 7 Will. 4 & 1 Vict. c. 23, the pillory was abolished. Whipping is obsolete. Fines fall under Article 22. Thus the text represents the result. Cf. Draft Code, ss. 120, 1.

<sup>5</sup> See Cases in Illustrations. Draft Code, s. 122.

*Illustrations.*

(1.)<sup>1</sup> A takes a false oath before a surrogate in order to obtain a marriage licence. A commits a misdemeanor.

(2.)<sup>2</sup> A takes a false oath before commissioners appointed by the king to inquire into cases in which a royal grant was required to confirm title to lands. A commits a misdemeanor.

(3.)<sup>3</sup> A swears a false affidavit under the Bills of Sale Act (17 & 18 Vict. c. 36). A commits a misdemeanor.

## ARTICLE 139.

## FORGING INSTRUMENTS OF EVIDENCE AND TENDERING THEM IN PROOF.

Every one commits felony and is liable, upon conviction thereof, to a maximum punishment of seven years penal servitude, or to a maximum of three, and a minimum of one year's hard labour, who does any of the following things (that is to say),

(a.)<sup>4</sup> Forges the seal, stamp, or signature of any such certificate, official, or public document, or document or proceeding of any corporation or joint stock or other company as is mentioned or referred to in the preamble to 8 & 9 Vict. c. 113, or of any document referred to in 14 & 15 Vict. c. 99, or any certified copy of any document, bye-law, entry in any register, or other book or other proceeding in the first mentioned Act referred to.

(b.) Tenders in evidence any such document knowing the same to be false and counterfeit.

(c.) Forges the signature of any judge of the Supreme Court attached or appended to any decree, order, certificate, or other judicial or official document.

(d.) Prints any copy of any private Act or of the journals of either House of Parliament, falsely purporting to have been printed by the printers to the Crown, or to either House of Parliament.

<sup>1</sup> *Chapman's Case*, 1 Den. C. C. 432.

<sup>2</sup> *Hobart*, 62. This case is given by *Hawkins*, 1 P. C. 430, as an instance of perjury in a proceeding not judicial; but this, I think, is a misconception.

<sup>3</sup> *R. v. Hodgkiss*, L. R. 1 C. C. R. 212.

<sup>4</sup> 8 & 9 Vict. c. 113, s. 4, and see my *Digest of the Law of Evidence*, Art. 79. See *Draft Code*, s. 125.

(e.) Tenders in evidence any such copy, knowing it not to have been printed by the person by whom it purports to have been printed.

## ARTICLE 140.

## OFFICERS GIVING FALSE CERTIFICATES.

<sup>1</sup> Every one commits a misdemeanor, and is liable, upon conviction thereof, to a maximum punishment of eighteen months imprisonment, who

Being an officer, required or authorized, by 14 & 15 Vict. c. 99, to furnish any certified copy under that Act, wilfully certifies any document as being a true copy or extract knowing that the same is not a true copy or extract.

## ARTICLE 141.

MAINTENANCE.<sup>2</sup>

<sup>3</sup> Maintenance is the act of assisting the plaintiff in any legal proceeding in which the person giving the assistance has no valuable interest, or in which he acts from any improper motive.

Champerty is maintenance in which the motive of the maintainer is an agreement that if the proceeding in which the maintenance takes place succeeds, the subject-matter of the suit shall be divided between the plaintiff and the maintainer.

<sup>1</sup> 14 & 15 Vict. c. 100, s. 15; all the authorities on the subject are fully examined in *Bradlaugh v. Newdegate*, L. R. 11 Q. B. D. 1. They are numerous, but all come to the same thing.

<sup>2</sup> In the earlier editions of this work I included under this head the offence of selling pretended titles. The whole matter is so indefinite, and partakes so much more of the nature of a civil penalty than of a crime, that I have left it out. The law upon the subject will be found in 32 Hen. 8, c. 9. See *Jenkins v. Jones*, L. R. 9 Q. B. D. 128, on the effect of 8 & 9 Vict. c. 106 upon 32 Hen. 8, c. 9, and *Kennedy v. Lyall*, L. R. 15 Q. B. D. 491, on the meaning of a "pretended title."

<sup>3</sup> 1 Russ. Cr. (5th ed.) 357-60. As to barratry, 362-3. See also 1 Hawk. P. C. 454-466, and Note III. in Appendix. See also 3 Hist. Cr. Law, 234-40. The old Statute of Conspirators, 33 Edw. 1, and many other ancient statutes (3 Edw. 1, c. 18; 13 Edw. 1, c. 49; 1 Edw. 3, st. 2, c. 14; 20 Edw. 3, c. 4; 1 Ric. 2, c. 4; 7 Ric. 2, c. 15; 32 Hen. 8, c. 9; 4 Edw. 3, c. 11) refer to these offences, but do not throw much light on their nature.

A common barrator is one who habitually moves, excites, or maintains suits or quarrels, either at law or otherwise.

Whoever commits maintenance, or champerty, or is a common barrator, is guilty of a misdemeanor.

<sup>1</sup> Every person who practices as a solicitor or agent in any suit or action, after having been convicted of forgery, perjury, or common barratry, is liable to seven years penal servitude as a maximum punishment, upon an order to be made by the judge or judges of the Court in which the suit or action was brought, who must upon complaint or information examine the matter in a summary way in open court.

<sup>2</sup> Every one who sues any person in the name of a fictitious plaintiff, or in the name of a real person, but without his authority, commits a misdemeanor, and must, upon conviction thereof, be imprisoned for six months.

#### ARTICLE 142.

##### CONSPIRACY TO DEFEAT JUSTICE—DISSUADING WITNESSES FROM TESTIFYING.

Every one commits a misdemeanor who

(a.) <sup>3</sup> Conspires with any other person to accuse any person falsely of any crime, or to do anything to obstruct, prevent, pervert, or defeat the course of justice; or

(b.) <sup>4</sup> In order to obstruct the due course of justice, dissuades, hinders, or prevents any person lawfully bound to appear and give evidence as a witness from so appearing and giving evidence, or endeavours to do so; or

(c.) <sup>5</sup> Obstructs or in any way interferes with, or knowingly prevents the execution of any legal process, civil or criminal.

<sup>1</sup> 12 Geo. 1, c. 29, s. 4.

<sup>2</sup> 18 Eliz. c. 5, s. 4 (redrawn and modernised).

<sup>3</sup> Every person convicted of an offence against clause (a.) is liable to be sentenced to hard labour. Wright on Conspiracies, 30; 14 & 15 Vict. c. 100, s. 29; cf. Draft Code, ss. 126, 7, 8.

<sup>4</sup> 1 Hawk. P. C. 64; *R. v. Lady Lawley*, Strange, 904; and see 5th Rep. C. L. C. Art. 57.

<sup>5</sup> Cases collected in 1 Russ. Cr. 569-71.

## CHAPTER XV.

ESCAPE—RESCUE—PRISON-BREACH—MISPRISIONS—  
COMPOUNDING OFFENCES.

## ARTICLE 143.

## VOLUNTARY PERMISSION BY OFFICERS OF ESCAPES BY PRISONERS.

<sup>1</sup> EVERY one who knowingly, and with an intent to save him from trial or execution, permits any person in his lawful custody to regain his liberty, otherwise than in due course of law, commits the offence of voluntary escape; and

Is guilty of high treason if the escaped prisoner was in his custody for and was guilty of high treason;

Becomes an accessory after the fact to the felony of which the escaped prisoner was guilty, if he was in his custody for and was guilty of felony; and

Is guilty of a misdemeanor if the escaped prisoner was in his custody for and was guilty of a misdemeanor.

## ARTICLE 144.

## NEGLIGENT PERMISSION BY OFFICERS OF ESCAPES BY PRISONERS.

<sup>2</sup> Every one is guilty of the misdemeanor called negligent escape who, by the neglect of any duty, or by ignorance of the law, permits a person in his lawful custody to regain his liberty otherwise than in due course of law.

The person escaping is deemed to have regained his liberty as soon as he gets out of sight of the person from whom he escapes, and not before.

## ARTICLE 145.

## RESCUE DEFINED.

<sup>3</sup> Rescue is the act of forcibly freeing a person from custody

<sup>1</sup> 2 Hawk. P. C. 192, 196, 197; 1 Russ. Cr. 583. It does not appear what is the effect of voluntarily permitting the escape of a man lawfully charged, but innocent in fact. Draft Code, s. 138.

<sup>2</sup> 1 Hale, P. C. 602; 2 Hawk. P. C. 194 (speaks doubtfully as to the second paragraph). Cf. Draft Code, s. 140.

<sup>3</sup> 1 Russ. Cr. 597; 2 Hawk. P. C. 201.

against the will of those who have him in custody. If the person rescued is in the custody of a private person, the offender must have notice of the fact that the person rescued is in such custody.

## ARTICLE 146.

## QUALITY OF OFFENCE OF RESCUE.

<sup>1</sup> Every one commits high treason, felony, or misdemeanor who rescues a prisoner imprisoned on a charge of, or under sentence for, high treason, felony, or misdemeanor respectively. <sup>2</sup> Any offender convicted of such a misdemeanor is liable to be sentenced to hard labour.

## ARTICLE 147.

## FELONIOUS RESCUES.

<sup>3</sup> Whoever feloniously rescues any prisoner is liable to a maximum punishment of seven years penal servitude, or to imprisonment with hard labour for a maximum period of three years.

## ARTICLE 148.

## RESCUING MURDERERS.

<sup>4</sup> Every one commits felony and is liable, upon conviction thereof, to penal servitude for life, as a maximum punishment, who by force sets at liberty, rescues, or attempts to rescue, or set at liberty any person out of prison, committed for or found guilty of murder, or rescues or attempts to rescue any person convicted of murder, going to execution or during execution.

## ARTICLE 149.

## ASSISTING ESCAPE OF PRISONERS OF WAR.

<sup>5</sup> Every one commits felony and is liable, upon conviction

<sup>1</sup> 1 Hale, P. C. 606; 1 Russ. Cr. 597. Draft Code, s. 136.

<sup>2</sup> 14 & 15 Vict. c. 100, s. 29.

<sup>3</sup> 1 & 2 Geo. 4, c. 88, s. 1. The offence was formerly a clergyable felony, so that this enactment increased the punishment.

<sup>4</sup> 25 Geo. 2, c. 37, s. 9. As to punishment, 7 Will. 4 & 1 Vict. c. 91. Cf. Draft Code, s. 135.

<sup>5</sup> 52 Geo. 3, c. 156. Draft Code, s. 131.



therof, to penal servitude for life, or for fourteen years, or for seven years, or to be imprisoned with or without hard labour for a maximum period of two years, who

(a.) <sup>1</sup> Assists any alien enemy of Her Majesty, being a prisoner of war in Her Majesty's dominions, whether such prisoner is confined as a prisoner of war in any prison or other place of confinement, or is suffered to be at large on his parole in Her Majesty's dominions or in any part thereof, to escape from such prison or place of confinement, or from Her Majesty's dominions, if at large on his <sup>2</sup> parole; or

(b.) <sup>3</sup> Who (owing allegiance to Her Majesty) after any such prisoner as aforesaid has quitted the coast of any part of Her Majesty's dominions in such his escape, knowingly and wilfully upon the high seas aids or assists such prisoner in his escape towards any other dominions or place.

## ARTICLE 150.

## RESCUING REVENUE PRISONERS.

\* Every one commits a misdemeanor and is liable upon conviction thereof to a fine of one hundred pounds who rescues any person apprehended for any offence punishable by fine or imprisonment under the Customs Acts, or prevents, or attempts to prevent, his apprehension or aids, abets, or assists in committing any such offence.

## ARTICLE 151.

## HELPING TO ESCAPE FROM PRISON.

<sup>5</sup> Every one commits felony and is liable upon conviction to be sentenced to imprisonment with hard labour for a term not exceeding two years, who aids any prisoner in escaping

<sup>1</sup> 52 Geo. 3, c. 156, s. 1.

<sup>2</sup> Sect. 2.

<sup>3</sup> Sect. 3.

<sup>4</sup> 39 & 40 Vict. c. 36, s. 187. This section also contains provisions as to several revenue offences which I omit as too special for this work, and for assaults on customs officers, as to which see Articles 236 (b.) and (c.).

<sup>5</sup> 28 & 29 Vict. c. 126, s. 37. The word "thing" at the end of the section is not confined to things *ejusdem generis*. It includes a crowbar: *R. v. Payne*, L. R. 1 C. C. R. 27. Draft Code, s. 137.

or attempting to escape from any<sup>1</sup> prison, or who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison, any mask, dress, or other disguise, or any letter, or any other article or thing.

#### ARTICLE 152.

##### ESCAPE BY PERSONS IN CUSTODY.

<sup>2</sup> Every one commits a misdemeanor,<sup>3</sup> and is liable upon conviction thereof, to be sentenced to hard labour, who, being lawfully in custody for any criminal offence, escapes from that custody.

#### ARTICLE 153.

##### BREAKING PRISON.

<sup>4</sup> Every one commits felony who, being lawfully detained on a charge of, or under sentence for, treason or felony, breaks out of the place in which he is so detained, against the will of the person by whom he is detained.

If the offender is detained under a charge of misdemeanor the offence of breaking out of the place of confinement is a misdemeanor,<sup>5</sup> and is liable on conviction to be sentenced to hard labour.

The expression "breaks out" means an actual breaking of the place in which the party is confined, whether intentional or not.

##### *Illustrations.*

(1.)<sup>6</sup> A, lawfully confined in prison under a charge of felony, climbs over the prison wall and escapes. A has not committed an offence within this Article (though he has within Article 152).

(2.)<sup>7</sup> On the top of the prison wall loose bricks are arranged so as to

<sup>1</sup> "Prison" includes gaol, house of correction, bridewell, or penitentiary. It also includes the airing-grounds or other grounds or buildings occupied by prison officers for the use of the prison, or contiguous thereto (sect. 4).

<sup>2</sup> 2 Hawk. P. C. 183. Draft Code, ss. 133, 4.

<sup>3</sup> 14 & 15 Vict. c. 100, s. 29.

<sup>4</sup> 2 Hawk. P. C. 183-189; 1 Russ. Cr. 592-5. There is a good deal of learning on the subject founded on 1 Edw. 2, st. 2, "De frangentibus prisonam," but it is mostly practically obsolete. This statute is not mentioned in the Revised Statutes. Draft Code, s. 132.

<sup>5</sup> *R. v. Haswell*, R. & R. 458.

fall if disturbed. In climbing over the wall A accidentally disturbs and throws down one of them. A has committed an offence within this Article.

## ARTICLE 154.

## ESCAPING FROM CERTAIN PRISONS.

<sup>1</sup> Every convict confined in Pentonville or Millbank prison and every offender ordered to be confined in Parkhurst prison is liable to the consequences hereinafter mentioned who

At any time during the term of his imprisonment breaks prison; or

Who, while being conveyed to such prison, escapes from any person having the lawful custody of him; or

Who (being ordered to be confined in Parkhurst prison) escapes from the place of his confinement, or from any lands belonging to the prison.

Every such offender may for his first offence be punished by an addition to the term of his imprisonment, not exceeding three years in the case of prisoners confined in Millbank or Pentonville prisons, and two years in the case of prisoners under sentence of imprisonment in Parkhurst prison. Offenders under sentence of penal servitude in Parkhurst prison are liable to be punished in the same manner as other persons under sentence of penal servitude escaping from their place of confinement.

If any offender punished by such addition as aforesaid to his term of imprisonment is afterwards convicted of a second escape or breach of prison he is guilty of felony.

Every person confined in any of the said prisons is liable to be punished by an addition not exceeding twelve months to the term of his imprisonment who attempts to break prison (or in the case of Parkhurst Prison to escape from the place of his confinement), or forcibly breaks out of his cell, or makes any breach therein with intent to <sup>2</sup> escape therefrom.

<sup>1</sup> As to Parkhurst Prison, 1 & 2 Vict. c. 82, s. 12; Pentonville, 5 & 6 Vict. c. 29, s. 24; Millbank, 6 & 7 Vict. c. 28, s. 22.

<sup>2</sup> This word does not apply to Pentonville.

## ARTICLE 155.

TRANSPORTS OR PERSONS SENTENCED TO PENAL SERVITUDE  
BEING AT LARGE.

<sup>1</sup> Every one commits felony and is liable, upon conviction thereof, to be kept in penal servitude for life, as a maximum punishment, and to be previously imprisoned with or without hard labour for any term not exceeding four years,

(a.) Who having been sentenced or ordered to be transported, or kept in penal servitude, or having agreed to transport himself on certain conditions, either for life or for any number of years, is afterwards at large within any part of her Majesty's dominions, without some lawful cause, before the expiration of the term for which he was ordered to be transported or kept in penal servitude, or agreed to transport himself;

(b.) <sup>2</sup> Who aids, abets, counsels, or procures the commission of the offence defined in clause (a.).

## ARTICLE 156.

## MISPRISION OF TREASON.

<sup>3</sup> Every one who knows that any other person has committed high treason, and does not within a reasonable time give information thereof to a judge of assize, or a justice of the peace, is guilty of misprision of treason, and must upon conviction thereof be sentenced to imprisonment for life, and to forfeit to the Queen all his goods and the profits of his lands during his life.

## ARTICLE 157.

## MISPRISION OF FELONY.

<sup>4</sup> Every one who knows that any other person has committed felony and conceals or procures the concealment

<sup>1</sup> 5 Geo. 4, c. 84, s. 22. Punishment altered by 4 & 5 Will. 4, c. 67. Draft Code, s. 130.

<sup>2</sup> 4 & 5 Will. 4, c. 67.

<sup>3</sup> 1 Hawkins, P. C. 60. As to punishment, ii. 630; 1 Hale, P. C. 371-4. See Note IX. Cf. Draft Code, s. 13.

<sup>4</sup> 1 Hawkins, P. C. 73. See Note IV.

thereof, is guilty of misprision of felony, and upon conviction thereof the offender, if a sheriff, coroner, or their bailiff, "shall have one year's imprisonment and after make a "grievous fine" at the discretion of the Court, and if they "have not whereof they shall have imprisonment of three "years."

In other cases the offender is guilty of a misdemeanor.

## ARTICLE 158.

## AGREEMENT NOT TO PROSECUTE.

Every one commits a misdemeanor who, in respect of any valuable consideration, enters into an agreement not to prosecute any person for felony, or to show favour to any person in any such prosecution.

## ARTICLE 159.

## COMPOUNDING PENAL ACTIONS.

Every one commits a misdemeanor, who, having brought, or under colour of bringing, an action against any person under any penal statute in order to obtain from him any penalty, compounds the said action without order or consent of the Court [whether any offence has in fact been committed or not].

<sup>1</sup> 3 Edw. 1, c. 9.

<sup>2</sup> The words "at the king's pleasure," mean this; see 1 Hale, P. C. 375.

<sup>3</sup> Others read "four." See Revised Statutes.

<sup>4</sup> 2 Hale, P. C. 619. Precedents of indictment, 2 Chit. Crim. Law, 219. It is not necessary to allege that the defendant did actually desist from prosecuting. *R. v. Burgess*, L. R. 16 Q. B. D. 141.

<sup>5</sup> 18 Eliz. c. 5, ss. 4, 5 (very much compressed). The punishment was the pillory, but see now 56 Geo. 3, c. 138, s. 3. See also *R. v. Somerton*, 6 Ea. 126; *R. v. Gotley*, Russ. & Ry. 84.

<sup>6</sup> *R. v. Best*, 2 Moo. C. C. 124.

## PART IV.

## ACTS INJURIOUS TO THE PUBLIC IN GENERAL.

CHAP. XVI.—UNDEFINED MISDEMEANORS.	CHAP. XVIII.—OFFENCES AGAINST MORALITY.
CHAP. XVII.—OFFENCES AGAINST RELIGION.	CHAP. XIX.—COMMON NUISANCES—DISORDERLY HOUSES.
	CHAP. XX.—VAGRANCY.

## CHAPTER XVI

## UNDEFINED MISDEMEANORS.

## ARTICLE 160.

## ACTS INVOLVING PUBLIC MISCHIEF.

<sup>1</sup> Acts deemed to be injurious to the public have in some instances been held to be misdemeanors, because it appeared to the Court before which they were tried that there was an analogy between such acts and other acts which had been

<sup>1</sup> See 3 Hist. Cr. Law, 351-60, and 2 Hist. Cr. Law, 197-9; see the whole of chapter i. of Sir W. Erle's work on Trade Unions, pp. 1-54, particularly pp. 48-53; also his account of *R. v. Rowlands* and *R. v. Duffield*, *Ibid.* 81-7. Wright on the Laws of Conspiracy should be studied, and contrasted with this. See also my account of the law of conspiracy in Roscoe's Criminal Evidence (8th ed.), pp. 409-414. As to offences relating to the administration of justice, see 5th Rep. C. L. C. *passim*, but particularly p. 29, &c., p. 50, &c., and *R. v. Opie*, 1 Saund. 301; *R. v. King*, 8 T. R. 585, and other cases there cited. As to public officers, *R. v. Bembridge*, 22 St. Tr. 1. After quoting the judgment of Willes, J. (the colleague of Lord Mansfield), in *Miller v. Taylor* (4 Burr. 2312), to the effect that "justice, moral fitness, and public convenience, when applied to a new subject, make common law without precedent," Pollock, C.B., said, "I entirely agree with the spirit of this passage so far as it regards the repressing what is a public evil and preventing what would become a public mischief; but I think there is a wide difference between protecting the community against a new source of danger and creating a new right. I think the Common Law is quite competent to pronounce anything to be illegal which is a liability against the public good; but I think the Common Law cannot create new rights," &c. (*Jefferys v. Boosey*, 4 H. L. C. 936). As to cheats affecting the public, see 2 East, P. C. 818-822.

held to be misdemeanors, although such first mentioned acts were not forbidden by any express law, and although no precedent exactly applied to them.

This has been done especially in the case of agreements between more persons than one to carry out purposes which the judges regarded as injurious to the public, in which case such acts have been held to amount to the offence of conspiracy,

or when they have been done by a public officer in relation to his official duty,

or when they tended in any way to pervert the administration of justice, or to disturb the public peace,

or when the proceeding has been by parliamentary impeachment.

## CHAPTER XVII.

## OFFENCES AGAINST RELIGION.

## ARTICLE 161.

## BLASPHEMY DEFINED—ALTERNATIVE DEFINITIONS.

<sup>2</sup> EVERY publication is said to be blasphemous which contains

<p>Matter relating to God, Jesus Christ, the Bible, or the Book of Common Prayer, intended to wound the feelings of mankind, or to excite contempt and hatred against the church by law established, or to promote immorality.</p>	<p>(a.) A denial of the truth of Christianity in general, or of the existence of God, whether the terms of such publication are decent or otherwise.</p>
<p>Publications intended in good faith to propagate opinions on religious subjects, which the person who publishes them regards as</p>	<p>(b.) Any contemptuous reviling or ludicrous matter relating to God, Jesus Christ, or the Bible, or the formularies of the Church of England as by law established, whatever may be the occasion of the publication thereof,</p>

<sup>1</sup> See 2 Hist. Cr. Law, ch. xxiv. 298-396, and Draft Code, Part XII.

<sup>2</sup> There is authority for each of these views, as may be seen from a collection of all the cases on the subject in Folkard's Edition of Starkie on Libel, pp. 593-603. Most of the cases are old, and I do not think that, in fact, any one has been convicted of blasphemy in modern times for a mere decent expression of disbelief in Christianity. Mr. Starkie many years ago wrote, "A wilful intention to pervert, insult, and mislead others by means of contumelious abuse applied to sacred subjects, or by wilful misrepresentations and artful sophistry calculated to mislead the ignorant and unwary, is the criterion and test of guilt." This is the language of a man who means, but is reluctant to say plainly, "You may deny Christianity to be true, but you must do it in a decent way, and with regard to the feelings of others." Lord Coleridge allows me to say that the left hand side of the page correctly states the law laid down in the last trial which took place for blasphemy, *R. v. Pooley*, tried at the Bodmin Summer Assizes, in 1857, before Coleridge, J. Lord Coleridge was counsel in that case. For the reasons given in the chapter on offences against religion in my History of the Criminal Law, Vol. II. p. 474. I am now unable to agree with the milder view of the law. See Draft Code, s. 141.



true, are not blasphemous (within the meaning of this definition) merely because their publication is likely to wound the feelings of those who believe such opinions to be false, or because their general adoption might tend by lawful means to alterations in the constitution of the church by law established.

and whether the matter published is, or is not, intended in good faith as an argument against any doctrine or opinion, unless the publication is made under circumstances constituting a lawful excuse

Every one who publishes any blasphemous document is guilty of the misdemeanor of publishing a blasphemous libel.

Every one who speaks blasphemous words is guilty of the misdemeanor of blasphemy.

#### ARTICLE 162.

##### HERESIES.

<sup>1</sup> Every person who is guilty of atheism, blasphemy, heresy, schism, or any other damnable doctrine or opinion (<sup>2</sup> not punishable at common law), may, upon conviction thereof before a competent ecclesiastical Court, be directed to recant the same and to do penance therefor, and to be excommunicated and imprisoned for such term, not exceeding six months, as the Court pronouncing the sentence of excommunication may direct.

In 1883, shortly after the publication of the last edition of this work, a man named Foote was tried for blasphemous libel before Lord Coleridge. He directed the jury according to the doctrine stated in the left hand column. His summing-up was published by Stevens and Sons in 1883. I wrote an article on the subject maintaining my own view in the *Fortnightly Review* for March, 1884, and Mr. Aspland afterwards published an able pamphlet on the other side of the question. It did not convince me. It has been often suggested, and would, I think, be highly desirable, that the question should be settled by Parliament.

<sup>1</sup> 29 Car. 2, c. 29; 53 Geo. 3, c. 127, ss. 1, 2, 3; and see Phillimore, *Eccl. Law*, 1075-7. The excommunication and term of imprisonment is signified to the Queen in Chancery, whereupon a writ issues "de excommunicato capiendo."

<sup>2</sup> *Phillimore v. Machon*, 1 P. D. 481; Co. Litt. 96 b.

## ARTICLE 163.

## DENYING TRUTH OF CHRISTIANITY, &amp;c.

<sup>1</sup> EVERY one commits a misdemeanor and upon conviction thereof is liable to the punishments hereinafter mentioned, who having been educated in, or at any time having made profession of, the Christian religion within this realm, by writing, printing, teaching, or advised speaking, denies the Christian religion to be true, or the holy scriptures of the Old and New Testament to be of Divine authority.

For the first offence the offender must be adjudged incapable and disabled in law, to all intents and purposes whatsoever, to have or enjoy any office or employment, ecclesiastical, civil or military, or any part in them, or any profit or advantage appertaining to them, and if at the time of his conviction the person convicted enjoys or possesses any office, place, or employment, such office, place, or employment becomes <sup>2</sup> void.

Upon a second conviction for all or any of the said crimes the offender is from thenceforth disabled to sue, prosecute, plead, or use any action or information in any Court of law or equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office, civil or military, or benefice ecclesiastical, for ever within this realm, and must also suffer imprisonment for the space of three years from the time of such conviction.

Provided that any person convicted of any of the aforesaid crimes for the first time shall be discharged from all penalties and disabilities incurred by such conviction, upon his acknowledgment or renunciation of such offence or erroneous opinions in the same court where he was convicted within four months after his conviction.

<sup>1</sup> 9 & 10 Will. 3, c. 35, as altered by 53 Geo. 3, c. 160.

<sup>2</sup> "Shall be and is hereby declared void."

## ARTICLE 164.

## DEPRAVING THE LORD'S SUPPER.

<sup>1</sup> Every one commits a misdemeanor who depraves, despises, or contemns the sacrament of the supper and table of the Lord, in contempt thereof by any contemptuous words, or by any words of depraving, despising, or reviling, or by advisedly in any other wise contemning, despising or reviling the said sacrament.

## ARTICLE 165.

## DEPRAVING THE BOOK OF COMMON PRAYER.

<sup>2</sup> Every one commits a misdemeanor and is liable upon conviction thereof to the punishments hereinafter mentioned, who does any of the following things: that is to say,

(a.) Who, in any interlude, play, song, rhymes, or other open words, declares or speaks anything in derogation, depraving, or despising of the Book of Common Prayer, or of anything therein contained, or any part thereof: or

(b.) Who by open fact, deed, or open threatenings, compels, causes, or otherwise procures or maintains any parson, vicar, or other minister, in any cathedral or parish church or chapel, or in any other place, to sing or say any common or open prayer, or to minister any sacrament otherwise or in any other manner or form than is mentioned in the said book;

(c.) Who by any of the said means unlawfully interrupts

<sup>1</sup> 1 Edw. 6, c. 1, s. 1, applied to the present Book of Common Prayer by 14 Car. 2, c. 4, s. 20. I have retained these and the following provisions because, though they are practically obsolete, they relate to acts which might still be done. But I have not thought it worth while to encumber the book with the statutes of *præmunire*, which, with hardly an exception, are only historical monuments of bygone political and religious conflicts, imposing penalties on acts which it is barely conceivable that any one should do in the present state of society. The subject is treated fully in the 7th Report of the Criminal Law Commissioners, pp. 37-45. The offences are appealing to Rome from any of the Queen's Courts (24 Hen. 8, c. 12); asserting that Parliament has a legislative authority without the Crown (3 Car. 2, c. 1); and some others.

<sup>2</sup> 1 Eliz. c. 2, s. 3, applied to the present Book of Common Prayer by 14 Car. 2, c. 4, s. 20.

and lets any parson, vicar, or other minister in any cathedral or parish church, or chapel, in singing or saying common or open prayer, or ministering the sacraments, or any of them, in the manner mentioned in the said book.

For the first offence the offender must be fined one hundred marks, and in default of payment within six weeks after his conviction must be imprisoned for six months.

For the second offence the offender must be fined four hundred marks, and in default of payment as aforesaid must be imprisoned for twelve months.

For the third offence the offender must forfeit to the Queen all his goods and chattels and be imprisoned for life.

#### ARTICLE 166.

##### CLERGYMEN REFUSING TO USE THE BOOK OF COMMON PRAYER.

<sup>1</sup>Every one commits a misdemeanor and is liable upon conviction thereof to the punishments hereinafter mentioned, who, being a parson, vicar, or other minister whatsoever, that ought or should sing or say common prayer according to the Book of Common Prayer,

(a.) Refuses to use the said common prayer, or to minister the sacrament, in such cathedral or parish church, or other place, as he should use or minister the same;

(b.) Uses, wilfully and obstinately standing in the same, any other rite, ceremony, order, or form of mass, openly or privily, or matins, evensong, administration of the sacrament, or other <sup>2</sup>open prayer than is mentioned and set forth in the said book;

(c.) Preaches, declares, or speaks anything in derogation or depraving of the said book, or anything therein contained, or of any part thereof.

For the first offence the offender must forfeit to the Queen

<sup>1</sup> 2 & 3 Edw 6, c. 1; 14 Car. 2, c. 4, s. 20, and see 1 Eliz. c. 2, s. 2, which slightly varies the penalty on one point.

<sup>2</sup> By "open prayer is meant that prayer which is for others to come unto or hear, either in common churches, or private chapels, or oratories, commonly called the Service of the Church."

one year's profit of such of his benefices as Her Majesty appoints, and be imprisoned for six months, whether he has any benefice or not.

For the second offence the offender must be deprived *ipso facto* of all his spiritual promotions, and be imprisoned for a year, and if he has no promotion he must be imprisoned for life.

For the third offence the offender must be imprisoned for life.

## ARTICLE 167.

## DISTURBING PUBLIC WORSHIP.

(a.)<sup>1</sup> Every one commits a misdemeanor and is liable, upon conviction thereof, to a fine of forty pounds, who wilfully and maliciously or contemptuously disquiets or disturbs any meeting, assembly, or congregation of persons<sup>2</sup> lawfully assembled for religious worship, or in any way disturbs, molests, or misuses any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled,

(b.)<sup>3</sup> Every one commits a misdemeanor and is liable upon conviction thereof, before two justices of the peace, to a fine not exceeding five pounds, or, if the justices think fit, to imprisonment for any time not exceeding two months,

who is guilty of riotous, violent, or indecent behaviour in any cathedral church, parish or district church or chapel of the Church of England or in any chapel of any religious denomination, or<sup>4</sup> in England in any place of religious worship, duly certified under 18 & 19 Vict. c. 81, whether during the celebration of divine service or at any other time, or in any churchyard or burial ground; or

<sup>1</sup> 52 Geo. 3, c. 155, s. 12. Draft Code, s. 143.

<sup>2</sup> This Act was originally confined to all Protestant Dissenters other than Quakers, but was extended to all persons lawfully assembled for religious worship by 9 & 10 Vict. c. 59, s. 4.

<sup>3</sup> 23 & 24 Vict. c. 32, s. 2. This Act abolished the jurisdiction of the Ecclesiastical Courts over laymen for brawling.

<sup>4</sup> The Act extends to Ireland.

who molests, lets, disturbs, vexes, or troubles, or by any other unlawful means disquiets or misuses any preacher duly authorized to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament or any divine service, rite, or office in any cathedral, church, or chapel, or in any churchyard or burial ground.

## CHAPTER XVIII.

<sup>1</sup> OFFENCES AGAINST MORALITY.

## ARTICLE 168.

## SODOMY.

<sup>2</sup> EVERY one commits the felony called sodomy, and is liable upon conviction thereof to penal servitude for life, as a maximum, and to penal servitude for ten years as a minimum punishment, who

- (a.) Carnally knows any animal; or,
- (b.) Being a male, carnally knows any man or any woman (per anum).

Any person above the age of fourteen years who permits himself or herself to be so carnally known as aforesaid is a principal in the first degree in the said felony.

## ARTICLE 169.

## ATTEMPT TO COMMIT SODOMY.

<sup>3</sup> Every one who attempts to commit sodomy is guilty of a misdemeanor, and is liable upon conviction thereof to ten years penal servitude as a maximum punishment.

## ARTICLE 169A.

## OUTRAGES ON DECENCY.

<sup>4</sup> Any male person is guilty of a misdemeanor and is liable on conviction thereof to two years imprisonment and hard labour, who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the

<sup>1</sup> As to rape and other offences of the same kind, see Chap. XXIX., *post*, p. 193.  
<sup>2</sup> 24 & 25 Vict. c. 100, s. 61; see cases in 1 Russ. Cr. (5th ed.) 879-82. See 2 Hist. Cr. Law, 429-30. As to carnal knowledge see Article 254, *post*. Draft Code, s. 144.

<sup>3</sup> 24 & 25 Vict. c. 100, s. 62. Draft Code, s. 145.

<sup>4</sup> 48 & 49 Vict. c. 69, s. 11.

commission by any male person of, any act of gross indecency with another male person.

#### ARTICLE 170.

##### ECCLESIASTICAL CENSURES FOR IMMORALITY.

<sup>1</sup> Every person who commits incest, adultery, fornication, or any other deadly sin (not punishable at common law), is liable upon conviction thereof in an ecclesiastical Court to be directed to do penance, and to be excommunicated, and to be imprisoned for such term not exceeding six months as the Court pronouncing the sentence of excommunication may direct.

#### ARTICLE 171.

##### PUBLIC INDECENCIES.

<sup>2</sup> Every one commits a misdemeanor who does any grossly indecent act in any open and public place in the presence of more persons than <sup>3</sup> one; but it is uncertain whether such conduct in a public place amounts to a misdemeanor if it is done when no one is present, or in the presence of one person only.

<sup>4</sup> A place is public within the meaning of this Article if it is so situated that what passes there can be seen by any considerable number of persons if they happen to look.

<sup>1</sup> 13 Edw. 1, c. 4; 53 Geo. 3, c. 127, ss. 1-3; and see Phillimore's Eccl. Law, 1081, 1442; also *Phillimore v. Machon*, 1 P. D. 481; Co. Litt. 96 b. Incest, though not mentioned in the statute "Circumspecté agatis," is the only offence which in these days is ever prosecuted under the law here stated. Such a prosecution occurred within the last few years in the Bishop of Chichester's Court. See 2 Hist. Cr. Law, 398-429.

<sup>2</sup> 1 Hawk. P. C. 358. The acts referred to are principally acts of open indecency, but an act scandalously profligate, though not in this sense openly indecent, might in some cases be a misdemeanor, as, e.g., selling a wife. See *per* Lord Mansfield in *R. v. Delaval*, 3 Burr. 1438. If the act done is a public and indecent exposure of the person the offender may on conviction be sentenced to hard labour. 14 & 15 Vict. c. 100, s. 23, and see Article 193 (d), (e). Draft Code, s. 146.

<sup>3</sup> *Elliot's Case*, L. & C. 103.

<sup>4</sup> *Webb's Case*, 1 Den. 338; *Holmes's Case*, Dears. 207; *R. v. Orchard*, 3 Cox. C. C. 248; *R. v. Bouverard*, stated by Parke, B., in *R. v. Webb*, 1 Den. 344.



*Illustrations.*

The following are instances of public places :

- <sup>1</sup> The inside of an omnibus ;
- <sup>2</sup> The roof of a house visible from the back windows of several houses ;
- <sup>3</sup> The inside of a urinal open to the public, and by the side of a footpath in Hyde Park ;
- <sup>4</sup> The inside of a booth on Epsom racecourse, which the public were invited to enter.
- <sup>5</sup> A place out of sight of the public footway where people had no legal right to go, but did habitually go without interference.

## ARTICLE 172.

## OBSCENE PUBLICATIONS.

<sup>6</sup> Every one commits a misdemeanor who without justification,

(a.) Publicly sells, or exposes for public sale or to public view, any obscene book, print, picture, or other indecent exhibition ; <sup>7</sup> or any publication recommending sexual immorality, even if the recommendation is made in good faith and for what the publisher considers to be the public good.

(b.) Publicly exhibits any disgusting object.

Any person convicted of the offence defined in clause (a.) may be sentenced to hard labour.

(SUBMITTED.)—A person is justified in exhibiting disgusting objects, or publishing obscene books, papers, writings, prints, pictures, drawings, or other representations, if their exhibition

<sup>1</sup> *R. v. Holmes*, Dears. 207.

<sup>2</sup> *Thalman's Case*, L. & C. 326.

<sup>3</sup> *R. v. Harris*, L. R. 1 C. C. R. 282.

<sup>4</sup> *R. v. Saunders*, 1 Q. B. D. 18.

<sup>5</sup> *R. v. Wellard*, L. R. 14 Q. B. D. 63.

<sup>6</sup> Note V ; *Strange*, 790 ; and see 20 & 21 Vict. c. 83, s. 1, 14 & 15 Vict. c. 100, s. 29 ; *Starkis* (by Folkard), 603-12. Draft Code, s. 147.

<sup>7</sup> These words are added in reference to the case of *R. v. Bradlaugh*, tried before Cockburn, C. J., 18 June, 1877. I have not seen any report of the trial itself. Proceedings in error on the ground that the indictment was defective were taken in 1873 and are reported in L. R. 3 Q. B. D. 607. The jury found that the work prosecuted called the 'Fruits of Philosophy' was published in good faith for the public good, and that it recommended immoral practices. It appeared in evidence that it was not obscene in the sense of being calculated or intended to excite passion.

or publication is for the public good, as being necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest; but the justification ceases if the publication is made in such a manner, to such an extent, or under such circumstances, as to exceed what the public good requires in regard to the particular matter published.

*Illustrations.*

(1.)<sup>1</sup> A exhibits for money, to all comers, an unnatural and monstrous birth. A commits a misdemeanor.

B exhibits a similar object to students of medicine only. B does not commit a misdemeanor.

(2.)<sup>2</sup> A, a bookseller, publishes the work of a casuist, which contains amongst other things obscene matter. The work is published in Latin, and appears from the circumstances of its publication to be intended for *bond fide* students of casuistry only. A has not committed a misdemeanor.

B extracts the obscene matter from the work so published, translates it into English, and sells it as a pamphlet about the streets for the purpose of throwing odium upon casuists. B has committed a misdemeanor.

<sup>1</sup> *Harring v. Watson*, 1 Russ. Cr. (5th ed.) 436.

<sup>2</sup> The second paragraph of this illustration is based upon *R. v. Hicklin*, L. R. 3 Q. B. 360; and see *Steele v. Brannan*, L. R. 7 C. P. 261. The first part is merely my suggestion as to what ought to be held to be the law if the question should arise, but the point cannot be called clear. Keating, J., referred, in passing to the question in *Steele v. Brannan*, L. R. 7 C. P. 269, 270, but expressed no opinion upon it. I confine this article to obscenity because I have found no authority for the proposition that the publication of a work immoral in the wider sense of the word is an offence. A man might with perfect decency of expression, and in complete good faith, maintain doctrines as to marriage, the relation of the sexes, the obligation of truthfulness, the nature and limits of the rights of property, &c., which would be regarded as highly immoral by most people, and yet (I think) commit no crime. Obscenity and immorality in this wide sense are entirely distinct from each other. The language used in reference to some of the cases might throw doubt on this, but I do not think any instance can be given of the punishment of a decent and *bond fide* expression of opinions commonly regarded as immoral. I leave this note unaltered, but since it was written the case cited above of *R. v. Bradlaugh* may be considered to have gone some way towards establishing a different principle, and to have invested juries to a certain extent with the powers of *ex post facto* censors of the press so far as such publications on the relation of the sexes are concerned. I think that juries ought to exercise such a power with the greatest caution, when a man writes in good faith on a subject of great interest and open to much difference of opinion, and when no indecency of language is used, except such as is necessary to make the matter treated of intelligible.

## ARTICLE 173.

<sup>1</sup> UNLAWFULLY DEFILEING WOMEN.

<sup>2</sup> Every one commits a misdemeanor and is liable upon conviction thereof to two years imprisonment with hard labour as a maximum punishment who,

(a.) Procures or attempts to procure any girl or woman under twenty-one years of age, not being a common prostitute, or of known immoral character, to have unlawful carnal connexion, either within or without the Queen's dominions, with any other person or persons; or

(b.) Procures or attempts to procure any woman or girl to become, either within or without the Queen's dominions, a common prostitute; or

(c.) Procures or attempts to procure any woman or girl to leave the United Kingdom, with intent that she may become an inmate of a brothel elsewhere; or

(d.) Procures or attempts to procure any woman or girl to leave her usual place of abode in the United Kingdom (such place not being a brothel), with intent that she may, for the purposes of prostitution, become an inmate of a brothel within or without the Queen's dominions,

(e.) By threats or intimidation procures or attempts to procure any woman or girl to have any unlawful carnal connexion, either within or without the Queen's dominions; or

(f.) By false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connexion, either within or without the Queen's dominions; or

(g.) Applies, administers to, or causes to be taken by any woman or girl any drug, matter, or thing, with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connexion with such woman or girl.

<sup>1</sup> 48 & 49 Vict. c. 69. (a.), (b.), (c.), (d.) represent s. 2; (e.), (f.) and (g.) s. 3.

<sup>2</sup> Draft Code, s. 148.

## ARTICLE 173A.

## HOUSEHOLDERS PERMITTING DENILEMENT OF GIRLS ON THEIR PREMISES.

<sup>1</sup> Every person, being the owner or occupier of any premises, or having, or acting or assisting in, the management or control thereof, is guilty of felony, and is liable to penal servitude for life as a maximum punishment, who

induces or knowingly suffers any girl under the age of thirteen years to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally.<sup>2</sup>

<sup>3</sup> Every such person as aforesaid who commits any such offence as aforesaid with respect to any girl of or above the age of thirteen and under the age of sixteen years, is guilty of a misdemeanor, and being convicted thereof is liable to be imprisoned for two years with hard labour as a maximum punishment.

It is a sufficient defence to any charge under this article if it is made to appear to the court or jury before whom the charge is brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.

## ARTICLE 174.

## CONSPIRACY TO DEFILE.

<sup>3</sup> Every one commits the misdemeanor of conspiracy who agrees with any other person to induce any woman to commit adultery or fornication, or to take any woman from the lawful custody of her parents, in order to marry her to any person without their consent;

(SUBMITTED.) Provided, that an agreement between a man

<sup>1</sup> 48 & 49 Vict. c. 69, s. 6.

<sup>2</sup> A father who allows his daughter living with him to act as a prostitute in his house is within this provision. *R. v. Webster*, L. R. 16 Q. B. D. 138.

<sup>3</sup> *R. v. Lord Grey*, 3 St. Tr. 519; 1 East, P. C. 460; *R. v. Mears*, 2 Den. 79; *R. v. Delaval*, 3 Burr. 434. Draft Code, s. 149.

and a woman to commit fornication or adultery, or that the woman shall leave the lawful custody of her parents without their consent, in order to marry the man, is not a conspiracy.

## ARTICLE 175.

PREVENTING THE BURIAL OF DEAD BODIES AND DISINTERRING THEM.<sup>1</sup>

<sup>2</sup> Every one commits a misdemeanor who prevents the burial of any dead body, or who, without authority, disinters a dead body, even from laudable motives; or

who, having the means, neglects to bury a dead body which he is legally bound to bury, provided that no one is legally bound to incur a debt for such a purpose; or

<sup>3</sup> who buries or otherwise disposes of any dead body on which an inquest ought to be taken, without giving notice to a coroner; or

who, being under a legal duty to do so, fails to give notice to a coroner that a body on which an inquest ought to be held is lying unburied, before such body has putrefied.

*Illustrations.*

(1.) <sup>4</sup> A digs up a dead body and sells it for purposes of dissection. This is a misdemeanor.

<sup>1</sup> In *R. v. Price*, L. R. 12 Q. B. D. 247, I held that to burn a dead body instead of burying it was not in itself a misdemeanor, if it was so done as not to amount to a public nuisance. This decision is to a certain extent recognized in *R. v. Stephenson* (L. R. 13 Q. B. D. 331.) There were no means of questioning it.

<sup>2</sup> *R. v. Yann*, 2 Den. 325. Inquests ought to be held when the coroner on reasonable grounds and in good faith believes that the deceased person's death was of such a nature as would, if true, justify the holding of an inquest. *R. v. Stephenson*, L. R. 13 Q. B. D. 331. A man is bound to bury his child's body, and, I suppose, his wife's. In *R. v. Yann*, Lord Campbell said, "A man is bound, if he has the means, to give his child Christian burial." This can hardly be a duty in the case of persons who are not Christians, but probably "Christian" means only decent. It appears from *R. v. Stewart*, 12 A. & E. 773, 779, that the person under whose roof another person dies is under a legal duty to carry the corpse, decently covered, to the place of burial if there is no one else who is bound to bury it. Draft Code, s. 158.

<sup>3</sup> 1 Russ. Cr. 620 (5th ed.) 7th Rep. C. L. C. pp. 50, 51; and see *R. v. Stephenson*, L. R. 13 Q. B. D. 331.

<sup>4</sup> *R. v. Lynn*, 1 Lea, 497.

(2.)<sup>1</sup> A, without the consent of a dissenting congregation, to which a burial ground belonged, or of trustees having the legal estate therein, but with the leave of the person in charge, digs up his mother's coffin in order to bury it in his father's grave in a churchyard some miles off. This is a misdemeanor.

(3.)<sup>2</sup> A, a gaoler, refuses to deliver up for burial the dead body of a prisoner who had died in gaol to the executors, on the ground that the deceased person owed him money. This is a misdemeanor.

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<sup>1</sup> *R. v. Sharpe*, D. & B. 160.

<sup>2</sup> *R. v. Scott*, 2 Q. B. 248 (in a note to *R. v. Fox*).

## CHAPTER XIX.

## COMMON NUISANCES—DISORDERLY HOUSES.

## ARTICLE 176.

## COMMON NUISANCE.

<sup>1</sup> A COMMON nuisance is an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects. It is immaterial whether the act complained of is convenient to a larger number of the public than it inconveniences, but the fact that the act complained of facilitates the lawful exercise of their rights by part of the public may shew that it is not a nuisance to any of the public.

*Illustrations.*

(1.)<sup>2</sup> An electric telegraph company without legal authority erects a telegraphic pole in a permanent manner on the waste at the side of and forming part of a highway, leaving room enough for the use of the highway, and not affecting either the metalled road or the footpath, by the side of it. This is a public nuisance, because a small portion of space which the public had a legal right to use is obstructed.

(2.)<sup>3</sup> A tramway laid down on a high road in such a manner as to obstruct to some extent the use of the road by common carriages is a public nuisance, although it may be convenient to a large majority of those who use the road.

(3.)<sup>4</sup> The public have a right to use the Tyne as a highway and to anchor

<sup>1</sup> 1 Hawk. P. C. 692. The question as to the public benefit of the act complained of may arise indirectly. Draft Code, s. 150.

<sup>2</sup> *R. v. United Kingdom Telegraph Co.*, 3 F. & F. 73.

<sup>3</sup> *R. v. Train*, 2 B. & S. 640.

<sup>4</sup> *R. v. Russel*, 6 B. & C. 566. I think this is the effect of the case, which deserves careful study. It is referred to in *R. v. Train*, but I doubt whether it is not misunderstood there. Lord Tenterden differed in it from Bayley and Holroyd, JJ. Of the eight counsel engaged seven became judges. *R. v. Betts*, 13 Q. B. 1022, refers to it in a manner which seems to me inadequate. In *A. G. v. Terry* (L. R. 9 Ch. App. 425) Jessel, M.R., disapproved of *R. v. Russel*, though

ships therein for a reasonable time to take in cargoes of coal. A erects staiths and spouts at which ships moored for the purpose can take in coal, but which prevent ships not lying at them from sailing over part of the waterway where they would otherwise be able to sail. The fact that the arrangement is on the whole convenient with regard to the public use of the river may be considered by the jury in deciding whether the staiths are a nuisance or not.

(4.) The non-repair of a public highway is a public nuisance.

(5.)<sup>1</sup> A railway company makes a railway within five yards of an ancient public highway in such a manner that the locomotives frighten the horses of persons using the highway as a carriage road. The railway is made and the locomotives used under Acts of Parliament, which do not require the railroad company to screen the line from the road. This is not a public nuisance because the act done is warranted by law.

#### ARTICLE 177.

##### COMMON NUISANCE A MISDEMEANOR.

<sup>2</sup> Every one who commits any common nuisance is guilty of a misdemeanor.

#### ARTICLE 178.

##### PUNISHMENT FOR KEEPING DISORDERLY HOUSES.

<sup>3</sup> Every one who keeps a disorderly house commits a common nuisance, and is liable upon conviction thereof to be sentenced to hard labour.

<sup>4</sup> Any person who appears, acts, or behaves as master or mistress, or as the person having the care, government, or

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he approved of the doctrine which I understand to be laid down in it. The turning point of the case, as I understand it, is that the ships anchored under the spouts had a right to anchor there for a reasonable time to receive cargo, and that the spouts being recognised by statute could not be regarded as in themselves illegal. The question on which the judges differed was whether Bayley, J., had influenced the jury by referring to the collateral advantage of cheapening coal in the London market. The effect of time in legalizing a nuisance is somewhat similar. It has not in itself that effect, but the fact that a given state of things is of very long standing may be evidence that it is not in fact a nuisance: see cases in 1 Russ. Cr. 421 and 442. The view taken by the Criminal Law Commissioners is rather different, see 7th Rep. p. 59.

<sup>1</sup> *R. v. Pease*, 4 B. & Ad. 30.

<sup>2</sup> Cf. Draft Code, ss. 151, 2.

<sup>3</sup> 3 Geo. 4, c. 114, s. 1. Draft Code, s. 154.

<sup>4</sup> 25 Geo. 2, c. 36, s. 8; 21 Geo. 3, c. 49, s. 2.



management of any disorderly house, is to be deemed and taken to be the keeper thereof, and is liable to be prosecuted and punished as such, although, in fact, he is not the real owner or keeper thereof.

<sup>1</sup> But the owner of a house, conducted as a disorderly house by a person to whom he lets it as a weekly tenant, is not the keeper of the house merely because he knows the use to which it is put, and does not give his tenant notice to quit.

## ARTICLE 179.

## DISORDERLY HOUSES.

The following houses are disorderly houses, that is to say, common bawdy houses, common gaming houses, common betting houses, disorderly places of entertainment.

## ARTICLE 180.

## COMMON BAWDY HOUSES.

<sup>2</sup> A common bawdy house is a house or room, or set of rooms, in any house kept for purposes of prostitution. And it is immaterial whether indecent or disorderly conduct is or is not perceptible from the <sup>3</sup> outside.

## ARTICLE 181.

## COMMON GAMING HOUSES.

<sup>4</sup> A common gaming house is any house, room, or place kept or used for the purpose of unlawful gaming therein by any considerable number of persons.

Gaming means playing at games either of chance, or of mixed chance and skill.

Unlawful gaming means gaming carried on in such a

<sup>1</sup> *R. v. Barrett*, L. & C. 263, and see *R. v. Stannard*, L. & C. 349, where the whole house was let in parts to different women as weekly tenants.

<sup>2</sup> 1 Russ. Cr. 443, see cases; *R. v. Pierson*, 2 Lord Raym. 1197; see also Chitty, and 3 Steph. Com. 353, n. Draft Code, s. 155.

<sup>3</sup> *R. v. Rice & Wilton*, L. R. 1 C. C. R. 21.

<sup>4</sup> This definition appears to me to be established by the interpretation put by *Jenks v. Turpin*, L. R. 13 Q. B. D. 505 on, *inter alia*, 17 & 18 Vict. c. 38. s. 4. The law is discussed at length in the judgments of Sir H. Hawkins and Smith, J.

manner, or for such a length of time or for such stakes (regard being had to the circumstances of the players) that it is likely to be injurious to the morals of those who game.

All gaming is unlawful in which

(i.) A bank is kept by one or more of the players, exclusively of the others; or

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

#### ARTICLE 182.

##### <sup>1</sup> COMMON BETTING HOUSES.

A common betting house is a house, office, room, or other place

(i.) Kept or used for the purpose of betting between persons resorting thereto and

The owner, occupier, or keeper thereof; or

Any person using the same; or

Any person procured or employed by, or acting for or on behalf of, any such person; <sup>2</sup> or

Any person having the care or management, or in any manner conducting the business thereof; or

(ii.) Kept or used for the purpose of any money or valuable thing being received by or on behalf of any such person as aforesaid, as or for the consideration

for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise; or

as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency.

<sup>3</sup> Every common betting house is deemed to be a common gaming house.

<sup>1</sup> 16 & 17 Vict. c. 119, s. 1, preamble. Draft Code, s. 157.

<sup>2</sup> "Any such person" = owner, occupier, keeper, or person using the same.

<sup>3</sup> Sect. 2.

## ARTICLE 183.

## EVIDENCE THAT A HOUSE IS A COMMON GAMING HOUSE.

The following circumstances are evidence (until the contrary is proved) that a house, room, or place is a common gaming house, and that the persons found therein were unlawfully playing therein: that is to say,

(i.) <sup>1</sup> Where any cards, dice, balls, counters, tables, or other instruments of gaming used in playing any unlawful game are found in any house, room, or place suspected to be used as a common gaming house, and entered under a warrant or order issued under 8 & 9 Vict. c. 109, or about the person of any of those found therein.

(ii.) <sup>2</sup> Where any constable or officer authorized as aforesaid, to enter any house, room, or place, is wilfully prevented from, or obstructed, or delayed in entering the same or any part thereof, or where any external or internal door or means of access to any such house, room, or place so authorized to be entered is found to be fitted or provided with any bolt, bar, chain, or any means or contrivance for the purpose of delaying, preventing, or obstructing the entry into the house, or any part thereof, of any constable or officer authorized as aforesaid, or for giving alarm in case of such entry; or

If any such house, room, or place is found fitted or provided with any means or contrivance for unlawful gaming, or for concealing, removing, or destroying any instruments of gaming.

## ARTICLE 184.

## DISORDERLY PLACES OF ENTERTAINMENT.

The following places are disorderly places of entertainment, that is to say—

(a.) <sup>3</sup> Every house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind in the cities of London and Westminster, or within

<sup>1</sup> 8 & 9 Vict. c. 109, s. 8.

<sup>2</sup> 17 & 18 Vict. c. 33, s. 2.

<sup>3</sup> 25 Geo. 2, c. 36, s. 2.

twenty miles thereof, without a licence granted in compliance with the provisions of 25 Geo. 2, c. 36.

<sup>1</sup>This definition does not include the Theatres Royal in Drury Lane and Covent Garden, or the King's Theatre in the Haymarket, or any performance or public entertainment carried on under letters patent, or licence from the Crown or the Lord Chamberlain.

(b.) <sup>2</sup>Every house, room, or other place opened or used for public entertainment or amusement, or for public debating on any subject whatsoever upon any part of the Lord's Day called Sunday, and to which persons are admitted by the payment of money, or by tickets sold for money.

The following places are deemed to be places to which persons are admitted by the payment of money, although money is not taken in the name of or for admittance, that is to say, any house, room, or place—

(i.) <sup>3</sup>At which persons are supplied with tea, coffee, or other refreshments of eating or drinking on the Lord's Day at any greater price than the common and usual prices at which the like refreshments are commonsold sold upon other days thereat, or at places where the same usually are sold.

(ii.) Any house, room, or place opened or used for any of the purposes aforesaid at the expense of any number of subscribers or contributors to the carrying on any such entertainment, or amusement, or debate, on the Lord's Day, and to which persons are admitted by tickets to which the subscribers or contributors are entitled.

#### ARTICLE 135.

##### DISORDERLY INNS.

<sup>4</sup>A disorderly inn is an inn kept in a disorderly manner and suffered to be resorted to by persons of bad character for any improper purpose.

<sup>1</sup> 25 Geo. 2, c. 36, s. 4.

<sup>2</sup> 21 Geo. 3, c. 49, s. 1.

<sup>3</sup> *Ibid.* s. 2.

<sup>4</sup> Precedent of indictment, 3 Chit. Crim. Law, 672-3. As to refusing entertainment, see *R. v. Rymer*, 2 Q. B. D. 136.

Every person who keeps a disorderly inn, or who, being an innkeeper, refuses, without reasonable grounds, to entertain any person ready and willing to pay for entertainment therein, commits a misdemeanor.

## ARTICLE 186.

## LOTTERIES.

<sup>1</sup> Every person commits a common nuisance who <sup>2</sup> keeps a lottery of any kind whatever without the authority of Parliament.

## ARTICLE 187.

## NUISANCES TO HEALTH, LIFE, AND PROPERTY.

<sup>3</sup> Every person commits a common nuisance who does anything which endangers the health, life, or property of the public or any part of it.

<sup>4</sup> Publicly and wilfully exposing or causing to be exposed for sale articles of food unfit for consumption, and knowingly permitting servants to mix unwholesome ingredients in articles of food, are acts endangering the health or life of the public within the meaning of this article.

<sup>5</sup> Everything is deemed to endanger health, life, or property, which either causes actual danger thereto, or which must do so in the absence of a degree of prudence and care the continual exercise of which cannot be reasonably expected.

*Illustrations.*

(1.) <sup>6</sup> A carries a child infected with the small-pox along a public high-

<sup>1</sup> 10 Will. 3, c. 23, s. 1; 42 Geo. 3, c. 119, s. 2; and see *R. v. Crawshaw*, Bell, C. C. 303.

<sup>2</sup> "Keeps" = publicly or privately keep any office or place to exercise, keep open, show, or expose, to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little go, or any other lottery whatsoever.

<sup>3</sup> See cases in Illustrations. The offences of being a common scold and of eavesdropping would fall under this head, but they may be regarded as practically obsolete.

<sup>4</sup> Draft Code, s. 153.

<sup>5</sup> Illustration (5).

<sup>6</sup> *R. v. Vantandillo*, 4 M. & S. 73. So of bringing a glandered horse to a fair,

way in which persons are passing, and near to inhabited houses. A commits a common nuisance.

(2.)<sup>1</sup> A permits his house standing by the highway to become so ruinous as to be likely to fall down, and to injure passengers. A commits a common nuisance.

(3.)<sup>2</sup> A burns down his own house, it being in a situation which makes such burning dangerous to others. A commits a common nuisance.

(4.)<sup>3</sup> A, a baker, under a contract to supply children at a military asylum with bread, delivers loaves into which his servant, to his knowledge, has introduced alum. A commits a common nuisance.

(5.)<sup>4</sup> A keeps in a warehouse in the City of London large quantities of a mixture of spirits of wine and wood naphtha, forming a substance more inflammable than gunpowder, and of such a nature that a fire lighted by it would be practically unquenchable. A commits a common nuisance, although he uses the most scrupulous care to avoid accidents.

#### ARTICLE 188.

##### NUISANCES BY OFFENSIVE TRADES.

<sup>5</sup> Every one commits a common nuisance who, for the purposes of trade or otherwise, makes loud noises, or offensive or unwholesome smells in such places and under such circumstances as to annoy any considerable number of persons in the exercise of rights common to all her Majesty's subjects.

#### ARTICLE 189.

##### NUISANCES TO HIGHWAYS.

Every one commits a common nuisance who obstructs any highway, by any permanent work or erection thereon or injury thereto, which renders the highway less commodious to the public than it would otherwise be; or who prevents

*R. v. Hanson*, Dear. 24. An infected person exposing himself would commit the same offence.

<sup>1</sup> *R. v. Watson*, 2 Str. 1167.

<sup>2</sup> *R. v. Probert*, 2 Ea. 1030. If there were an intent to injure or defraud, this would be felony. See Article 377 (a).

<sup>3</sup> *R. v. Dixon*, 3 M. & S. 11. See, too, *R. v. Crawley*, 3 F. & F. 109; *R. v. Jarvis*, 3 F. & F. 108.

<sup>4</sup> *Lister's Case*, 1 D. & B. C. C. 209.

<sup>5</sup> 1 Russ. Cr. 436, &c.

them from having access to any part of it by an excessive and unreasonable temporary use thereof, or by so dealing with the land in the immediate neighbourhood of the highway as to prevent the public from using and enjoying it securely.

*Illustrations.*

Each of the following acts is a nuisance to a highway :

- (1.)<sup>1</sup> Digging a ditch, or making a hedge across it, or ploughing it up.
- (2.)<sup>2</sup> Allowing waggons to stand before a warehouse for an unreasonable time as to occupy great part of the street for several hours by day and night.
- (3.)<sup>3</sup> Keeping up a hoarding in front of a house in a street for the purpose of repairs for an unreasonable time.
- (4.)<sup>4</sup> Excavating an area close to a footpath, and leaving it unfenced.
- (5.)<sup>5</sup> Blasting stone in a quarry so as to throw stones upon the houses and road.

ARTICLE 190.

NUISANCES TO BRIDGES.

\* Every one is guilty of a common nuisance who, being bound by law to repair a bridge, leaves it unrepaired.

ARTICLE 191.

NUISANCES TO NAVIGABLE RIVERS.

Every one is guilty of a common nuisance who wilfully diverts or obstructs the course of any navigable river<sup>6</sup> so as

<sup>1</sup> 1 Russ. Cr. 485.

<sup>2</sup> *R. v. Russel*, 6 East, 427.

<sup>3</sup> *R. v. Jones*, 3 Camp. 230.

<sup>4</sup> *Barnes v. Ward*, 9 C. B. 392.

<sup>5</sup> *R. v. Mullins*, L. & C. 489.

<sup>6</sup> 1 Russ. Cr. 541, 68, where the whole law as to the liability to repair different classes of bridges is discussed.

<sup>7</sup> 1 Russ. Cr. 531.

<sup>8</sup> *R. v. Randall, C. & M.* 496; *R. v. Russel*, 3 E. & B. 942.

appreciably to diminish its convenience for purposes of navigation, even though the alteration may, upon the whole, be for the convenience of the public; <sup>1</sup> but the owner of a vessel wrecked in a navigable river is not guilty of a common nuisance because he does not remove it.

<sup>1</sup> *R. v. Watts*, 2 Esp. 675; *White v. Crisp*, 10 Ex. 318; *Brown v. Mallett*, 5 C. B. 599. *White v. Crisp* and *Brown v. Mallett* are not altogether consistent on the further question as to the duty of the owner to buoy his vessel, or otherwise provide against other vessels striking on it.



## CHAPTER XX.

## VAGRANCY.

## ARTICLE 192.

## IDLE AND DISORDERLY PERSONS.

<sup>2</sup> AN idle and disorderly person is a person who

(a.) Being able, wholly or in part, to maintain himself or his family by work or otherwise, wilfully refuses or neglects so to do, by which refusal or neglect he or any of his family whom he may be legally bound to maintain becomes chargeable to any parish, township, or place; or

(b.) Who returns to, and becomes chargeable in any parish, township, or place whence he has been legally removed by order of two justices of the peace, unless he produces a certificate of the churchwardens and overseers of the poor of some other parish, township, or place, thereby acknowledging him to be settled in such other parish, township, or place; or

(c.) Who, being a petty chapman or pedlar, wanders abroad and trades without being duly licensed or otherwise authorized by law; or

(d.) Who, being a common prostitute, wanders in the public street or public highways or any place of public resort, and behaves in a riotous or indecent manner; or

(e.) Who wanders abroad, or places himself in any public place, street, highway, court, or passage, <sup>3</sup> to beg or gather alms, or causes or procures any child so to do; or

(f.) <sup>4</sup> Who being a pauper,

(i.) Absconds or escapes from, or leaves any casual ward before he is entitled to discharge himself therefrom; or

<sup>1</sup> 3 Hist. Cr. Law, 266-275.

<sup>2</sup> 5 Geo. 4, c. 83, s. 3.

<sup>3</sup> 34 & 35 Vict. c. 103, s. 7.

<sup>4</sup> The wandering, &c., must be as a habit of life. Persons who go about collecting alms for a specific purpose, and not as a way of life, are not within the statute. *Pointon v. Hill*, L. R. 12 Q. B. D. 306.

(ii.) Refuses to be removed to any workhouse or asylum under the provisions of the "Pauper Inmates Discharge and Regulation Act, 1871" (34 & 35 Vict. c. 108); or

(iii.) Absconds or escapes from, or leaves any workhouse or asylum during the period for which he may be detained therein; or

(iv.) Refuses or neglects, whilst an inmate of any casual ward, workhouse, or asylum, to do the work or observe the regulations prescribed; or

(v.) Wilfully gives a false name, or makes a false statement, for the purpose of obtaining relief.

#### ARTICLE 193.

##### ROGUES AND VAGABONDS.

<sup>1</sup> A rogue and vagabond is a person who

(a.) Commits any of the offences in the last Article mentioned, after having been convicted as an idle and disorderly person; or

(b.) Pretends or professes to tell fortunes, or uses any subtle craft, means, or device, <sup>2</sup> by palmistry or otherwise, to deceive and impose on any of Her Majesty's subjects; or

(c.) Wanders abroad and lodges in any barn or outhouse, or in any deserted unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself; or

(d.) <sup>3</sup> Wilfully exposes to view in any street, road, highway, or public place, or in the window or other part of any shop, or other building situate therein, any obscene print, picture, or other indecent exhibition; or

(e.) Wilfully, openly, lewdly, and obscenely exposes his

<sup>1</sup> 5 Geo. 4, c. 83, s. 4.

<sup>2</sup> *i.e.*, "by palmistry, or by contrivances to deceive other than palmistry, provided they are of the same general character as is indicated by the earlier words of the statute," *per* Pollock, B., in *Monck v. Hilton*, 2 Ex. Div. 279. In this case the person convicted called himself a 'Spiritualist,' and had a fixed residence.

<sup>3</sup> 1 & 2 Vict. c. 38, s. 2.

person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female; or

(f.) Wanders abroad and endeavours, by the exposure of wounds or deformities, to obtain or gather alms; or

(g.) Goes about as a gatherer or collector of alms, or endeavours to procure charitable contributions of any nature or kind under any false or fraudulent pretence; or

(h.) Runs away and leaves his wife and his or her child or children chargeable, or whereby she or they or any of them become chargeable to any parish, township, or place; or

(i.)<sup>1</sup> Plays or bets\* in any street, road, highway, or other open and public place, † at or with any table or instrument of gaming, ‡ at any game or pretended game of chance; or

(j.) Has in his custody or possession any picklock, key, crow, jack, bit, or other implement, with intent feloniously to break into any dwelling-house, warehouse, coachhouse, stable, or outbuilding; or

(k.) Is armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or has upon him any instrument with intent to commit any felonious act; or

(l.) Is found in or upon any dwelling-house, warehouse, coachhouse, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose; or

(m.) Is a suspected person or reputed thief<sup>2</sup> frequenting any river, canal, or navigable stream, dock or basin, or any quay, wharf, or warehouse, or any avenue leading thereto, or any street, or any highway, or any place adjacent to a street or highway, with intent to commit felony;

<sup>1</sup> 36 & 37 Vict. c. 38, s. 3, re-enacts this provision, adding at \* "by way of wagering or gaming," at † "or in any open place to which the public have or are permitted to have access," and at ‡ "or any coin, cash, token, or other article used as an instrument of such wagering or gaming."

<sup>2</sup> A single visit to a place, or once passing through a street, can in no sense be said to be a "frequenting that place or street." Grove, J., in *Clark v. Reg.*, L. R. 14 Q. B. D. 98. "The mere finding upon one occasion of a man in a public street under circumstances leading to the conclusion that he intended to commit a felony, is not sufficient to satisfy the statute. What amounts to a 'frequenting' a street must depend upon the circumstances of each particular case; I only say *one* visit to it does not." Hawkins, J., in *ibid.* p. 102.

<sup>1</sup> In proving the intent to commit a felony it is not necessary to shew that the person suspected was guilty of any particular act tending to shew his purpose or intent, and he may be convicted if, from the circumstances of the case, and from his known character as proved to the Court or justice before whom or which he is brought, it appears to such Court or justice that his intent was to commit a felony; or

(*n.*) Being apprehended as an idle and disorderly person, violently resists any constable or other peace officer, so apprehending him, and is subsequently convicted of the offence for which he was so apprehended; or

(*o.*)<sup>2</sup> Who, being a pauper, wilfully destroys or injures his own clothes, or damages any of the property of the guardians.

#### ARTICLE 194.

##### INCORRIGIBLE ROGUES.

<sup>3</sup> An incorrigible rogue is a person who

(*a.*) Breaks or escapes out of any place of legal confinement before the expiration of the term for which he is committed under Article 193; or

(*b.*) Is convicted as a rogue and vagabond after being previously so convicted; or

(*c.*) Being apprehended as a rogue and vagabond, violently resists any constable or peace officer so apprehending him, and is subsequently convicted of the offence for which he was apprehended.

#### ARTICLE 195.

##### PUNISHMENT OF ROGUES, VAGABONDS, ETC.

<sup>4</sup> Every one convicted before a justice of the peace of being an idle and disorderly person may be imprisoned with hard labour for any term not exceeding one month;

<sup>1</sup> 34 & 35 Vict. c. 112, s. 15.

<sup>2</sup> *Ibid.* c. 108, ss. 7, 10.

<sup>3</sup> 5 Geo. 4, c. 83, s. 5.

<sup>4</sup> *Ibid.* ss. 3, 4, 5.

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Of being a rogue and vagabond may be imprisoned with hard labour for any term not exceeding three months ;

Of being an incorrigible rogue must be committed to prison and kept to hard labour till the next general or quarter sessions of the peace ;

At the said sessions the justices may order such offender to be further committed to prison and to be there kept to hard labour for any term not exceeding one year, and if a male to be whipped.

## \*PART V.

OFFENCES AGAINST THE PERSON, THE CONJUGAL  
AND PARENTAL RIGHTS, AND THE REPUTATION  
OF INDIVIDUALS.

CHAP. XXI.—CASES IN WHICH INFLECTION OF BODILY INJURY IS NOT CRIMINAL.	BODILY INJURIES NOT AMOUNTING TO FELONY.
CHAP. XXII.—OF CULPABLE NEGLIGENCE AND OF DUTIES TENDING TO THE PRESERVATION OF LIFE.	CHAP. XXVII.—ASSAULTS, AGGRAVATED AND COMMON, PUNISHABLE ON INDICTMENT.
CHAP. XXIII.—HOMICIDE.	CHAP. XXVIII.—PUNISHMENT OF ASSAULTS ON SUMMARY CONVICTION.
CHAP. XXIV.—MURDER—MANSLAUGHTER—ATTEMPTS TO COMMIT MURDER—CONCEALMENT OF BIRTH.	CHAP. XXIX.—RAPE, ETC.
CHAP. XXV.—THE MALICIOUS INFLECTION OF BODILY INJURIES AMOUNTING TO FELONY.	CHAP. XXX.—CRIMES AFFECTING CONJUGAL AND PARENTAL RIGHTS—BIGAMY—ABDUCTION.
CHAP. XXVI.—THE INFLECTION OF	CHAP. XXXI.—OFFENCES AGAINST CHILDREN BY PARENTS AND OTHERS.
	CHAP. XXXII.—LIBELS ON PRIVATE PERSONS.

## CHAPTER XXI.

CASES IN WHICH INFLECTION OF BODILY INJURY  
IS NOT CRIMINAL.

## ARTICLE 196.

## EXCEPTIONS TO REST OF PART V.

THE contents of Part V. are to be taken to be subject to the provisions contained in this chapter.

## ARTICLE 197.

## EXECUTION OF LAWFUL SENTENCES.

<sup>1</sup> The intentional infliction of death or bodily harm is not

\* Note VII. See also 3 Hist. Cr. Law, ch. xxvi. and xxvii. pp. 1-120.

<sup>1</sup> 1 Hale, P. C. 497; Foster, 267; 1 Hawk. P. C. 80; 1 East, P. C. 332-4. These authorities contain (*inter alia*) discussions as to varying the form of punish-

a crime when it is done in the execution, in the manner prescribed by law by a person whose duty it is to execute it, of a lawful sentence duly passed by a competent Court.

A Court which, but for some formal defect in its authority or in its proceedings, would have had jurisdiction to pass a sentence, is deemed for the purposes of this Article to be a competent Court; but a Court which has, by law no jurisdiction at all over the case in which sentence is passed is not deemed to be a competent Court, and a mistaken belief on the part of the judge, or of the officer who executes the sentence, that it is competent, does not justify or excuse his act.

*Illustrations.*

(1.)<sup>1</sup> A sits under a commission of gaol delivery. The officer forgets to adjourn the Court at the end of the first day's sitting. This determines the commission. On the following day A sits again, and sentences a felon to death, who is duly executed by B. Neither A nor B is guilty of murder or manslaughter, though the proceedings are irregular.

(2.)<sup>2</sup> A, a lieutenant or other having commission of martial authority in time of peace, causes B to be hanged by C by colour of martial law. This is murder in both A and C.

ARTICLE 198.

SUPPRESSION OF RIOTS.

<sup>3</sup> The intentional infliction of death or bodily harm is not a crime when it is done either by justices of the peace, peace

ment (as by substituting beheading for hanging) little likely to be of practical value. Draft Code, ss. 25 and 28.

<sup>1</sup> *Per* Lord Hale, 1 Hale, P. C. 499.

<sup>2</sup> Coke, 3rd Inst. 52; 1 Hale, P. C. 499, 500. The whole subject of martial law underwent full discussion in connection with the execution of Mr. Gordon by a court martial in Jamaica in 1865. An elaborate history of the case has been published by Mr. Finlason, and the charge to the grand jury, delivered at the Central Criminal Court by the Lord Chief Justice of England, has been published in a separate form. I know not whether the charge to the grand jury of Middlesex, delivered by Lord (then Mr. Justice) Blackburn, has been published or not. Much information on the subject will be found in Forsyth's Cases and opinions on Constitutional Law, pp. 484-563. Mr. Forsyth prints, *inter alia*, an opinion given by the late Mr. Edward James, Q.C., and myself, in 1866, see pp. 551-563; and see *Phillips v. Eyre*, L. R. 6 Q. B. 11.

<sup>3</sup> See the charge of Tindal, C.J., to the grand jury of Bristol in 1832, printed in a note to *R. v. Pinney*, 5 C. & P. 261, and quoted and approved in *Phillips v.*

officers, or private persons, whether such persons are, and whether they act as, soldiers under military discipline or not for the purpose of suppressing a general and dangerous riot which cannot otherwise be suppressed.

ARTICLE 199.

PREVENTION OF THE COMMISSION OF CRIMES AND ARREST OF CRIMINALS.

The intentional infliction of death or bodily harm is not a crime when it is done by any person

<sup>1</sup> in order to prevent the commission of treason, murder, burglary, rape, robbery, arson, piracy, or any other felony in which the traitor, felon, or pirate so acts as to give the person who kills or wounds him reasonable ground to believe that he intends to accomplish his purpose by open force ;

<sup>2</sup> or, in order to arrest a traitor, felon, or pirate, or retake or keep in lawful custody a traitor, felon, or pirate who has escaped, or is about to escape, from such custody, although such traitor, felon, or pirate offers no violence to any person ;

<sup>3</sup> or, when it is done by a constable, or other officer of justice, in order to execute a warrant of arrest for treason or

*Eyre*, L. R. 6 Q. B. 15 (Court of Exchequer Chamber). The proper course in such cases is for the civil magistrate to direct and control what is done, but this is not absolutely necessary. The Riot Act (1 Geo. 1, st. 2, c. 5, see Article 74) authorizes in express terms the dispersion of rioters who continue riotously assembled together for more than an hour after the proclamation made, and indemnifies the persons concerned if any of the rioters should be killed ; but this Act appears to be narrower than the common law as laid down by Tindal, C.J. See Draft Code, ss. 43, 50.

<sup>1</sup> Coke, 3rd Inst. 55 ; 1 Hale, P. C. 486-7 ; Foster, 273 (more fully and satisfactorily) ; 1 Hawk. P. C. 83 (rather confusedly) ; 1 East, P. C. 271-4 (best and most fully stated) ; 1 Russ. Cr. 5th ed. 84 or 52 (taken substantially from East). Piracy is not mentioned by the authorities, but see § Geo. 1, c. 24, s. 6. Article 112. Draft Code, s. 54.

<sup>2</sup> Coke, 3rd Inst. 56 ; 1 Hale, P. C. 489 ; 1 Hawk. P. C. 81 ; Foster, 270-1 ; 1 East, P. C. 298-302. Draft Code, ss. 32-46.

<sup>3</sup> Coke, 3rd Inst. 55 ; 1 Hale, P. C. 490 ; 1 Hawk. P. C. 81 ; 1 East, P. C. 298-302. It must be observed that this Article is confined to the intentional infliction of death or bodily injury. If the death or injury is not an intended or probable consequence of the act, the case is provided for under Articles 210, 222.



felony, which cannot otherwise be executed, although the person named in the warrant offers no violence to any person; provided, in each of the said cases, that the object for which death or harm is inflicted cannot be otherwise accomplished.

## ARTICLE 200.

<sup>1</sup> PRIVATE DEFENCE.

The intentional infliction of death or bodily harm is not a crime when it is inflicted by any person in order to defend himself or any other person from unlawful violence, provided that the person inflicting it observes the following rules as to avoiding its infliction, and inflicts no greater injury in any case than he in good faith, and on reasonable grounds, believes to be necessary when he inflicts it:—

(a.) <sup>2</sup> If a person is assaulted in such a manner as to put him in immediate and obvious danger of instant death or grievous bodily harm, he may defend himself on the spot, and may kill or wound the person by whom he is assaulted.

(b.) <sup>3</sup> If a person is unlawfully assaulted,

(i.) In his own house;

(ii.) <sup>4</sup> In the execution of a duty imposed upon him by law;

(iii.) <sup>4</sup> By way of resistance to the exercise of force which he has by law a right to employ against the person of another;

he may defend himself on the spot, and may use a degree of force for that purpose proportioned to the violence of the assault, and sufficient (in case iii.) to enable him not only to

<sup>1</sup> See Draft Code, ss. 55-65.

<sup>2</sup> Coke, 3rd Inst. 55; 1 Hale, P. C. 482; 1 Hawk. P. C. 82; Foster, 273-5; 1 Russ. Cr. 849. This case is so nearly co-extensive with the first case mentioned in the last Article that East does not notice them separately. Cases, however, may be imagined in which a sudden and violent assault would be no crime, and yet might be resisted by killing the assailant: see Illustration (1).

<sup>3</sup> Staundforde, 14a; Coke, 3rd Inst. 56; 1 Hale, P. C. 476, &c.; 1 Hawk. P. C. 87; Foster, 275-6; 1 East, P. C. 279-80.

<sup>4</sup> In addition to the authorities in the last note, see 1 East, P. C. 287, 307; 1 Hale, P. C. 486.

repel the attack made upon him, but to effect his original purpose; but a person using force in the execution of a duty imposed upon him by law, or in order to effect a purpose which he may by law effect in that manner, and not being assaulted, is not entitled to strike or hurt the person against whom he employs such force, merely because he is unable otherwise to execute such duty or fulfil such purpose, except in the cases provided for in Article 199.

(c.)<sup>1</sup> If a person is unlawfully assaulted by another without any fault of his own, and otherwise than in the cases provided for in clauses (a.) and (b.), but with a deadly weapon, it is his duty to abstain from the intentional infliction of death or grievous bodily harm on the person assaulting, until he (the person assaulted) has retreated as far as he can with safety to himself.

But any person unlawfully assaulted may defend himself on the spot by any force short of the intentional infliction of death or grievous bodily harm; and if the assault upon him is notwithstanding continued, he is in the position of a person assaulted in the employment of lawful force against the person of another.

<sup>1</sup> See the authorities quoted for clauses (a.), (b.), and (c.), and especially 1 Hale, P. C. 481. The qualification at the end of this rule is founded on the doctrine that any one may lawfully prevent or suppress by force a breach of the peace or affray (1 Hawk. P. C. 469; *R. v. Osmer*, 5 East, 308), from which it would seem to follow that a man who is himself assaulted may arrest his assailant, and on the doctrine that *son assault damesne* is a good defence to an indictment for assault (1 Hawk. P. C. 110). If this were not the law it would follow that any ruffian who chose to assault a quiet person in the street might impose upon him the legal duty of running away, even if he were the stronger man of the two. The passage of Hale appears to me to be applicable only to cases where deadly weapons are produced by way of bravado or intimidation, a case which no doubt often occurred when people habitually carried arms and used them on very slight provocation. In such a case it might reasonably be regarded as the duty of the person assaulted to retreat rather than draw his own sword, but I cannot think that Hale meant to say that a man who in such a case closed with his assailant and took his sword from him would be acting illegally, or that if in doing so the assailant were thrown down and accidentally killed by the fall the person causing his death would be guilty of felony. The minuteness of the law contained in the authorities on which this Article is founded is a curious relic of a time when police was lax and brawls frequent, and when every gentleman wore arms and was supposed to be familiar with the use of them. It might, I think, be simplified in the present day with advantage.

(d.)<sup>1</sup> If two persons quarrel and fight neither is regarded as defending himself against the other until he has in good faith fled from the fight as far as he can; but if either party does in good faith flee from the fight as far as he can, and if, when he is prevented either by a natural obstacle or any other cause of the same nature, from flying farther, the other party to the fight follows and again assaults him, the person who has so fled may defend himself, and may use a degree of violence for that purpose proportioned to the violence employed against him.

*Illustrations.*

(1.)<sup>2</sup> A, a madman, violently attacks B in such a manner as to cause instant danger to B's life. B may kill A, though A is not committing any crime.

(2.)<sup>3</sup> A, an officer, has a warrant to arrest B on civil process. B flies. A overtakes him, and B assaults A. A may use any degree of violence to B necessary to repel his assault and to arrest him.

(3.)<sup>4</sup> A, a trespasser, enters B's house and refuses to leave it. B has a right to remove A by force, but not to strike him even if he cannot otherwise get him out of the house. If on the application of such force A assaults B, B may use any degree of force necessary to defend himself and to remove A from the house.

ARTICLE 201.

LAWFUL FORCE.

<sup>5</sup> It is not a crime to inflict bodily harm by way of lawful correction, or by any lawful application of force (other than those hereinbefore mentioned) to the person of another; but if the harm inflicted on such an occasion is excessive the act which inflicts it is unlawful, and, even if there is no excess,

<sup>1</sup> See the authorities for clause (b.).

<sup>2</sup> This seems to follow directly from the authorities cited. So, if A were under a mistake of fact which B had no time to explain.

<sup>3</sup> 1 East, P. C. 307.

<sup>4</sup> 1 Hale, P. C. 486.

<sup>5</sup> It would be inconsistent with the plan of this work to try to enumerate all the cases in which force may be lawfully applied to the person of another. In 1 Russ. Cr. 858-60, cases will be found as to excessive violence in executing legal process: *R. v. Hunter*, Str. 499, p. 857. Pressing for the sea service (p. 859). Captains in the merchant service: *R. v. Leggetts*, 8 C. & P. 191 (p. 860). Correction of children and servants (861-4). See Draft Code, s. 66.

it is the duty of every person applying the force to take reasonable precautions against the infliction of other or greater harm than the occasion requires.

*Illustrations.*

- (1.)<sup>1</sup> A, a schoolmaster, beats B, a scholar, for two hours with a thick stick. Such a beating is unlawful.
- (2.)<sup>2</sup> A kicks B, a trespasser, out of his house, in order to force him to leave it. B is killed. The kick is an unlawful act.
- (3.) (SUBMITTED) A, the governor of a gaol, flogs B, a criminal, under the sentence of a court. It is A's duty to cause the surgeon of the gaol to be in attendance to see that no unintended injury is inflicted on B.

ARTICLE 202.

SUPERIOR ORDERS TO EMPLOY FORCE.

In all cases in which force is used against the person of another, both the person who orders such force to be used and the person using that force is responsible for its use, and neither of them is justified by the circumstance that he acts in obedience to orders given him by a civil or military superior, but the fact that he did so act, and the fact that the order was apparently lawful, are in all cases relevant to the question whether he believed, in good faith and on reasonable grounds, in the existence of a state of facts which would have justified what he did apart from such orders,<sup>3</sup> or which might justify his superior officer in giving such orders.

*Illustrations.*

- (1.)<sup>4</sup> A, a marine, is ordered by his superior officer on board a man-of-war to prevent boats from approaching the ship, and has ammunition given him for that purpose. Boats persisting after repeated warnings in approaching the ship A fires at one and kills B. This is murder in A, although he fired under the impression that it was his duty to do so, as the act was not necessary for the preservation of the ship [though desirable for the maintenance of discipline].

<sup>1</sup> *R. v. Hopley*, 1 Russ. Cr. 751; 2 F. & F. 202.

<sup>2</sup> *Wild's Case*, 1 Russ. Cr. (5th ed.) 686; 2 Lewin, 214.

<sup>3</sup> As to this see 1 Hist. Cr. Law, 205.

<sup>4</sup> *R. v. Thomas*, 1 Russ. Cr. 823; 4 M. & S. 441.

(2.)<sup>1</sup> A, the driver of an engine, orders B, the stoker (whose duty it is to obey his orders), not to stop the engine. The train runs into another in consequence, and C is killed. B is justified by A's order.

(3.)<sup>2</sup> (SUBMITTED.) A, a civil magistrate, directs B, a military officer, to order his men to fire into a mob. B gives the order. It is obeyed, and C, a common soldier, shoots D dead. The question whether A, B, and C respectively committed any offence depends on the question whether each of them respectively had reasonable grounds to believe and did in fact believe in good faith either that what they did was necessary to suppress a dangerous riot, or in the case of B, that A, or in the case of D, that B, had reasonable grounds to believe and did believe that the order given was necessary to suppress a dangerous riot. A's direction to B, and B's order to C, would not necessarily justify B or C in what they did, but would be facts relevant to the question whether they believed upon reasonable grounds as aforesaid.

## ARTICLE 203.

## CONSENT TO BODILY INJURY.

The consent of a person killed or maimed to the infliction of death or bodily harm, affects the criminality of such infliction to the extent defined in Articles 204-209, both inclusive. In each of these Articles the word "Consent" means a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents.

Consent is said to be given freely when it is not procured by force, fraud, or threats of whatever nature.

<sup>1</sup> *R. v. Trainer*, 4 F. & F. 165; 1 Russ. Cr. (5th ed.) 837, 838. The language of Willes, J., in this case seems to be a little too wide, unless it is taken in connection with the particular facts.

<sup>2</sup> Whether C would commit a military offence if he refused to obey B's order because he rightly thought it unreasonable, is a question which would have to be decided by a court martial. I should suppose that cases might be imagined in which even a court martial would hold that a military inferior might and ought to disobey orders on the ground of their illegality. An officer, *e.g.*, who commanded his men to fire a volley down Fleet Street when there was no appearance of a disturbance, or to shoot a child of four years old running away during a riot, or to desert to the enemy, or to shoot a superior officer, ought to be disobeyed, and I suppose that a soldier who obeyed such an order might be punished by a court martial. That such acts as shooting peaceable people wantonly, or a child of four years old intentionally, even in a riot, would be murder as well in the soldier as in the officer cannot be doubted. If so, it seems impossible to suggest any other principle as to the effect of superior orders than the one mentioned in the text. It is indeed essential to the maintenance of the supremacy of the common law over military force.

## ARTICLE 204.

## RIGHT TO CONSENT TO BODILY INJURY FOR SURGICAL PURPOSES.

<sup>1</sup> Every one has a right to consent to the infliction of any bodily injury in the nature of a surgical operation upon himself or upon any child under his care, and too young to exercise a reasonable discretion in such a matter, but such consent does not discharge the person performing the operation from the duties hereinafter defined in relation thereto.

## ARTICLE 205.

## SURGICAL OPERATION ON PERSON INCAPABLE OF ASSENT.

(SUBMITTED)—<sup>2</sup> If a person is in such circumstances as to be incapable of giving consent to a surgical operation, or to the infliction of other bodily harm of a similar nature and for similar objects, it is not a crime to perform such operation or to inflict such bodily harm upon him without his consent or in spite of his resistance.

*Illustrations.*

(1.) A is rendered insensible by an accident which renders it necessary to amputate one of his limbs before he recovers his senses. The amputation of his limb without his consent is not an offence.

(2.) If the accident made him mad; the amputation in spite of his resistance would be no offence.

(3.) B is drowning and insensible. A, in order to save his life, pulls B out of the water with a hook which injures him. This is no offence.

## ARTICLE 206.

## RIGHT TO CONSENT TO BODILY INJURY SHORT OF MAIM.

<sup>3</sup> Every one has a right to consent to the infliction upon

<sup>1</sup> I know of no authority for these propositions, but I apprehend they require none. The existence of surgery as a profession assumes their truth.

<sup>2</sup> See note 1, p. 128. Draft Code, s. 67.

<sup>3</sup> The positive part of this Article is proved thus:—Injuries short of maims are not criminal at common law unless they are assaults, but an assault is inconsistent with consent. As to the definition of a maim, see 1 Hawk. P. C. 107. He expressly mentions castration.

himself of bodily harm not amounting to a maim. A maim is bodily harm whereby a man is deprived of the use of any member of his body or of any sense which he can use in fighting, or by the loss of which he is generally and permanently weakened, but a bodily injury is not a maim merely because it is a disfigurement.

*Illustration.*

(1.) It is a maim to strike out a front tooth. It is not a maim to cut off a man's nose. Castration is a maim.

ARTICLE 207.

NO RIGHT TO CONSENT TO INFLECTION OF DEATH.

<sup>1</sup> No one has a right to consent to the infliction upon himself of death, or of an injury likely to cause death, in any case (other than those mentioned in Article 204), or to consent to the infliction upon himself of bodily harm amounting to a maim, for any purpose injurious to the public.

*Illustrations.*

(1.) <sup>2</sup> A and B agree to fight a duel together with deadly weapons. If either is killed or wounded his consent is immaterial.

(2.) <sup>3</sup> A gets B to cut off A's right hand, in order that A may avoid labour and be enabled to beg. Both A and B commit an offence.

ARTICLE 208.

NO RIGHT TO CONSENT TO INJURY CONSTITUTING A BREACH OF THE PEACE.

<sup>4</sup> No one has a right to consent to the infliction of bodily

<sup>1</sup> Draft Code, s. 69.

<sup>2</sup> *R. v. Barronet*, Dear. 51. The law has never, I believe, been disputed. It is also immaterial whether the duel is or is not what is called fair. See, too, authorities as to suicide, Article 227.

<sup>3</sup> 1 Inst. 107 a, b. I think the qualification in the Article, "for any purpose injurious to the public," must be supplied. It seems absurd to say that if A gets a dentist to pull out a front tooth of A's because it is unsightly, though not diseased, A and the dentist both commit a misdemeanour. When it was an essential part of a common soldier's drill to bite cartridges I believe that it was not an uncommon military offence to get the front teeth pulled out, and this would, I presume, be an offence at common law also.

<sup>4</sup> *Foster*, 260; 1 *East*, 270; *R. v. Billingham*, 2 C. & P. 234; *R. v. Perkins*, 4 C. & P. 537; *R. v. Coney*, L. R. 8 Q. B. D. 534.

harm upon himself in such a manner as to amount to a breach of the peace, or in a prize fight or other exhibition calculated to collect together disorderly persons.

#### ARTICLE 209.

##### CONSENT TO BE PUT IN DANGER.

<sup>1</sup> It is uncertain to what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another.

##### *Illustration.*

(1.) A, with B's consent, wheels B in a barrow along a tight rope at a great height from the ground. C hires A and B to do so, D, E, and F pay money to C to see the performance. B is killed.

*Quere*, are A, C, D, E, and F, or any and which of them, guilty of manslaughter?

#### ARTICLE 210.

##### ACCIDENTAL INFLECTION OF BODILY INJURY BY LAWFUL ACT— WHAT ACTS ARE LAWFUL.

<sup>2</sup> It is not a crime to cause death or bodily harm accidentally by an act which is not unlawful, unless such act is accompanied by an omission, amounting to culpable negligence, as defined in Article 211, to perform a legal duty imposed either by law or by contract on the person who does the act.

An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it.

<sup>3</sup> There is, so far as I know, no authority on this point, but the principle on which prizefights have been held to be illegal might include such a case. Such an exhibition might also under circumstances be a public nuisance. To collect a large number of people to see a man put his life in jeopardy is a less coarse and boisterous proceeding than a prizefight, but is it less immoral?

<sup>2</sup> 1 Hale, 471, &c.; Foster, 258; 1 East, P. C. 260; 1 Russ. Cr. (5th ed.) 844. I cannot give any precise authority as to acts involving penalties.



The words "unlawful act" include—

- (i.) Acts punishable as crimes [or involving penalties];
- (ii.)<sup>1</sup> Acts constituting actionable wrongs;
- (iii.)<sup>2</sup> Acts contrary to public policy or morality, or injurious to the public.

Other acts are not unlawful within the meaning of this Article, though they may involve private immorality.

*Illustrations.*

(1.)<sup>3</sup> A, a schoolmaster, corrects a scholar in a manner not intended or likely to injure him, using due care. The scholar dies. Such a death is accidental.

(2.)<sup>4</sup> A turns B, a trespasser, out of his house, using no more force than is necessary for that purpose. B resists, but without striking A. They fall in the struggle and B is killed. Such a death is accidental.

(3.)<sup>5</sup> A, a workman, throws snow from a roof, giving proper warning. A passenger is nevertheless killed. Such a death is accidental.

(4.)<sup>6</sup> A takes up a gun, not knowing whether it is loaded or not, points it in sport at B and pulls the trigger. B is shot dead. Such a death is not accidental. If A had had reason to believe that the gun was not loaded, the death would have been accidental, although he had not used every possible precaution to ascertain whether the gun was loaded or not.

(5.)<sup>6</sup> A seduces B, who dies in her confinement. The seduction though an immoral, is not an unlawful act, within the meaning of this Article.

<sup>1</sup> 1 Russ. Cr. 812-21, for cases; see especially the summing up of Tindal, C.J., in 1 Lew. 179; 1 Russ. Cr. 817. Hale, East, and Foster make a distinction between *mala in se* and *mala prohibita*, which I think can no longer be regarded as law.

<sup>2</sup> See authorities for Article 208.

<sup>3</sup> 1 Hale, 473. The same law of course applies to all cases of lawful correction. It would also, I think, apply to Illustration (2), and to all other cases in which force is lawfully applied by one person to the person of another. It is, of course, impossible in a work like this to attempt an enumeration of those cases.

<sup>4</sup> Founded on Foster, 262.

<sup>5</sup> Founded on Foster, 263. In one of the cases referred to in Foster, the prisoner was convicted of manslaughter, although he had tried the pistol with the rammer. Foster, with reason, thinks this "an extremely hard case." *Dixon v. Bell*, 5 M. & S. 198, may be taken as illustrating the line between negligence, for which a man is civilly, and negligence for which he is criminally responsible. A in this case had caused the priming to be taken from a loaded gun, and left it in a place where a little girl playing with it shot a little boy. The boy recovered damages against A, but if he had died I do not think A would have been guilty of felony. The case is just on the line.

<sup>6</sup> No one ever suggested that this would be manslaughter, but it exactly marks the distinction between illegality and immorality.

## CHAPTER XXII.

OF CULPABLE NEGLIGENCE AND OF DUTIES TENDING TO  
THE PRESERVATION OF LIFE.

## ARTICLE 211.

DEATH OR BODILY INJURY CAUSED BY OMISSION TO DISCHARGE  
A LEGAL DUTY.

<sup>1</sup> EVERY one upon whom the law imposes any duty,<sup>2</sup> or who has by contract or by any wrongful act taken upon himself any duty, tending to the preservation of life, and who neglects to perform that duty, and thereby causes the death of any person, commits the same offence as if he had caused the same effect by an act done in the state of mind, as to intent or otherwise, which accompanied the neglect of duty.

Provided, that no one is deemed to have committed a crime only because he has caused the death of or bodily injury to another by negligence which is not culpable. What amount of negligence can be called culpable is a question of degree for the jury, depending on the circumstances of each particular case.

Provided, also, that no one is deemed to have committed

<sup>1</sup> The first part of this Article is illustrated by all the Illustrations of the other Articles in the chapter. The whole subject is treated at great length in Wharton on Homicide, chapter iv. s. 72, p. 166. Dr. Wharton classifies negligent homicides under the following heads (generalities apart):

- |  |                              |
|--|------------------------------|
| 1. Use of dangerous things.              | 6. The care of children, &c. |
| 2. Dropping things on roads.             | 7. The care of medical men.  |
| 3. Management of railroads and steamers. | 8. Dangerous machinery.      |
| 4. Riding and driving.                   | 9. Athletic sports.          |
| 5. The care of dangerous animals.        | 10. Conclusion.              |

I have carefully gone through the whole chapter, and I think the whole of it is only a set of illustrations of the principles stated in this and in the concluding Articles of the preceding chapter. It should be observed that the word "negligence" excludes intention. The very slightest omission of caution in order to cause death, would constitute malice aforethought, if death were caused thereby.

<sup>2</sup> Draft Code, s. 164.

a crime by reason of the negligence of any servant or agent employed by him.

<sup>1</sup> Provided also that it must be shewn that death not only follows but is also caused by the neglect of duty.

*Illustrations.*

(1.) <sup>2</sup> It is A's duty, by contract, as the banksman of a colliery shaft, to put a stage on the mouth of the shaft in order to prevent loaded trucks from falling down it. A omits to do so either carelessly or intentionally. A truck falls down the shaft and kills B. A is in the same position as if he had pushed the truck down the shaft carelessly or intentionally.

(2.) <sup>3</sup> A slings a cask in a manner which is reasonably sufficient for public safety. The cask slips and kills B. A is not criminally responsible merely because he omitted to take further precautions.

(3.) <sup>4</sup> A leaves an unloaded gun leaning against a wall in a friend's room. In his absence B loads it and leaves it loaded where he found it. A points it in sport at C and pulls the trigger. The gun goes off and kills C. A is not criminally responsible merely because he did not examine the gun before he pulled the trigger.

(4.) <sup>5</sup> A, the captain of a steamer, sets B to keep a look out. B fails to do so, whereby the steamer runs down a smack and drowns C. A is not criminally responsible for B's omission to look out.

(5.) <sup>6</sup> A, acting as a surgeon, physician, or midwife, causes the death of a patient by improper treatment, arising from ignorance or inattention. A is not criminally responsible, unless his ignorance, or inattention, or rashness is of such a nature that the jury regard it as culpable under all the circumstances of the case. It makes no difference whether A is or is not a properly qualified practitioner.

(6.) <sup>7</sup> A, by his servants, makes fireworks in his house contrary to the provisions of an Act of Parliament. The servants by culpable negligence cause an explosion which kills B. A is not criminally responsible for B's death.

(7.) <sup>8</sup> A being under a legal duty to supply medical aid for his son B, who has confluent small pox, refuses to do so from religious motives, and B dies. It must be shewn that B's life would probably have been prolonged if medical aid had been provided, before A can be convicted of manslaughter.

<sup>1</sup> Illustration (7).

<sup>2</sup> *R. v. Hughes*, D. & B. 248.

<sup>3</sup> *Rigmaid's Case*, 1 Law. 180. Probably in such a case there would be a civil liability; see *Byrne v. Boudier*, 2 H. & C. 722.

<sup>4</sup> *Foster*, 265.

<sup>5</sup> *R. v. Allen*, 7 C. & P. 153; *R. v. Green*, 7 C. & P. 156.

<sup>6</sup> *R. v. Van Butcher*, 3 C. & P. 129; *R. v. St. John Long* (1st case), 4 C. & P. 398; (2nd case) 4 C. & P. 433; *R. v. Williamson*, 3 C. & P. 635.

<sup>7</sup> *Bennett's Case*, Bell, C. C. 1.

<sup>8</sup> *R. v. Morby*, L. R. 8 Q. B. D. 571.

## ARTICLE 212.

CAUSING DEATH BY OMISSIONS OTHER THAN THOSE MENTIONED  
IN ARTICLE 211.

<sup>1</sup> It is not a crime to cause death or bodily injury, even intentionally, by any omission other than those referred to in the last Article.

*Illustration.*

(1.) A sees B drowning and is able to save him by holding out his hand. A abstains from doing so in order that B may be drowned, and B is drowned. A has committed no offence.

## ARTICLE 213.

## DUTY TO PROVIDE NECESSARIES OF LIFE.

<sup>2</sup> Every person under a legal duty, whether by contract or by law, or by the act of taking charge, wrongfully or otherwise, of another person, to provide the necessaries of life for such other person, is criminally responsible if death is caused by the neglect of that duty, and if the person to whom the duty is owing, is, from age, health, insanity, or any other cause, unable to withdraw himself from the control of the person from whom it is due, but not otherwise.

Some of the duties of parents towards children and of masters towards apprentices are defined in Articles 264, 265, and 266.

*Illustrations.*

(1.) <sup>3</sup> A neglects to provide proper food and lodging for her servant, B, (who is of weak mind, but twenty-three years old,) B's life is shortened by such neglect. A is criminally responsible if B was in such an enfeebled state of body and mind as to be helpless and unable to take care of herself, or was under the dominion and restraint of A, and unable to withdraw herself from A's control; otherwise not.

<sup>1</sup> *R. v. Smith*, 2 C. & P. 449. This subject is discussed in a striking manner by Lord Macaulay in his notes on the Indian Penal Code; see, too, Wharton on Homicide, § 72.

<sup>2</sup> See cases in Illustrations. Some duties of this sort are imposed by statute. See Articles 264, 265, 266. Draft Code, ss. 159-61.

<sup>3</sup> *R. v. Charlotte Smith*, L. & C. 607.

(2.)<sup>1</sup> B, a girl of eighteen, comes from service to the house of her mother, A, and is there confined of a bastard child. A does not provide a midwife, in consequence of which B dies. A is not criminally responsible for this omission.

(3.)<sup>2</sup> A persuades B, an aged and infirm woman, to live in his house, and causes her death by neglecting to supply her properly with food and fire, she being incapable of providing for herself from age and infirmity. A is criminally responsible for his neglect.

## ARTICLE 214.

## DELEGATION OF DUTY DEFINED IN ARTICLE 213.

If a person delegates the discharge of the duty mentioned in the last Article to his wife or to a servant, and supplies such wife or servant with the means of discharging the duties so delegated, it is the legal duty of such wife or servant to discharge such duties, and it is the legal duty of the man who delegates them to use ordinary care to see that they are properly discharged.

*Illustration.*

<sup>3</sup> A, the sister of B's deceased wife, acts as B's housekeeper, and neglects to give to B's infant child food duly provided by B, and so causes its death. A is criminally responsible for this neglect. If B knew of A's neglect, and permitted her to continue it, he also is responsible, but not otherwise.

## ARTICLE 215.

## WHEN DIRECT PERFORMANCE OF DUTY IMPOSSIBLE.

<sup>4</sup> It is the legal duty of a person who is unable to provide for any person necessaries which he is legally bound to provide for him to make application to the proper authorities for parochial relief in cases in which such authorities are legally bound to furnish such relief.

<sup>1</sup> *R. v. Shepherd*, L. & C. 147.

<sup>2</sup> *R. v. Marriott*, 8 C. & P. 425.

<sup>3</sup> *R. v. Bubb*, 4 Cox, C. C. 455; 1 Russ. Cr. 681; *R. v. Hook*, 4 Cox, 455; 1 Russ. Cr. 682.

<sup>4</sup> *R. v. Mabbett*, 5 Cox, C. C. 339; 1 Russ. Cr. 683.

## ARTICLE 216.

## DUTY OF CARE IN DOING DANGEROUS ACTS.

<sup>1</sup> It is the legal duty of every one who does any act which without ordinary precautions is, or may be, dangerous to human life, to employ those precautions in doing it.

*Illustrations.*

(1.) <sup>2</sup> It is the duty of persons having charge of dangerous things, animals or machinery, to take care of them.

(2.) <sup>3</sup> Workmen are employed to throw snow off the roof of a house. It is their duty to see whether people are passing, and to give warning before they throw it down.

(3.) <sup>4</sup> It is the duty of people riding, driving, or sailing, to be careful.

(4.) <sup>5</sup> A turns out a vicious horse to graze on a common on which people are likely to pass. It is his duty to take proper precautions against its injuring passers-by.

(5.) <sup>6</sup> A, B, and C went to practise with a rifle which carried a mile. A handed a board to B, who in C's presence fixed it in a tree, and they all fired at it at a distance of 100 yards, taking no precautions to prevent mischief to persons in the neighbourhood. One of the shots killed a boy in a tree about 200 yards behind the target. All were held guilty of manslaughter.

## ARTICLE 217.

## DUTY OF PERSONS DOING ACTS REQUIRING SPECIAL SKILL OR KNOWLEDGE.

<sup>1</sup> It is the legal duty of every person who undertakes (ex-

<sup>2</sup> How far can it be said to be a legal duty to abstain from doing such acts wantonly even with precautions? Suppose a man, merely for his own amusement or from caprice, took a dangerous wild beast into a public street, using all proper precautions, and suppose the wild beast notwithstanding broke loose and killed some one, would this be manslaughter? I know of no authority on the subject. See Draft Code, s. 162.

<sup>3</sup> Cases collected in Wharton on Homicide, §§ 87-93, 99, 125, 107-24; and see 1 Russ. Cr. 864-880.

<sup>4</sup> *R. v. Dent*, L. & C. 567.

<sup>5</sup> *R. v. Salmon & Others*, L. R. 6 Q. B. D. 79. My judgment was nearly in the terms of Article 216, and the other judgments were to the same effect.

<sup>6</sup> *E. v. St. John Long*, 4 C. & P. 404. (Per Garrow, B.) As to caution, see *R. v. St. John Long*, 2nd case, 4 C. & P. 440; see other cases collected in 1 Russ. Cr. (5th ed.) 572-3. Draft Code, s. 162.

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cept in case of necessity) to administer surgical or medical treatment, or to do any other lawful act of a dangerous character, and which requires special knowledge, skill, attention, or caution, to employ in doing it a common amount of such knowledge, skill, attention and caution.

## CHAPTER XXIII.

## HOMICIDE.

## ARTICLE 218.

## HOMICIDE DEFINED—WHEN A CHILD BECOMES A HUMAN BEING.

<sup>1</sup> HOMICIDE is the killing of a human being by a human being.

<sup>2</sup> A child becomes a human being within the meaning of this definition, when it has completely proceeded in a living state from the body of its mother, <sup>3</sup> whether it has or has not breathed, <sup>4</sup> and whether the navel string has or has not been divided, <sup>5</sup> and the killing of such a child is homicide, whether it is killed by injuries inflicted before, during, or after birth.

<sup>6</sup> A living child in its mother's womb, or a child in the act of birth, even though such child may have breathed, is not a human being within the meaning of this definition, and the killing of such a child is not homicide.

## ARTICLE 219.

## KILLING DEFINED.

<sup>7</sup> Killing is causing the death of a person by an act or omission but for which the person killed would not have died when he did, and which is directly and immediately connected with his death. The question whether a given

<sup>1</sup> Draft Code, ss. 165, 166.

<sup>2</sup> *R. v. Poulton*, 5 C. & P. 329.

<sup>3</sup> *R. v. Brain*, 6 C. & P. 349.

<sup>4</sup> *R. v. Trilloe*, Car. & Mar. 650.

<sup>5</sup> Authorities collected, 1 Russ. Cr. (5th ed.) 646.

<sup>6</sup> *E. v. Enoch*, 5 C. & P. 539, and see note to the case; *R. v. Wright*, 9 C. & P. 754; *R. v. Soller*, 7 C. & P. 850.

<sup>7</sup> See Draft Code, ss. 167-173. Dr. Wharton's work on Homicide contains an



act or omission is directly and immediately connected with the death of any person is a question of degree dependent upon the circumstances of each particular case.

(SUBMITTED.) But the conduct of one person is not deemed for the purposes of this Article to be the cause of the conduct of another, if it affects such conduct only by way of supplying a motive for it, and not so as to make the first person an accessory before the fact to the act of the other.

This Article is subject to the provisions contained in the next two Articles.

interesting and elaborate chapter (ch. xii. §§ 358-389), entitled "Causal Connection," into which some discussion is introduced on the distinction between causes and conditions; a distinction of which Dr. Wharton maintains, and of which Mr. Mill (see his *Logic*, vol. i. p. 398, &c.) denies the solidity. For practical purposes, I think the Article in the text is sufficient. And if this were the proper place, I should be disposed to discuss some of Dr. Wharton's positions. The latter part of the Article and the Illustration (6) intended to explain it, must, I think, be law; but I know of no direct authority on the subject. The maxim "In jure non remota causa sed proxima spectatur" has no doubt a bearing on the subject (see Bacon's *Maxims*, 35-9, and Broom's *Maxims*, 216-30), but it is very vague. Lord Bacon says it does not apply to "criminal acts except they have a full interruption." His illustration is,—A fires a pistol at B, and misses him, and runs away. B pursues A. A stabs B with a dagger. "If the law should consider the last impulsiva-cause, it should say it was in his own defence, but the law is otherwise, for it is but a pursuance and execution of the first murderous intent." Surely in this case the stab is the immediate cause of B's death; A's state of mind is another matter, and is to be inferred from facts. The law as to accessories and incitement appears to shew the limit to which participation in a crime can be carried. Unless the line is drawn there it is impossible to say how far it would extend. Illustration (6) is a prosaic version of Othello. Iago, however, in Act iv. sc. 1, says when asked to give poison, "Do it not with poison, strangle her in her bed." This would clearly make him an accessory. To take a humbler instance, the catastrophe of *Oliver Twist* might, perhaps, fall within Illustration (6). In ch. xlvii. of that work, Fagin, after getting Sikes to say he would murder any one who should betray him, wakes up Noah Claypole and makes him tell Sikes that the girl Nancy had betrayed him, and, as Sikes rushes out in a passion, says, "You won't be too violent, Bill; I mean not too violent for safety." I think that the whole conversation taken together would be evidence to go to a jury, that Fagin did 'counsel' or 'procure' the murder committed by Sikes, which would make him an accessory before the fact, but if he had confined himself to merely telling Sikes what Claypole said he had heard, it would not have been enough. After all there was only the uncorroborated testimony of an accomplice to prove what he said, and Claypole does not seem to have been by when the most damaging words were spoken.

*Illustrations.*

(1.)<sup>1</sup> A substitutes poison for medicine, which is to be administered to C by B. B innocently administers the poison to C, who dies of it. A has killed C.

(2.)<sup>2</sup> A gives a poisoned apple to his wife B, intending to poison her. B, in A's presence, and with his knowledge, gives the apple to C, their child, whom B did not intend to poison. A not interfering, C eats the apple and dies. A has killed C.

(3.)<sup>3</sup> A, an ironfounder, ordered to melt down a saluting cannon which had burst, repairs it with lead in a dangerous manner. Being fired with an ordinary charge, it bursts and kills B. A has killed B.

(4.)<sup>4</sup> A, B, and C, road trustees under an Act of Parliament, and as such under an obligation to make contracts for the repairs of the road, neglect to make any such contract, whereby the road gets out of repair, and D passing along it is killed. A, B, and C have not killed D.

(5.)<sup>5</sup> A by his servants makes fireworks in a house in London contrary to the provisions of an Act of Parliament (9 & 10 Will. 3, c. 77). Through the negligence of his servants, and without any act of his, a rocket explodes and sets fire to another house whereby B is killed. A has not killed B.

(6.) A tells B facts about C in the hope that the knowledge of those facts will induce B to murder C, and in order that C may be murdered; but A does not advise B to murder C; B murders C accordingly. A has not caused C's death within the meaning of this Article.

## ARTICLE 220.

WHEN AN ACT IS THE REMOTE CAUSE OF DEATH OR ONE OF SEVERAL CAUSES.

A person is deemed to have committed homicide, although his act is not the immediate or not the sole cause of death in the following cases—

(a.)<sup>6</sup> If he inflicts a bodily injury on another which causes surgical or medical treatment, which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith, and with common knowledge and skill, but the person inflicting the

<sup>1</sup> *Donellan's Case*. See my Gen. View, Cr. L. 338.

<sup>2</sup> *Saunders' Case*, 1 Hale, P. C. 436.

<sup>3</sup> *E. v. Carr*, 8 C. & P. 163.

<sup>4</sup> *R. v. Pocock*, 17 Q. B. 34.

<sup>5</sup> *R. v. Bennett*, Bell, C. C. 1.

<sup>6</sup> 1 Hale, 418; 1 Ex. 344; Illustrations (1), (2). Draft Code, s. 173.

injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith, or was so employed without common knowledge or skill.

(b.) <sup>1</sup> If he inflicts a bodily injury on another, which would not have caused death if the injured person had submitted to proper surgical or medical treatment, or had observed proper precautions as to his mode of living.

(c.) <sup>2</sup> If by actual violence or threats of violence he causes a person to do some act which causes his own death, such act being a mode of avoiding such violence or threats, which under the circumstances would appear natural to the person injured.

(d.) <sup>3</sup> If by any act he hastens the death of a person suffering under any disease or injury which apart from such act would have caused death.

(e.) <sup>4</sup> If his act or omission would not have caused death unless it had been accompanied by the acts or omissions of the person killed or of other persons.

#### Illustrations.

(1.) <sup>5</sup> A wounds B in a duel. Competent surgeons perform an operation which they in good faith regard as necessary. B dies of the operation, and it appears that the surgeons were mistaken as to the necessity for the operation. A has killed B.

(2.) <sup>6</sup> A gives B a wound. C, a surgeon, applies poison to the wound, either from bad faith or by negligence. B dies of the poison. C and not A has killed B.

(3.) <sup>7</sup> A injures B's finger. B is advised by a surgeon to allow it to be amputated, refuses to do so, and dies of lockjaw. A has killed B.

(4.) <sup>8</sup> A violently beats and kicks B, his wife, on the edge of a pond. She,

<sup>1</sup> Illustration (3). Draft Code, s. 172.

<sup>2</sup> Illustration (4). Draft Code, s. 167.

<sup>3</sup> 1 Hale, 428; Illustration (5). Draft Code, s. 171.

<sup>4</sup> See Illustrations (6) and (7). See also *R. v. Longbottom*, 1 Russ. Cr. (5th ed.) 830; 3 Cox, 439. *E. v. Ledger*, 1 Russ. Cr. (5th ed.) 835, 6; and Mr. Greaves' note. This case is a very peculiar one.

<sup>5</sup> *R. v. Pym*, 1 C. C. C. 339; 1 Russ. Cr. 702.

<sup>6</sup> Founded on 1 Hale, 428.

<sup>7</sup> *R. v. Holland*, 2 Moo. and Ro. 357.

<sup>8</sup> *R. v. Evans*, 1 Russ. Cr. (5th ed.) 651; *R. v. Wager*, tried at Derby Summer

to avoid his violence, throws herself into the pond and is drowned. A has killed B.

(5.)<sup>1</sup> A strikes B, who is at the time so ill that she could not possibly have lived more than six weeks if she had not been struck. B dies earlier than she would otherwise have died in consequence. A has killed B.

(6.)<sup>2</sup> A and B, the drivers of two carts, race along a high road. C is lying drunk in the middle of the road. One or other or both of the carts run over C and kill him. In either case both A and B have killed C.

(7.)<sup>3</sup> It is the duty of A to put up air headings in a colliery where they are required. It is the duty of B to give A notice where an air heading is required. But A has means, apart from B's report, of knowing whether such air headings are required or not. A omits to put up an air heading, B omits to give A notice that one is wanted. An explosion follows, and C is killed. Both A and B have killed C.

#### ARTICLE 221.

##### WHEN CAUSING DEATH DOES NOT AMOUNT TO HOMICIDE.

A person is not deemed to have committed homicide, although his conduct may have caused death, in the following cases:

(a.)<sup>4</sup> When the death takes place more than a year and a day after the injury causing it. In computing the period the day on which the injury is inflicted is to be counted as the first day;

(b.) [It is said]<sup>5</sup> When the death is caused without any definite bodily injury to the person killed, but this does not

*Assizes, 1884*, was precisely similar. See, upon this subject, Wharton on Homicide, §§ 374-5. If the intention was to escape further ill usage by suicide, the case would be altered.

<sup>1</sup> *R. v. Fletcher*, 1 Russ. Cr. 703.

<sup>2</sup> *R. v. Swindall*, 2 C. & K. 230.

<sup>3</sup> *R. v. Haines*, 2 C. & K. 368.

<sup>4</sup> 1 East, P. C. 343, 4; 1 Russ. Cr. (5th ed.) 673, 4; Draft Code, s. 169.

<sup>5</sup> 1 Hale, 429. Lord Hale's reason is that "secret things belong to God; and hence it was that before 1 Ja. 1, c. 12, witchcraft or fascination was not felony, because it wanted a trial" (i.e. I suppose because of the difficulty of proof). I suspect that the fear of encouraging prosecutions for witchcraft was the real reason of this rule. Dr. Wharton rationalizes the rule thus: "Death from nervous causes does not involve penal consequences." This appears to me to substitute an arbitrary quasi scientific rule for a bad rule founded on ignorance now dispelled. Suppose a man were intentionally killed by being kept awake till the nervous irritation of sleeplessness killed him, might not this be murder? Suppose

extend to the case of a person whose death is caused not by any one bodily injury, but by repeated acts affecting the body, which collectively cause death, though no one of them by itself would have caused death;

(c.) [It seems] <sup>1</sup> When death is caused by false testimony given in a court of justice.

*Illustrations.*

(1.) <sup>2</sup> A by a long series of acts of ill-treatment, no one of which by itself would cause death, causes the death of B. A has killed B.

(2.) <sup>3</sup> A and B, in order to get a reward, offered for the conviction of highway robbers, conspire together to bring a false accusation of highway robbery against C, whereby C is convicted and executed. A and B do not kill C.

ARTICLE 222.

WHEN HOMICIDE IS UNLAWFUL.

<sup>4</sup> Homicide is unlawful,

(a.) When death is caused by an act done with the inten-

a man kills a sick person intentionally, by making a loud noise which wakes him when sleep gives him a chance of life; or suppose knowing that a man has aneurism of the heart, his heir rushes into his room, and roars in his ear, "Your wife is dead!" intending to kill and killing him, why are not these acts murder? They are no more "secret things belonging to God" than the operation of arsenic. As to the fear that by admitting that such acts are made, people might be rendered liable to prosecution for breaking the hearts of their fathers or wives by bad conduct, the answer is that such an event could never be proved. A long course of conduct, gradually "breaking a man's heart," could never be the "direct or immediate" cause of death. If it was, and it was intended to have that effect, why should it not be murder? In *R. v. Towers*, 12 C. C. C. 530, a man was convicted before Denman, J., of manslaughter, for frightening a child to death (see Wharton on Homicide, § 372, on this case).

Lord Hale doubts whether voluntarily and maliciously infecting a person of the plague, and so causing his death, would be murder (i. 432). It is hard to see why. He says that "infection is God's arrow." A different view was taken in the analogous case of *R. v. Greenwood*, 1 Russ. Cr. 100; 7 Cox, C. C. 404. As to the proviso, see Illustration (1).

<sup>1</sup> Illustration (1). Draft Code, s. 163.

<sup>2</sup> *R. v. Self*, 1 East, P. C. 226, 227, and 1 Russ. Cr. 677; *R. v. Squire*, 1 Russ. Cr. 678.

<sup>3</sup> *R. v. MacDaniel and Others*, 19 S. T. 746, and see particularly the note 810-14, and Foster, 131, 132.

<sup>4</sup> This Article sums up the result of the preceding chapters. See Note VII. Draft Code, s. 167.