CHAPTER XXIV.

[1] *MURDER—MANSLAUGHTER—ATTEMPTS TO COMMIT MURDER —CONCEALMENT OF BIRTH.*

ARTICLE 223.

MANSLAUGHTER AND MURDER DEFINED.

[2] MANSLAUGHTER is unlawful homicide without malice aforethought.

Murder is unlawful homicide with malice aforethought.

Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused, and [3] it may exist where that act is unpremeditated.

(*a.*) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not;

(*b.*) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(*c.*) An intent to commit any felony whatever;

[1] See 3 Hist. Cr. Law, ch. xxvi. pp. 1–107.

[2] For the authorities for this Article see Note VIII. Draft Code, s. 174–177.

[3] Coke's first case of implied malice is malice implied from the want of provocation. A man who wantonly or on a slight cause intentionally and violently kills another, shews by that act, not indeed the existence of hatred of long standing, but the existence of deadly hatred instantly conceived and executed, which is at least as bad if not worse. This in the strict sense of the words is malice aforethpught. As Hobbes well observes: "it is malice forethought, though not long forethought." (Dialogus of the Common Laws, "Works," vi. 85.) And it is not by law necessary that it should be long. If a slight provocation does not reduce murder to manslaughter, *à fortiori*, the total absence of all provocation, and the mere rapidity with which the execution of a cruel and wicked design follows on its conception cannot have that effect. For cases of slight provocation, see 1 Russ. Cr. 712, and cases there collected.

(*d.*) An intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed.

The expression "officer of justice" in this clause includes every person who has a legal right to do any of the acts mentioned, whether he is an officer or a private person.

Notice may be given, either by words, by the production of a warrant, or other legal authority by the known official character of the person killed, or by the circumstances of the case.

This Article is subject to the provisions contained in Articles 224–226, both inclusive, as to the effect of provocation.

Illustrations.

(1.)[1] A knowing that B is suffering from disease of the heart, and intending to kill B, gives B a slight push, and thereby kills B. A commits murder.

(2.)[1] A in the last illustration pushes B unlawfully, but without knowledge of his state of health or intention to kill him, or do him grievous bodily harm. A commits manslaughter. If A laid his hand gently on B to attract his attention, and by doing so startled and killed him, A's act would be no offence at all.

(3.)[2] A finding B asleep on straw, lights the straw, meaning to do B serious injury, but not to kill him. B is burnt to death. A commits murder.

(4.)[3] A waylays B, intending to beat, but not intending to kill him or do him grievous bodily harm. A beats B and does kill him. This is manslaughter at least, and may be murder if the beating were so violent as to be likely, according to common knowledge, to cause death.

(5.)[4] A strikes at B with a small stick, not intending either to kill

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[1] I know of no direct authority for these illustrations, but they follow directly from the principles stated in the note.

[2] *Errington's Case*, 2 Lewin, 217.

[3] Fost. 259.

[4] *Rowley's Case*, Fost. 294, remarking on earlier reporters; and see 1 Russ. Cr. 717, where some other cases are given.

or to do him grievous bodily harm. The blow kills B. A commits manslaughter.

(6.) [1] A, recently delivered of a child, lays it naked by the side of the road and wholly conceals its birth. It dies of cold. This is murder or manslaughter, according as A had or had not reasonable ground for believing that the child would be preserved.

(7.) [2] It is A's duty to put a stage at the mouth of the shaft of a colliery. He omits to do so. A truck falls down the shaft in consequence and kills B. If by omitting to erect the stage A intended that B's death should be caused, A is guilty of murder. If the omission was caused only by the culpable negligence of A, and without any intention to kill or injure B, or a reckless disregard to the chance of his being killed, A is guilty of manslaughter.

(8.) [3] A, for the purpose of rescuing a prisoner, explodes a barrel of gunpowder in a crowded street and kills a number of persons, intending to explode the barrel of powder in a crowded street. A commits murder, although he may have no intention at all about the people in the street, or may hope that they will escape injury.

(9.) [4] A shoots at a domestic fowl, intending to steal it, and accidentally kills B. A commits murder.

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[1] *R.* v. *Walters*, C. & M. 164, and 1 Russ. Cr. 675. This case appears to me to illustrate the true doctrine on the subject better than the old and often quoted case of the woman who left her child in a place where it was struck by a kite and killed. The point of that case I take to be that the striking by a kite was an occurrence sufficiently likely to impose upon the mother the duty of guarding against it. Kites having been almost exterminated in England their habits are forgotten. But to lay a child on the ground in Calcutta would be to expose it to almost certain and speedy death from kites and other birds of prey. I have myself been struck by a kite which had just struck at one of my children.

[2] *R.* v. *Hughes*, D. & B. 248.

[3] *R.* v. *Desmond, Barrett and Others.* In this case Lord Chief Justice Cockburn said, "If a man did an act, more especially if that were an illegal act, although its immediate purpose might not be to take life, yet if it were such that life was necessarily endangered by it—if a man did such an act, not with the purpose of taking life, but with the knowledge or belief that life was likely to be sacrificed by it," that was murder: *Times* Report, Apr. 28, 1868. It is singular that this case is noticed in Cox's Reports only for the sake of a point about evidence not the least worth reporting: see 11 Cox, C. C. 146. The case of *R.* v. *Allen and Others*, the Fenians executed after the Manchester Special Commission in 1867, is not, so far as I know, reported, except in 17 L. T. (N.S.) 223, which reprints the letters printed in Note IX.

[4] Post. 258–9, and see note. This dictum (which is supported by many other authorities) was followed by Lord Chief Justice Cockburn in *Barrett's Case.* He said, "If a person seeking to commit a felony should in the prosecution of that purpose cause, although it might be unintentionally, the death of another, that, by the law of England, was murder. There were persons who thought and maintained that where death thus occurred, not being the immediate purpose of the

(10.) [1] A, from wanton mischief, throws stones down a coal-pit and knocks away a scaffolding. The absence of the scaffolding causes an accident by which B is killed. A commits manslaughter.

(11.) [2] A, a thief, pursued by B, a policeman, who wishes to arrest A, trips up B, who is accidentally killed. A commits murder.

(12.) [3] A, having words with his wife, B, strikes her on the head with a pestle, and kills her. A commits murder, though the act was not premeditated.

(13.) [4] A, being called names by B, a woman, throws a broomstick at her, which happens to kill her. A commits manslaughter.

(14.) [5] A shoots at B, intending to kill him, and kills C. A commits murder.

ARTICLE 224.

EFFECT AND DEFINITION OF PROVOCATION.

[6] Homicide, which would otherwise be murder, is not murder, but manslaughter, if the act by which death is caused is done in the heat of passion, caused by provocation, as hereinafter defined, unless the provocation was sought or voluntarily provoked by the offender as an excuse for killing or doing bodily harm.

The following acts may, subject to the provisions contained in Article 225, amount to provocation:—

(*a.*) [7] An assault and battery of such a nature as to inflict actual bodily harm, or great insult, is a provocation to the person assaulted.

(*b.*) [8] If two persons quarrel and fight upon equal terms,

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person causing the death, it was a harsh law which made the act murder. But the Court and jury were sitting there to administer law, not to make or mould it, and the law was what he told them." *Times*, April 28, 1868.

[1] *R.* v. *Fenton*, 1 Lewin, 179; 1 Russ. Cr. 854.

[2] 1 Russ. Cr. 732–8 for a large collection of cases and authorities. See, too, 1 Hale, 456, 460; no distinction is taken in any of these cases as to the manner in which death is caused.

[3] 1 Russ. Cr. 712.

[4] Founded on 1 Hale, 455–6. The judges doubted whether the case was murder or manslaughter, and no judgment was delivered, but the prisoner was pardoned. This would no doubt be held to be manslaughter at the present day.

[5] Fost. 261; 1 Russ. Cr. 739.

[6] Draft Code, s. 176.

[7] 1 Russ. Cr. 713.

[8] *Lord Byron's Case*, 11 S. T. 1177; *R.* v. *Walters*, 11 S. T. 114; and 1 Russ. Cr. 727–32 and 790, where other cases are cited.

and upon the spot, whether with deadly weapons or otherwise, each gives provocation to the other, whichever is right in the quarrel, and whichever strikes the first blow.

(*c*) [1] An unlawful imprisonment is a provocation to the person imprisoned, but not to the bystanders, though an unlawful imprisonment may amount to such a breach of the peace as to entitle a bystander to prevent it by the use of force sufficient for that purpose. An arrest by officers of justice, whose character as such is known, but who are acting under a warrant so irregular as to make the arrest illegal, is provocation to the person illegally arrested, but not to bystanders.

(*d*.) [2] The sight of the act of adultery committed with his wife is provocation to the husband of the adulteress on the part both of the adulterer and of the adulteress.

(*e*.) [3] The sight of the act of sodomy committed upon a man's son is provocation to the father on the part of the person committing the offence.

(*f*.) [4] Neither words, nor gestures, nor injuries to property, nor breaches of contract, amount to provocation within this Article, except [perhaps] words expressing an intention to inflict actual bodily injury, accompanied by some act which shews that such injury is intended; [5] but words used at the time of an assault—slight in itself—may be taken into account in estimating the degree of provocation given by a blow.

(*g*.) [6] The employment of lawful force against the person of another is not a provocation to the person against whom it is employed.

[1] For the first part of the clause see *Buckner's Case*, 1 Russ. Cr. 785; *R.* v. *Withers*, Ibid. For the latter part compare *Huggett's Case*, *Sir H. Ferrer's Case*, *Tooley's Case*, and *Adey's Case*, with Foster's remarks on *Tooley's Case*; 1 Russ. Cr. 753–7. See also 1 Hawk. P. C. 489; *R.* v. *Osmer*, 5 Ea. 308. Also Illustration (5), and Note IX.

[2] Cases cited, 1 Russ. Cr. 786. I am not aware that it has ever been decided that adultery by the husband is provocation to the wife.

[3] *R.* v. *Fisher*, 8 C. & P. 182.

[4] 1 East, P. C. 232; 1 Russ. Cr. 711, 784.

[5] 1 Russ. Cr. 711, note v.; *Lord Morley's Case*, 1 Hale, P. C. 455; *R.* v. *Shorwood*, 1 C. & K. 536, and see *R.* v. *W. Smith*, 4 F. & F. 1066.

[6] Illustration (12).

Illustrations.

(1.) [1] A, a woman, gives B, a soldier, a slap in the face. A has not given B provocation within this Article.

(2.) [2] A, a woman, strikes B, a soldier, with a heavy clog violently in the face and wounds him. A has given B provocation within this Article.

(3.) [3] A pulls B by the nose. A has given B provocation within the meaning of this Article.

(4.) [4] A attempts to arrest B on an irregular warrant and in an irregular way. B shoots A dead. This is manslaughter by reason of the provocation given by B to A.

(5.) [5] A arrests B under an irregular warrant and conveys him to gaol. C, D, and others attempt to rescue B. A resists, and one of the party shoots A dead. This is murder in C, D and all their party.

(6.) [6] A and B, armed with swords, quarrel, draw their swords, and fight. Each gives the other provocation.

(7.) [7] A and B quarrel, and agree together to fight, and do fight, a duel next day. Neither gives the other such provocation as would reduce the offence to manslaughter if either is killed.

(8.) [8] A and B quarrel, and upon the spot agree to fight with their fists. A, from the beginning of the fight, uses a knife and kills B. A has not received such provocation from B as reduces his offence to manslaughter.

(9.) [9] A and B quarrel and agree to fight with their fists. In the course of the fight A snatches up a knife, which happens to be near, and which he has not previously provided, and kills B. A has received such provocation from B as reduces his offence to manslaughter.

(10.) [10] A, at a tavern, throws a bottle at B's head and draws his sword. B throws a bottle at A's head. A kills B. A has not received such provocation from B as reduces his offence to manslaughter.

(11.) [11] A and B quarrel and fight in a public-house. A leaves the public-house, says he will kill B, conceals a sword under his coat, returns to the public-house, tempts B to strike him with a stick, saying "Stand

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[1] *Stedman's Case*, Fost. 292.

[2] Ibid.

[3] 1 East, P. C. 233.

[4] *R.* v. *Stevenson*, 19 St. Tr. 846. This case must be understood to be subject to the provisions of the next Article.

[5] This is the case of the Fenians executed at Manchester in 1867, for shooting Brett, a police constable in charge of a police van containing a Fenian prisoner. See Note IX.

[6] *R.* v. *Walters*, 12 St. Tr. 113; and see *R.* v. *Lord Byron*, 11 St. Tr. 177.

[7] *R.* v. *Cuddey*, 1 C. & K. 210; *R.* v. *Barronet*, and *R.* v. *Barthelemy*, Dears. 51 and 63, are recent cases of duelling.

[8] *R.* v. *Anderson*, 1 Russ. Cr. 731.

[9] Ibid.

[10] *R.* v. *Mawgridge*, Kel. 128–9; Foster, 295–6.

[11] *Mason's Case*, Foster, 132.

off, or I'll stab you," and without giving B time to retreat, does stab him mortally. A does not receive from B such provocation as reduces his offence to manslaughter.

(12.) [1] A attacks B in such a manner as to endanger B's life. B drives off and pursues A. A in self-defence kills B. This is murder in A.

ARTICLE 225.

WHEN PROVOCATION DOES NOT EXTENUATE HOMICIDE.

[2] Provocation does not extenuate the guilt of homicide unless the person provoked is at the time when he does the act deprived of the power of self-control by the provocation which he has received, and in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to shew the state of his mind.

Illustrations.

(1.) [3] A and B violently quarrel, and throw bottles at each other at a tavern, A throwing the first bottle. The company interfering, they remain quiet for an hour, B wishing to be reconciled. A refuses, and says he will have B's blood. When B and the rest of the company leave, A called B back in terms of insult, and fights with him with swords; B is killed. A commits murder, though the fight is on equal terms.

(2.) [4] B strikes A with his fist. A, being the stronger man of the two, throws B down on the ground, and beats out his brains with a poker. A commits murder.

(3.) [5] A and B quarrel and fight. B, getting the best of the fight, leaves A. A throws a coal-pick at B and injures him, and then wounds him with a knife. B leaves the house, saying to A, "You have killed me." A says to a third person, "I will have my revenge." B returns to the house soon afterwards and A stabs him again and kills him. A has committed murder.

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[1] Bacon's Maxims, 37, 38. I suppose B is trying to arrest A.

[2] See the cases quoted in the Illustrations, and *R.* v. *Lynch*, 5 C. & P. 324. Draft Code, s. 176.

[3] *R.* v. *Oneby*, 2 Str. 766; 1 Russ. Cr. 730–1.

[4] Per Parke, B. in *R.* v. *Thomas*, 7 C. & P. 817.

[5] *R.* v. *Kirkham*, 8 C. & P. 115.

(4.) [1] A is turned out of a house and kicked by B. A runs to his own house, between 200 and 300 yards off, returns with a knife, and meeting B, stabs him after walking quietly with him some yards. A then runs back and puts his knife in its usual place. The deliberation shewn in fetching and replacing the knife are facts to be considered by the jury in deciding whether or not A committed the offence whilst deprived of self-control by passion.

(5.) [2] Police-officers in charge of a police-van have in custody D, a person charged with felony under 11 Vict. c. 12. A, B, and C, and others assault the van in concert, rescue the prisoner, and shoot one of the policemen dead with a pistol. The warrant under which D was in custody was informal, but not to the knowledge of A, B, and C. A, B, and C, and the others are guilty of murder, and it would have made no difference if they had known of the irregularity of the warrant.

ARTICLE 226.

PROVOCATION TO THIRD PERSON.

[3] Provocation to a person by an actual assault or by a mutual combat, or by a false imprisonment, is in some cases provocation to those who are with that person at the time, and to his friends who, in the case of a mutual combat, take part in the fight for his defence. But it is uncertain how far this principle extends.

ARTICLE 227.

SUICIDE—ABETTING SUICIDE.

[4] A person who kills himself in a manner which in the case of another person would amount to murder is guilty of murder,

[1] *R.* v. *Hayward*, 6 C. & P. 157.

[2] This is the case of *R.* v. *Allen and Others*, the Fenians, who murdered Brett, the policeman. See Note IX.

[3] 1 Russ. Cr. (5th ed.), 704–5. The passage referred to is taken from Hawkins. See *Cary's Case* (p. 705), which is this: "A and B were fighting in a field in a quarrel. C, A's kinsman, casually riding by and seeing them in fight and his kinsman one of them, rode in, drew his sword, thrust B through and killed him, Coke, C.J., and the rest of the Court agreed that this is clearly but manslaughter in him (i.e. C) and murder in the other, for the one may have malice and the other not." I should have said C's offence was infinitely worse than A's, and I do not think this case would be followed in the present day.

[4] 1 Hale, P. C. 411–419. See *R.* v. *Fretwell*, L. & C. 161; *R.* v. *Russell*, 1 Mood. 356. Draft Code, s. 183.

and every person who aids and abets any person in so killing himself is an accessory before the fact, or a principal in the second degree in such murder.

ARTICLE 228.

MANSLAUGHTER ON ONESELF.

[1] A person cannot commit manslaughter on himself.

ARTICLE 229.

ACCESSORIES BEFORE THE FACT IN MANSLAUGHTER.

It seems that there may be accessories before the fact in manslaughter if the act or omission by which death is caused is not such an act or omission as, but for provocation received by the offender, would have been murder.

Illustration.

[2] A advises B to give C a strong dose of medicine to make him feel sick and uncomfortable. B does so and C dies. B is guilty of manslaughter, and A is accessory before the fact to manslaughter.

ARTICLE 230.

PRESUMPTION THAT KILLING IS MURDER.

[3] Every person who kills another is presumed to have wilfully murdered him unless the circumstances are such as to raise a contrary presumption.

The burden of proving circumstances of excuse, justifica-

[1] *Per* Pollock, C.B., and Williams, J., in *R.* v. *Burgess*, L. & C. 258, referring to Jervis on Coroners, App. p. 322, note 4.

[2] *Per* Bramwell, B., in *R.* v. *Gaylor*, D. & B. 291. The text is stated doubtfully because the question has never been positively decided: Coke (3rd Inst. 55), Hale (2 P. C. 437) and East (1 P. C. 218) say that there can be no accessories before the fact in manslaughter; but the doctrine on the subject is very differently understood in these days. See *R.* v. *Taylor*, L. R. 2 C. C. R. 148. That unlawful killing with a deliberate intent to do slight bodily harm, which happens to cause death, is manslaughter, is a comparatively modern doctrine. By Coke's definition it would be murder. Whatever it is called there may obviously be an accessory before the fact to such an act.

[3] 1 Russ. Cr. 668; *R.* v. *Greenacre*, 8 C. & P. 35.

tion, or extenuation is upon the person who is shewn to have killed another.

ARTICLE 231.

PUNISHMENT OF MURDER.

[1] Every one who commits murder is guilty of felony, and must on conviction thereof be sentenced to death, [2] and the judgment must direct that his body shall be buried within the precincts of the prison in which he shall have been last confined after conviction.

[3] ARTICLE 232.

PUNISHMENT OF MANSLAUGHTER.

[4] Every one who commits manslaughter is guilty of felony and liable to a maximum punishment of penal servitude for life, or to a fine.

ARTICLE 233.

[5] ATTEMPTS TO COMMIT MURDER.

[6] Every one is guilty of felony, and is liable upon conviction thereof to penal servitude for life as a maximum punishment, who does any of the following things with intent to commit murder; that is to say—

(*a.*) [7] administers any poison or other destructive thing to any person, or causes any such poisonous thing to be so adminstered or taken, or attempts to administer it, or attempts to cause it to be so administered or taken;

[1] 24 & 25 Vict. c. 100, s. 3. Draft Code, s. 178.

[2] Ibid. Probably the latter part of the section would be held if the case arose to be merely directory, so that its omission would not render the sentence void. See *R.* v. *Wyatt*, R. & R. 230, decided on an analogous provision in 25 Geo. 2, c. 37, ss. 4, 7. The execution must in this case be private. See 31 Vict. c. 24.

[3] 3 Hist. Cr. Law, 78–9. Draft Code, s. 182.

[4] 24 & 25 Vict. c. 100, s. 5.

[5] For the history of the provisions see 3 Hist. Cr. Law, ch. xxvii. p. 108–120. Draft Code, s. 179.

[6] 24 & 25 Vict. c. 100, ss. 11–15.

[7] Ibid. ss. 11 & 14, S.

(*b.*) [1] by any means whatever wounds or causes any grievous bodily harm to any person;

(*c.*) [2] shoots at any person, or, by drawing a trigger or in any other manner, attempts to discharge at any person [3] any kind of loaded arms;

(*d.*) [4] attempts to drown, suffocate, or strangle any person;

(*e.*) [5] destroys or damages any building by the explosion of gunpowder or other explosive substance;

(*f.*) [6] sets fire to any ship or vessel or any part thereof, or any part of the tackle, apparel, or furniture thereof, or to any goods or chattles being therein;

(*g.*) [7] casts away or destroys any vessel;

(*h.*) [8] or who attempts to commit murder by any means other than those specified in clauses (*a.*)–(*g.*), both inclusive;

(*i.*) [9] or who is accessory after the fact to any murder.

[1] 24 & 25 Vict. c. 100, s. 11, S. In *R.* v. *Gray*, D. & B. 303, it was held that to cause congestion of the lungs by exposing a child in a field was not causing "a bodily injury dangerous to life" within 7 Will. 4 & 1 Vict. c. 15, s. 2, but such a case would now fall under clause (*b.*), s. 15. See remark of Cockburn, C.J., p. 306.

[2] Ibid. s. 14, S. The words "any other manner" mean any other manner like drawing a trigger, e.g. applying a lighted match to a matchlock, or striking a percussion cap with a hammer, see *R.* v. *St. George*, 9 C. & P. 483, and *R.* v. *Lewis*, 9 C. & P. 523. These cases have been doubted by the Court for Crown Cases Reserved. See *R.* v. *Brown*, L. R. 10 Q. B. D. 381. In this case a man was tried for attempting to commit murder by drawing a pistol from his pocket for the purpose of committing murder with it, but his hand was seized. I held this to be an attempt to commit murder by means other than those specified in clauses (*a.*)–(*g.*); but, on the authority of *R.* v. *St. George*, that it did not constitute an offence under clause (*h.*), the Court held that clause (*h.*), s. 15, applied only to cases other than those specified in clauses (*a.*)–(*g.*), s. 14, but *ejusdem generis* as for instance trying to push a man off a cliff or under a railway train; but that it did not apply to extend s. 14. I agreed in this view. The Court thought that *R.* v. *St. George* ought to be reconsidered, and inclined to the view that if I had held otherwise in *R.* v. *Brown* my ruling would have been upheld.

[3] "Loaded arms" means arms loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, although the attempt to discharge the same may fail from want of proper priming or any other cause, s. 19.

[4] 24 & 25 Vict. c. 100, s. 14, S.

[5] Ibid. s. 12, S.; *R.* v. *St. George*, 9 C. & P. 483; 1 Russ. Cr. 982.

[6] Ibid. s. 13, S.

[7] Ibid.

[8] Ibid. s. 15, S. This does not apply to attempts to commit suicide; *R.* v. *Burgess*, L. & C. 258.

[9] Ibid. s. 67.

ARTICLE 234.

THREATS AND CONSPIRACIES TO MURDER.

Every one is liable to a maximum punishment of ten years penal servitude who commits either of the following offences, the first of which is a felony and the others misdemeanors; that is to say—

(*a.*) [1] whoever maliciously sends, delivers, or utters or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person;

(*b.*) [2] all persons who conspire, confederate, and agree to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not;

(*c.*) [3] every one who solicits, encourages, persuades, endeavours to persuade, or proposes to any person to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not.

[[4] And whether the solicitation, encouragement, persuasion, or endeavour to persuade, is addressed to any specific person or not, or relates to the murder of any specific person or not.]

ARTICLE 235.

[5] CONCEALING THE BIRTH OF CHILDREN.

[6] Every person is guilty of a misdemeanor, and is liable upon conviction thereof to two years imprisonment and hard labour as a maximum punishment, who, if any woman is delivered of a child, endeavours to conceal the birth thereof by any secret dispositions of the dead body of the said child, whether such child died before, at, or after its birth.

[1] 24 & 25 Vict. c. 100, s. 16, S. W.

[2] Ibid. s. 4.

[3] Ibid. s. 4.

[4] The words in brackets are intended to give the effect of *R.* v. *Most*, L. R. 7 Q. B. D. 244.

[5] 3 Hist. Cr. Law, 118. Cf. Draft Code, ss. 185–7.

[6] 24 & 25 Vict. c. 100, s. 60 (verbally altered).

[1] The expression "delivered of a child" does not include delivery of a fœtus which has not reached the period at which it might have been born alive.

[2] The words "secret disposition of the body" include cases in which the body is placed in a situation where it is not likely to be found except by accident, or upon search, although the body is in no way concealed from any one who happens to go to that place.

[1] *R.* v. *Berriman*, 6 Cox, C. C. 388.

[2] *R.* v. *Brown*, L. R. 1 C. C. R. 244. The Act seems to be defective in punishing only the secret disposition of the body, and not the disposing of the body in such a way as to conceal the fact that it was born of its mother. If a woman were to leave a child's body by night in the middle of a street, or to drop it by day in a crowd of people, there would be an effectual concealment of the birth, but would there be a "secret disposition" of the body? Under the old Act, 9 Geo. 4, c. 31, s. 14, it was held that a temporary concealment of the body with intent to remove it afterwards to some other place was within the words "secret burying or otherwise disposing": *R.* v. *Perry*, Dear. 471. This would seem to be so *à fortiori* under the present law.

CHAPTER XXV.

[1] THE MALICIOUS INFLICTION OF BODILY INJURIES AMOUNTING TO FELONY.

ARTICLE 236.

WOUNDINGS AND ACTS ENDANGERING LIFE PUNISHABLE WITH PENAL SERVITUDE FOR LIFE.

EVERY one is guilty of felony, and liable to penal servitude for life as a maximum punishment, who does any of the following things unlawfully and maliciously; that is to say—

(*a.*) [2] who, with intent to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or to resist or prevent the lawful apprehension or detainer of any person,

by any means whatsoever [3] wounds or causes any grievous bodily harm to any person, or shoots at any person, [4] or by drawing a trigger, or in any other manner attempts to discharge at any person any kind of [5] loaded arms; or

(*b.*) [6] shoots at any vessel or boat belonging to Her Majesty's navy, or in the service of the revenue, within one hundred leagues of any part of the coast of the United Kingdom, or

(*c.*) [6] maliciously shoots at, maims, or wounds any officer of the army, navy, or marines, being duly employed in the prevention of smuggling, and on full pay, or any officer of customs or excise, or any person acting in his aid or assist-

[1] 3 Hist. Cr. Law, ch. xxvii. pp. 108–120. Draft Code, Part xviii. ss. 188–202.

[2] 24 & 25 Vict. c. 100, s. 18, S.

[3] To wound means to divide the surface of the body whether it be an internal or external surface, *e.g.* the inside of the mouth. *R.* v. *Leonard Smith*, 8 C. & P. 173, and see other cases in 1 Russ. Cr. 921.

[4] But not by attempting to draw a trigger: *R.* v. *St. George*, 9 C. & P. 483. See however *R.* v. *Brown*, L. R. 10 Q. B. D. 381.

[5] See p. 168, note 3, for definition of loaded arms.

[6] 39 & 40 Vict. c. 36, s. 193. The word "unlawfully" is not in this section.

ance, or duly employed for the prevention of smuggling, in the execution of his office or duty; or

(*d.*) [1] who, with intent to enable himself or any other person to commit, or with intent to assist any other person in committing, any indictable offence,

[2] attempts by any means whatsoever to choke, suffocate, or strangle any other person, or attempts by any means calculated to choke, suffocate, or strangle, to render any other person insensible, unconscious, or incapable of resistance;

[3] or [4] administers to any person any chloroform, laudanum, or other stupefying or overpowering [5] matter, [4] or attempts to do so;

(*e.*) [6] or who burns, maims, disfigures, disables, or does any grievous bodily harm to any person by the explosion of gunpowder or other explosive substance;

(*f.*) [7] or who, with intent to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, causes any gunpowder or other explosive substance to explode, or

sends or delivers, or causes to be taken or received by any person, any explosive substance or other dangerous or noxious thing, or puts or lays at any place or casts or throws at or upon or otherwise applies to any person any corrosive fluid or destructive or explosive substance;

(*g.*) [8] or who, with intent to endanger the safety of any person travelling, or being upon any railway,

puts or throws [9] anything upon or across any railway, or

[1] 24 & 25 Vict. c. 100, ss. 21 & 22.

[2] Ibid. s. 21. An offender against this section is liable, if a male of whatever age, to be thrice privately whipped in addition to the other punishments specified above: 26 & 27 Vict. c. 44, s. 1, and see Article 12 (*d.*), as to the manner of inflicting the punishment.

[3] Ibid. s. 22. The word "maliciously" does not apply to this section.

[4] "Applies or administers to, or causes to be taken by, or attempts to apply or administer to or attempts to cause to be administered to or taken by."

[5] "Drug, matter, or thing."

[6] 24 & 25 Vict. c. 100, s. 28, S. W.

[7] Ibid. s. 29, S. W.

[8] Ibid. s. 32, W.

[9] "Any wood, stone, or other matter or thing."

takes up, removes, or displaces any rail, sleeper, or other matter or thing belonging to any railway, or

turns, moves, or diverts any points or other machinery belonging to any railway, or

makes or shows, hides or removes, any signal or light upon or near any railway, or does or causes to be done any other matter or thing;

(*h.*) [1] or who [2] throws [3] anything at any [4] carriage used upon any railway with intent to injure or endanger the safety of any person therein or thereon, or in or upon any other [4] carriage forming part of the same train;

(*i.*) [5] or who prevents or impedes any person being on board of or having quitted any ship or vessel in distress, wrecked, stranded, or cast on shore, in his endeavour to save his life, or prevents and impedes any person in his endeavour to save the life of any person so situated;

(*j.*) [6] or who, being a woman with child, unlawfully administers to herself any poison or other noxious thing or unlawfully uses any instrument or other means whatsoever with intent to procure her own miscarriage;

(*k.*) [7] or who, with intent to procure the miscarriage of any woman whether she be or be not with child, unlawfully administers to or causes to be taken by her any poison or other [8] noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent.

[1] 24 & 25 Vict. c. 100, s. 33.

[2] Throws, or causes to fall, or strike at, against, into, or upon.

[3] Any wood, stone, or other matter or thing.

[4] Engine, tender, carriage, or truck.

[5] 24 & 25 Vict. c. 100, s. 17, S.

[6] Ibid. s. 58, S. A person who gives another a drug to be taken in the absence of the giver "causes it to be taken," and, it would seem, "administers" it, though absent when it is taken: *R.* v. *Wilson*, D. & B. 127, and cases referred to in the argument; also *R.* v. *Farrow*, D. & B. 164.

[7] Ibid. s. 58, S.

[8] A thing not otherwise noxious may be noxious if administered in excess, but some things are so commonly noxious (arsenic, *e.g.*) that perhaps the administration even of a quantity too small to do harm might be held to constitute the offence punished by this section if there were an intent to procure miscarriage. See *R.* v. *Crump*, L. R. 5 Q. B. D. 307; also *R.* v. *Isaacs*, L. & C. 220, and *R.* v. *Hennah*, 13 Cox, C. C. 347.

ARTICLE 237.

BLOWING UP BUILDINGS AND SHIPS WITH INTENT TO INJURE—FOURTEEN YEARS PENAL SERVITUDE.

[1] Every one is guilty of felony, and is liable on conviction to a maximum punishment of fourteen years penal servitude, who, with intent to do any bodily injury to any person, unlawfully and maliciously places or throws any gunpowder or other explosive substance in, into, upon, against, or near any building, ship or vessel, whether or not any explosion takes place, and whether or not any bodily injury is effected.

ARTICLE 238.

ADMINISTERING POISON SO AS TO ENDANGER LIFE OR CAUSE HARM—TEN YEARS PENAL SERVITUDE.

[2] Every one is guilty of felony, and is liable upon conviction to a maximum punishment of ten years penal servitude, who unlawfully and maliciously administers to, or causes to be administered to, or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm.

[1] 24 & 25 Vict. c. 100, s. 30, S. W.
[2] Ibid. s. 23.

CHAPTER XXVI.

[1] *THE INFLICTION OF BODILY INJURIES NOT AMOUNTING TO FELONY.*

ARTICLE 239.

MALICIOUS WOUNDING AND SIMILAR ACTS PUNISHABLE WITH FIVE YEARS PENAL SERVITUDE.

EVERY one commits a misdemeanor and is liable to a maximum punishment of five years penal servitude, who

(*a.*) [2] unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person either with or without any weapon or instrument;

(*b.*) [3] or who unlawfully and maliciously administers, or causes to be administered to or taken by any other person, any poison or other destructive or noxious thing with intent to injure, aggrieve, or annoy such person;

(*c.*) [4] or who unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child ([5] even if the intention so to use the same exists only in his own mind, and is not entertained by the woman whose miscarriage he intends to procure).

(*d.*) [6] or who, being legally liable either as a master or a mistress, to provide for any apprentice or servant necessary

[1] Draft Code, Part XVIII. ss. 188–202.

[2] 24 & 25 Vict. c. 100, s. 20. "Maliciously" in this section covers all cases in which a person wilfully and without lawful excuse does that which he knows to be likely to injure another: *R.* v. *Martin*, L. R. 8 Q. B. D. 54. It applies to cases in which a man strikes at one person maliciously and wounds another accidentally: *R.* v. *Latimer*, L. R. 17 Q. B. D. 359; *R.* v. *Hunt*, 1 Moo. C. C. 93.

[3] Ibid. s. 24. An intent to excite sexual passion is within this provision: *R.* v. *Wilkins*, L. & C. 80.

[4] Ibid. s. 59. To supply a thing which is not noxious with the intent mentioned is not within the section: *R.* v. *Isaac*, L. & C. 220.

[5] *R.* v. *Hillman*, L. & C. 343.

[6] 24 & 25 Vict. c. 100, s. 26.

food, clothing, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, or unlawfully and maliciously does, or causes to be done, any bodily harm to such apprentice or servant, so that the life of such apprentice or servant is endangered, or that his health has been or is likely to be permanently injured;

(*e.*) [1] or who [2] sets any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith.

Every person is deemed to have set any of the above-mentioned engines who, when it has been set by any other person in any place then in or afterwards coming into the possession or occupation of the person first mentioned, permits it to continue so set with the intent aforesaid.

Provided that this clause does not extend to any gin or trap usually set with the intent of destroying vermin, or to any spring-gun, man-trap, or engine, set from sunset or sunrise in a dwelling-house for the protection thereof.

Article 240.

NEGLIGENT ACTS PUNISHABLE WITH TWO YEARS IMPRISONMENT.

Every one is guilty of a misdemeanor and liable to two years imprisonment with hard labour as a maximum punishment,

(*a.*) [3] who by any unlawful act, wilful omission, or neglect, endangers, or causes to be endangered, the safety of any person conveyed or being in or upon a railway, or aids or assists therein,

(*b.*) [4] or who, having the charge of any carriage or vehicle, by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person whatever.

[1] 24 & 25 Vict. c. 100, s. 31.
[2] "Sets or places or causes to be set or placed."
[3] 24 & 25 Vict. c. 100, s. 34.
[4] Ibid. s. 35.

CHAPTER XXVII.

[1] *ASSAULTS, AGGRAVATED AND COMMON, PUNISHABLE ON INDICTMENT.*

ARTICLE 241.

ASSAULT AND BATTERY AND ASSAULT DEFINED.

AN assault is

(*a.*) [2] an attempt unlawfully to apply any the least actual [3] force to the person of another directly or indirectly,

(*b.*) the act of using a gesture towards another giving him reasonable grounds to believe that the person using that gesture meant to apply such actual force to his person as aforesaid,

(*c.*) the act of depriving another of his liberty,

in either case without the consent of the person assaulted, or with such consent if it is obtained by fraud.

[4] It is no defence to a charge or an indictment for an indecent assault on a young person under the age of thirteen to prove that he or she consented to the act of indecency.

A battery is an assault whereby any the least actual force is actually applied to the person of another, or to the dress worn by him, directly or indirectly.

Provided that such acts as are reasonably necessary for the common intercourse of life, are not assaults or batteries

[1] Draft Code, Part xix. ss. 203–6.

[2] See Article 42 for a definition of an attempt.

[3] 1 Russ. Cr. (5th ed.) 956; 1 Hawk. P. C. 100. A most elaborate definition of "force" is given in the Indian Penal Code, s. 350, as the foundation for a definition of assault, s. 351. The definition is almost more mathematical than legal. It begins thus: "A person is said to use force to another if he causes motion, change of motion, or cessation of motion to that other," &c., &c. It is impossible not to ask why, if force is to be defined, motion should be left undefined. It is, I think, hardly too great a demand on the candour of a reader to suppose that he will see that a man who withdraws a chair on which a person is about to sit down, causing him thereby to fall to the ground; or who whips a horse on which he is sitting, and so makes him run away with his rider; or who breaks a hole in ice in front of a skater, and so causes him to fall into the water—"applies" actual force to his person indirectly."

[4] 44 & 45 Vict. c. 45, s. 2.

if they are done for the purpose of such intercourse only and with no greater force than the occasion requires.

No mere words can in any case amount to an assault.

Illustrations.

The following are cases of assault and battery :—

(1.) [1] A cut B's dress whilst B is wearing it, but without touching or intending to touch any part of B's person.

(2.) [2] A sets a dog at B, which bites B.

(3.) [3] A man professing to act as a medical adviser fraudulently induces a girl to allow him to undress her, by falsely alleging that it is necessary for medical reasons to do so.

(4.) [4] A touches B, a boy of eight, in a grossly indecent manner, B acquiescing in ignorance of the nature of the act.

(5.) [5] A induces B to permit him to have connection with her, by pretending to be her husband.

The following are cases of assault without battery :—

(6.) [6] A strikes at B with a stick without hitting him.

(7.) [7] A aims a pistol at B which A knows is not loaded, but which B believes to be loaded.

In the following cases no assault or battery is committed :—

(8.) A lays his hand on B, to attract his attention.

(9.) A, falling down, catches hold of B to save himself.

(10.) A crowd of people, going into a theatre, push and are pushed against each other.

ARTICLE 242.

PUNISHMENT OF ASSAULTS WITH INTENT TO COMMIT SODOMY.

[8] Every one is guilty of a misdemeanor and is liable, upon

[1] *R.* v. *Day*, 1 Cox, C. C. 207.

[2] 1 Russ. Cr. 958, gives several cases of this sort.

[3] *R.* v. *Rosinski*, 1 Russ. Cr. 959 ; and see *R.* v. *Case*, 1 Den. 580.

[4] *R.* v. *Lock*, L. R. 2 C. C. R. 10, and see *R.* v. *Barnett*, L. R. 2 C. C. R. 81.

[5] *R.* v. *Williams*, 8 C. & P. 286. The prisoner was sentenced to three years imprisonment with hard labour, no doubt on the ground that the assault was indecent. The maximum punishment would now be two years hard labour. See Article 245 (*d*).

[6] 1 Hawk. P. C. 110.

[7] *R.* v. *George*, 9 C. & P. 483.

[8] 24 & 25 Vict. c. 100, s. 62. The last words of this enactment would cover the case of an indecent assault by a woman on a man ; but this can hardly have been intended. Consent is no defence when the boy is under thirteen. See 44 & 45 Vict. c. 45, referred to in Art. 241.

conviction thereof, to ten years penal servitude as a maximum punishment, who is guilty of any assault with intent to commit sodomy or of any indecent assault upon any male person.

ARTICLE 243.

ASSAULTS ON PERSONS PROTECTING WRECK.

[1] Every one is guilty of a misdemeanor and is liable, upon conviction thereof, to a maximum punishment of seven years penal servitude, who assaults and strikes or wounds any magistrate, officer, or other person lawfully authorized, in or on account of the execution of his duty in or concerning the preservation of any vessel in distress, or of any vessel or goods or effects wrecked, stranded, or cast on shore, or lying under water.

ARTICLE 244.

ASSAULTS CAUSING ACTUAL BODILY HARM.

[2] Every one commits a misdemeanor and is liable, upon conviction thereof, to a maximum punishment of five years penal servitude, who commits an assault occasioning actual bodily harm.

ARTICLE 245.

ASSAULTS PUNISHABLE WITH TWO YEARS IMPRISONMENT.

Every person commits a misdemeanor and is liable, upon conviction, to a maximum punishment of two years imprisonment and hard labour,

(*a.*) [3] who assaults any person with intent to commit a felony or to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence;

(*b.*) [3] or who assaults, resists, or wilfully obstructs any peace

[1] 24 & 25 Vict. c. 100, s. 37.
[2] Ibid. s. 47.
[3] Ibid. s. 38; s. 41 was repealed by 34 & 35 Vict. c. 32.

officer in the due execution of his duty, or any person acting in aid of such officer;

(*c.*) [1] or who indecently assaults any female, or attempts to have carnal knowledge of any girl under twelve years of age;

(*d.*) [2] or who by threats or force obstructs, or prevents, or endeavours to obstruct or prevent any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place;

(*e.*) [3] or who strikes or offers any violence, or arrests upon or under the pretence of executing any civil process any clergyman or other minister engaged in or to the knowledge of the offender about to engage in any of the rites or duties mentioned in the last clause, or to the knowledge of the offender going to perform the same, or returning from the performance thereof.

ARTICLE 246.

PUNISHMENT OF COMMON ASSAULT ON INDICTMENT.

[4] Every person who commits a common assault is guilty of a misdemeanor and is liable, on conviction thereof, to a maximum punishment of one year's imprisonment and hard labour.

The punishment specified in this chapter can be inflicted only in cases in which the offender is convicted on an indictment or information.

ARTICLE 247.

ASSAULTS ON OFFICERS PREVENTING SMUGGLING.

[5] Every person is guilty of a misdemeanor and is liable to

[1] 24 & 25 Vict. c. 100, s. 52. In cases of indecent assault consent is no defence if the girl is under thirteen, 48 & 44 Vict. c. 45. See Art. 241.

[2] 24 & 25 Vict. c. 100, s. 36.

[3] Ibid.

[4] Ibid. s. 47.

[5] 39 & 40 Vict. c. 36, s. 187. This offence appears to be punishable only on indictment or information. See s. 255.

a fine of one hundred pounds who assaults, resists, or obstructs any officer of the army, navy, marines, coastguard, customs, or other person duly employed for the prevention of smuggling, in the execution of his duty, or in the seizing of any goods liable to forfeiture under the Customs Acts, or aids, abets, or assists therein.

CHAPTER XXVIII.

PUNISHMENT OF ASSAULTS ON SUMMARY CONVICTION.

ARTICLE 248.

ASSAULTS PUNISHABLE ON SUMMARY CONVICTION.

EVERY person who commits an assault may, subject to the provisions in this chapter contained, be punished in respect thereof upon summary conviction before two justices of the peace.

ARTICLE 249.

ASSAULTS WHICH OUGHT NOT TO BE PUNISHED ON SUMMARY CONVICTION.

[1]In case the justices find the assault or battery complained of to have been accompanied by any attempt to commit felony, or are of opinion that the case is from any other circumstance a fit subject for a prosecution by indictment, they must abstain from any adjudication thereupon and deal with the case in all respects in the same manner as if they had no authority finally to hear and determine the same.

Justices have no power under the provisions of this chapter to hear and determine any case of assault or battery in which any question arises as to the title to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any Court of justice.

ARTICLE 250.

AGGRAVATED ASSAULTS.

[2]If the assault or battery is, in the opinion of the justices,

[1] 24 & 25 Vict. c. 100, s. 46.
[2] Ibid. s. 43.

of an aggravated nature, and if the person assaulted is a female, or a male whose age does not in the opinion of the justices exceed fourteen years,[1] or if the person assaulted is a constable in the execution of his duty,[2] or if the offender resists or wilfully obstructs any constable or peace officer in the execution of his duty, the offender may be fined any sum not exceeding £20, [3] together with costs, and in default of payment may be imprisoned with or without hard labour for a maximum period of six months, unless such fine is sooner paid; or he may be imprisoned without the option of a fine, and [3] he may in any case be bound to keep the peace and be of good behaviour for six months from the expiration of his sentence if the justices think fit.

In the case of an assault on a constable in the execution of his duty the offender may, if he has been convicted of a similar assault within two years, be imprisoned with or without hard labour for a maximum term of nine months.

[4] If any person assaults or resists a borough constable [appointed under the Municipal Corporation Act, 1881] in the execution of his duty, or aids or incites any person so to assault or resist, he may for every such offence be fined on summary conviction a sum not exceeding five pounds.

This provision does not prevent any prosecution by way of indictment against any such offender, except that he cannot be prosecuted both by indictment and in a summary manner for the same offence.

[1] 34 & 35 Vict. c. 112, s. 12.

[2] See 48 & 49 Vict. c. 75, s. 2. The effect of the two enactments is perhaps not quite clear. 34 & 35 Vict. c. 112, s. 12, says, "Where any person is convicted of an assault on any constable when in the execution of his duty." 48 & 49 Vict. c. 75, s. 2, says, "The provisions of this section shall apply to all cases of resisting or wilfully obstructing any constable or police officer when in the execution of his duty." This could hardly be without an assault. I suppose it would apply to cases of passive obstruction. A man resists his apprehension by catching hold of a post, or by pulling his friend one way when the constable is pulling him the other.

[3] These words do not apply to the case of an assault on a constable.

[4] 44 & 45 Vict. c. 50, s. 195. The object of this enactment is not apparent, as a more severe sentence may be inflicted for a common assault; see 24 & 25 Vict. c. 100, s. 42, Art. 252 below. It can hardly have been the intention of the legislature to repeal by implication the enactments embodied in the earlier part of the present Article, so far as they relate to borough constables.

ARTICLE 251.

ASSAULTS PUNISHABLE WITH THREE MONTHS IMPRISONMENT.

Every one is liable to a maximum punishment of three months hard labour

(*a.*) [1] who beats or uses any violence or threat of violence to any person with intent to deter or hinder him from buying, selling, or otherwise disposing of, or to compel him to buy, sell, or otherwise dispose of, any wheat or other grain, flour, meal, malt, or potatoes, in any market or other place, or beats or uses any such violence or threat to any person having the care or charge of any such thing whilst on the way to or from any city, market town, or other place, with intent to stop the conveyance of the same;

(*b.*) [2] or who unlawfully and with force hinders or prevents any seaman, keelman, or caster from working at or exercising his lawful trade, business, or occupation, or beats or uses any violence to any such person with intent to hinder or prevent him from working at the same.

Provided that no person punished under this Article can be punished for the same offence by virtue of any other law whatsoever.

ARTICLE 252.

PUNISHMENT OF COMMON ASSAULTS ON SUMMARY CONVICTION.

[3] Where any person unlawfully assaults or beats any other person, and is convicted thereof upon complaint by or on behalf of the party aggrieved, he is liable to the following consequences:

To be imprisoned with or without hard labour for a maximum term of two months;

~~or~~ ~~else~~ to be fined any sum not exceeding, together with costs, if ordered, £5, and if such sum is not paid within such term as the convicting justices appoint at the time of the conviction, to be imprisoned, with or without hard labour, for a maximum term of two months.

[1] 24 & 25 Vict. c. 100, s. 39.
[2] Ibid. s. 40.
[3] Ibid. s. 42.

ARTICLE 253.

CERTIFICATE OF CONVICTION OR ACQUITTAL.

[1] When a complaint of assault or battery preferred by or on behalf of the party aggrieved under Articles 250 or 252 has been heard upon the merits before justices and they deem the offence not to be proved, or find the assault or battery to have been justified, or so trifling as not to merit any punishment, and accordingly dismiss the complaint, or when the punishment awarded by them has been endured, the defendant is released from all further proceedings for such assault or battery.

[2] Upon the dismissal of any such complaint the justices must forthwith make out a certificate of the fact of such dismissal and give it to the party against whom the complaint was dismissed.

[1] 24 & 25 Vict. c. 100, ss. 44, 45. The words in the Act are "for the same cause." In *R.* v. *Morris*, L. R. 1 C. C. R. 90 (followed in *Masper* v. *Brown*, L. R. 1 C. P. D. 97), it was held that these words mean subsequent proceedings for an assault, and that they do not mean to cover subsequent proceedings for the act constituting the assault. It was held in *R.* v. *Morris* that if death followed an assault, for which the offender had been punished, he might nevertheless be indicted for manslaughter. In *Masper* v. *Brown* it was held that a man who had been fined for an assault on a married woman could not be afterwards sued by her husband for the damage he had sustained by the loss of his wife's services.

[2] 24 & 25 Vict. c. 100, s. 44.

CHAPTER XXIX.

[1] *RAPE, ETC.*

ARTICLE 253A.

DEFINITION OF CARNAL KNOWLEDGE.

[2] CARNAL knowledge means the penetration to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation.

ARTICLE 254.

DEFINITION OF RAPE.

[3] Rape is the act of having carnal knowledge of a woman

[1] Draft Code, Part X. ss. 207–11.

[2] 24 & 25 Vict. c. 100, s. 63, and see *R.* v. *Cox*, Ry. & Mood. 337, and *R.* v. *Allen*, 9 C. & P. 31, decided on the earlier enactmeat, 9 Geo. 4, c. 31, s. 111.

[3] See the cases in the Illustrations, and see 1 Russ. Cr. 858, &c. A late decision, *R.* v. *Flattery* (46 L. J. (M.C.) 130), has thrown much uncertainty over the law. The prisoner was convicted of rape for having procured connection with a girl by falsely pretending that the act was necessary for a surgical or medical purpose, "the prosecutrix making but feeble resistance, believing that the prisoner was treating her medically." Two of the judges laid stress upon the resistance as negativing consent to sexual connection, though not to the act done or supposed to be done. The Court, however, almost, though not altogether, overruled the principle said in *R.* v. *Barrow* (L. R. 1 C. C. R. 158) to be "established by a class of cases" (*R.* v. *Jackson*, R. & R. 487; *R.* v. *Clarke*, Dear. 397; *R.* v. *Saunders*, 8 C. & P. 265; *R.* v. *Williams*, 8 C. & P. 286) "that where consent is obtained by fraud the act done does not amount to rape." Hardly any of these cases seem to have been cited in the argument, though *R.* v. *Barrow* was. In *R.* v. *Flattery*, as in *R.* v. *N. Fletcher*, the Statute of Westminster 2nd., 13 Edw. 1, c. 34, was referred to as giving a "definition of rape." I do not see how the statute can be treated as defining rape at all. The words are "purveu est que si homme ravist femme, esponse, damoisele, ou autre femme desoremes, par la ou ele ne se est assentue, ne avaunt ne apres eit judgement, &c., e ensement par la ou home ravist femme, &c., a force tut seit ke ele se assente apres." In the Latin version the words are "rapiat ubi nec ante nec post consenserit." This cannot be a definition of rape, because it contains the word "rape." If however it is taken as being a definition, it implies that there may be cases of rape in which the woman consents, for the punishment is confined to cases of rape where there is no consent, before or after. The latter part of the enactment which speaks of consent after the fact appears inapplicable to rape in the modern sense of the word.

without her conscious permission, such permission not being extorted by force or fear of immediate bodily harm; but if such permission is given, the act [1] does not [2] except in the case next hereinafter mentioned amount to rape, although such permission may have been obtained by fraud, and although the woman may not have been aware of the nature of the act.

[3] Whereas before the Criminal Law Amendment Act, 1885, doubts were entertained whether a man who induces a married woman to permit him to have connection with her by personating her husband is or is not guilty of rape, it was by that Act enacted and declared that every such offender should be deemed to be guilty of rape.

ARTICLE 254A.

OTHER PROVISIONS AS TO RAPE.

(1.) [4] A husband [it is said] cannot commit rape upon his wife by carnally knowing her himself, but he may do so if he aids another person to have carnal knowledge of her.

When the crime is over how can a person consent to it? Had it not been for Coke's comments (2nd Inst. 180, 433, 3rd Inst. 60), I should have thought that the words applied rather to abduction than to what we mean by rape, especially as the statute contains provisions as to the ravishment of wards, in which the word "rapuit" is used, but I cannot think that the legislature intended to lay down any definition at all. Their language implies that the crime was then well known, and so does Coke's comment. The Act was repealed by 9 Geo. 4, c. 31, s. 1.

[1] See *R.* v. *Dee*, Irish C. C. R., reported in *Law Times* Jan. 24, 1884.

[2] It would, however, amount to an offence under Article 173 (*f*). The effect of the Criminal Law Amendment Act appears to be that *R.* v. *Flattery* is no longer law, though it was recognised as having created doubts as to *R.* v. *Barrow*, &c., which doubts are declared to have been well founded, but I think the point doubtful.

[3] 48 & 49 Vict. c. 69, s. 4. The doubts referred to were founded on the cases of *R.* v. *Flattery*, *R.* v. *Barrow*, &c., noticed in the last note.

[4] 1 Hale, P. C. 629. Hale's reason is that the wife's consent at marriage is irrevocable. It may be doubted however whether the consent is not confined to the decent and proper use of marital rights. If a man used violence to his wife under circumstances in which decency or her own health or safety required or justified her in refusing her consent, I think he might be convicted at least of an indecent assault. Hale gives no authority for it, but makes the remark only by way of introduction to the qualification contained in the latter part of clause (1), for which *Lord Castlehaven's Case* (3 St. Tr. 402) is an authority.

(2.) [1] A boy under fourteen years of age is conclusively presumed to be incapable of committing rape.

Illustrations.

(1.) [2] A has connection with B, a woman who at the time of the connection is in a state of insensibility. A has ravished B.

(2.) [3] A has connection with B, an idiot, who by reason of her idiotcy submits, but does not permit the act. A has ravished B.[2]

(3.) [4] A has connection with B, an idiot, who permits the act from mere sexual instinct, but without understanding its nature. A has not ravished B.

ARTICLE 255.

PUNISHMENT OF RAPE AND CARNALLY KNOWING CHILDREN UNDER THIRTEEN.

[5] Every one is guilty of felony and liable to penal pervitude for life as a maximum punishment, who

(*a.*) commits rape, or

(*b.*) [6] unlawfully and carnally knows any girl under the age of thirteen years.

ARTICLE 256.

CARNALLY KNOWING GIRLS BETWEEN THIRTEEN AND SIXTEEN.

Every one commits a misdemeanor, and is liable upon conviction thereof to a maximum punishment of two years imprisonment and hard labour, who

(1.) [7] attempts to have unlawful carnal knowledge of any girl under the age of thirteen;

[1] 1 Hale, P. C. 630. See *R.* v. *Groombridge*, 7 C. & P. 583. The presumption extends to cases of assault with intent to ravish. See *R.* v. *Phillips*, 8 C. & P. 736. The occasional incorrectness of this presumption is shown by *R.* v. *Read*, 1 Den. 377. The presumption is founded, I believe, on the notion that a boy under fourteen cannot be a father, and could not thus inflict what was regarded as the principal injury involved in rape.

[2] *R.* v. *Camplin*, 1 Den. C. C. 89.

[3] *R.* v. *N. Fletcher*, Bell, C. C. 63; referring to the definition given in Westm. 2, c. 34.

[4] *R.* v. *C. Fletcher*, L. R. 1 C. C. R. 39. In *R. Barratt* (L. R. 2 C. C. R. 81), in which the facts are similar to those in the case of *N. Fletcher*, the judges said that there was no inconsistency between the cases of *N. Fletcher* and *C. Fletcher*.

[5] 24 & 25 Vict. c. 100, s. 48.

[6] 48 & 49 Vict. c. 69, s. 3.

[7] 48 & 49 Vict. c. 69, s. 4.

(2.) [1] unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen and under the age of sixteen; or

(3.) unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any female idiot or imbecile woman under circumstances which do not amount to rape, but which prove that the offender knew at the time of the commission of the offence that the woman was an idiot or imbecile.[2]

An offender against (1) whose age does not exceed sixteen years may instead of being sentenced to imprisonment be sentenced to be whipped and to be sent to a certified reformatory school for not less than two years and not more than five years, and to be detained in custody for seven days before he is sent to such reformatory school.

[3] 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.

[1] 48 & 49 Vict. c. 69, s. 5.
[2] 48 & 49 Vict. c. 69, s. 4.
[3] Ibid. s. 5.

CHAPTER XXX.

CRIMES AFFECTING CONJUGAL AND PARENTAL RIGHTS—BIGAMY—ABDUCTION.

ARTICLE 257.

[1] DEFINITION AND PUNISHMENT OF BIGAMY.

[2] EVERY one commits the felony called bigamy, and is liable, upon conviction thereof, to a maximum punishment of seven years penal servitude, who, being married, marries any other person during the life of his or her wife or husband.

[3] The expression "being married" means being legally married. The word "marries" means goes through a form of marriage which the [4] law of the place where such form is used recognizes as [5] binding, whether the parties are by that law competent to contract marriage or not, and although by their fraud the form employed may, apart from the [6] bigamy, have been insufficient to constitute a binding marriage.

Provided that this article does not extend

(i.) [7] to a second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty; nor

(ii.) to any person marrying a second time, whose husband or wife has been continually absent from such person for seven years then last past, and has not been known by such person to be living within that time.

[1] 2 Hist. Cr. Law, 430.

[2] 24 & 25 Vict. c. 100, s. 57, as explained by the authorities referred to in the Illustrations. See note to Article 34, *ante*.

[3] See Illustration (2).

[4] *Burt* v. *Burt*, 29 L. J. (Probate) 153.

[5] See Illustration (3).

[6] See Illustration (4).

[7] The Act does extend to a subject of Her Majesty who has contracted a second marriage in Scotland during the lifetime of a wife previously married in Scotland: *R.* v. *Topping*, Dear. 647. The same rule would, of course, apply to a bigamous marriage in any foreign country.

[1] The burden of proving such knowledge is upon the prosecutor when ([2] but not until) the fact that the parties have been continually absent for seven years has been proved; nor

(iii.) to any person who at the time of such second marriage was divorced from the bond of the first marriage, nor to any person whose first marriage has been declared void by the sentence of any Court of competent jurisdiction.

[3] A divorce *à vinculo matrimonii* pronounced by a foreign Court between persons who have contracted marriage in England, and who continued to be domiciled in England, on grounds which would not justify such a divorce in England, is not a divorce within the meaning of this clause.

It is [4] uncertain whether a person who marries again during his wife's or her husband's lifetime, but in the honest belief on reasonable grounds that she or he is dead, is guilty of bigamy or not.

Illustrations.

(1.) [5] A marries B, a person within the prohibited degrees of affinity, and during B's lifetime marries C. A has not committed bigamy.

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[1] *R.* v. *Curgerwen*, L. R. 1 C. C. R. 1.

[2] *R.* v. *Jones*, L. R. 11 Q. B. D. 118.

[2] *R.* v. *Lolley*, R. & R. 237. The decision does not refer to domicil, but this qualification appears from later cases to be required. See *Harvey* v. *Farnie*, L. R. 5 P. D. 153, and 6 P. D. 32; also in 8 App. Ca. 43, where *R.* v. *Lolley* is explained as above by Lord Selborne at p. 54, and Lord Blackburn at p. 59. *Harvey* v. *Farnie* was the converse of *R.* v. *Lolley*. It recognised a Scotch divorce as dissolving a marriage between people domiciled in Scotland at the time of the divorce, though the marriage took place in England, the wife being domiciled at the time of the marriage in England. The cases on the effect of foreign judgments on marriage are collected in 2 Sm. L. C. 865–71, 18th Edition.

A question as to the exact time at which a person can be said to be divorced may arise. In 1 Hale, P. C. 694, a case is mentioned in which a person marrying after sentence of divorce, but pending an appeal, was held to be within a similar proviso in 1 Ja. 1, c. 11. In *R.* v. *Hale*, tried at the Leeds summer assizes, 1875, a woman pleaded guilty to a charge of bigamy before Lindley, J., she having married after the decree nisi was pronounced, but before it became absolute, which it afterwards did. The judge's attention, however, was not directed to the passage in Hale.

[4] I held in *R.* v. *Hibbert*, tried at Nottingham in July, 1886, that a reasonable belief in the husband's death was no defence. This was in order to raise the point, but the prisoner was acquitted. There are other decisions both ways. See Article 34, note, p. 28, *ante*).

[5] *R.* v. *Chadwick*, 11 Q. B. 205.

(2.) [1] A marries B, and during B's lifetime, goes through a form of marriage with C, a person within the prohibited degrees of affinity. A has committed bigamy.

(3.) [2] A marries B in Ireland, and during B's lifetime goes through a form of marriage with C in Ireland which is invalid, because both A and C are Protestants, and the marriage is performed by a Roman Catholic priest. A commits bigamy.

(4.) [3] A, married to C, marries B in C's lifetime by banns. B, (the woman) being married, for purposes of concealment under a false name. A has committed bigamy.

(5.) [4] A, married to B, marries C in B's lifetime, in the colony of Victoria. In order to show that A committed bigamy it must be proved that the form by which he was married was one recognised as a regular form of marriage by the law in force in Victoria.

ARTICLE 258.

PRINCIPALS IN SECOND DEGREE IN BIGAMY.

[5] Every one is a principal in the second degree in the crime of bigamy who, being unmarried, knowingly enters into a marriage which renders the other party thereto guilty of bigamy.

ARTICLE 259.

IRREGULAR MARRIAGES UNDER THE MARRIAGE ACT OF 1823.

[6] Every one is guilty of felony, and is liable upon conviction therof to a maximum punishment of fourteen years penal servitude, who knowingly and wilfully

(*a.*) solemnises matrimony in any other place than a church or such public chapel wherein banns may be lawfully published, or at any other time than between the hours of eight and twelve in the forenoon, unless by special licence from the Archbishop of Canterbury; or

[1] *R.* v. *Brown*, 1 C. & K. 144; *R.* v. *Allen*, L. R. 1 C. C. R. 367.

[2] *R.* v. *Allen*, *ub. sup.* pp. 373–5, disapproving of *R.* v. *Fanning*, 17 Ir. C. L. 289.

[3] *R.* v. *Parson*, 5 C. & P. 412. In *R.* v. *Rea*, the prisoner at the bigamous marriage (before the registrar) gave a false Christian name, and was held to be rightly convicted.

[4] *Burt* v. *Burt*, 29 L. J. (Probate) 133.

[5] *R.* v. *Brown & Webb*, 1 C & K. 144.

[6] 4 Geo. 4, c. 76, s. 21.

(*b.*) solemnises matrimony without due publication of banns, unless licence of marriage be first had and obtained from some person having authority to grant the same; or

(*c.*) falsely pretending to be in holy orders, solemnises matrimony according to the rites of the Church of England.

[1] Provided that nothing in this Article contained applies to the solemnisation of marriage under the provisions of any Act of Parliament passed after the 18th of July, 1823.

Article 260.

Irregular marriages under the Marriage Act of 1837.

[2] Every one is guilty of felony who knowingly and wilfully

(*a.*) solemnises any marriage in England, except by special licence, in any other place than a church or chapel in which marriages may be solemnised according to the rites of the Church of England, or than the registered building or office specified in a [3] notice and certificate issued under the 6 & 7 Will. 4, c. 85 ([4] except in the case of a marriage between two of the Society of Friends, commonly called Quakers, or between two persons professing the Jewish religion, according to the usages of the Jews); or

(*b.*) who, in any such registered building or office, solemnises any marriage in the absence of a registrar of the district in which such registered building or office is situated; or

(*c.*) who solemnises any marriage in England (except by licence) within twenty-one days after the entry of the notice to the superintendent registrar, or after three months after such entry.

[1] This proviso is added to express the effect of subsequent legislation on the subject. The Acts referred to are 6 Geo. 4, c. 92; 11 Geo. 4 & 1 Will. 4, c. 18; 6 & 7 Will. 4, c. 85; 7 Will. 4 & 1 Vict. c. 22, and some others. The Act of 1823 assumes that all marriages are solemnised in the Established Church. The Act of 1837, 6 & 7 Will. 4, c. 85, provides for the solemnisation of marriages elsewhere.

[2] 6 & 7 Will. 4, c. 85, s. 39.

[3] Sect. 7, relating to the certificate, is repealed, 37 & 38 Vict. c. 35.

[4] No such exception is contained in the Act of 1823; but it can hardly have been intended to apply to such marriages. See 10 & 11 Vict. c. 58 (passed in consequence of the decision in *R.* v. *Millis*, 10 C. & F. 534).

ARTICLE 261.

ABDUCTION WITH INTENT TO MARRY.

Every one commits felony and is liable, upon conviction, to a maximum punishment of fourteen years penal servitude, who, with intent to marry or carnally know any woman, or with intent to cause any woman to be married or carnally known by any other person,

(*a.*) [1] from motives of lucre, takes away or detains against her will any such woman having any such interest in property as is hereinafter mentioned; or

(*b.*) [2] fraudulently allures, takes away, or detains, any such woman, being under the age of twenty-one years, and having any such interest in property as is hereinafter mentioned, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her; or

(*c.*) [3] by force takes away or detains against her will any woman of any age.

If any woman, against whom either of the offences defined in clauses (*a.*) and (*b.*) is committed, has any interest, legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or is a presumptive heiress or co-heiress, or presumptive next of kin, or one of the presumptive next of kin to any one having such interest, any person convicted of either of the said offences against her is incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she has any interest, or which comes to her as such heiress, co-heiress, or next-of kin, and if any such marriage has taken place, such property must, upon such conviction, be settled in such manner as the Court of Chancery

[1] 24 & 25 Vict. c. 100, s. 53 (redrawn). The meaning of the words "possession" and "fraudulently" was considerably discussed in *R. v. Burrell*, L. & C. 354; but as the Court differed on the facts of the case, no definite conclusion was arrived at.

[2] See *ante*, note [4], p. 177.

[3] 24 & 25 Vict. c. 100, s. 54.

in England or Ireland may, upon any information at the suit of the Attorney-General, appoint.

[1] In prosecutions for offences against this Article, a woman who, having been taken away, has been married to the offender, is, notwithstanding that marriage, competent to be a witness against him.

ARTICLE 262.

ABDUCTION OF GIRLS UNDER SIXTEEN.

[2] Every one commits a misdemeanor and is liable to a maximum punishment of two years imprisonment and hard labour, who unlawfully takes, or causes to be taken, any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her.

The taking must be a taking under the power, charge, or protection of the taker, but it is immaterial whether the girl is taken with her own consent, or at her own suggestion, or against her will.

The expression "taking out of the possession" means taking the girl to some place where the person in whose charge she is cannot exercise control over her, for some purpose inconsistent with the objects of such control. A taking for a time only may amount to abduction.

If the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such person.

The fact that the offender supposes, in good faith and on reasonable grounds, that the girl is more than sixteen years of age, is immaterial; but [it seems] it is necessary that he should either know, or have reason to believe, that she was under the lawful care or charge of her father, mother, or some other person.

[1] *R.* v. *Wakefield*, 1 Lew. 279; *R.* v. *Perry*, 1 R. C. & M. 949.

[2] 24 & 25 Vict. c. 100, s. 55, as explained by the case referred to in the Illustrations.

Illustrations.

(1.) [1] A and B, two girls under sixteen, run away from home together. Neither abducts the other.

(2.) [2] A persuades B, a girl under sixteen, to leave her father's house, and sleep with him for three nights, and then sends her back. A has abducted B.

(3.) [3] A, a lady, persuades B, a girl under sixteen, to leave her father's house, and come to A's house for a short time, for the purpose of going to the play with her. A has not abducted B.

(4.) [4] A, a girl, under sixteen, asks B, by whom she had been seduced, to elope with her, which he does. B commits abduction.

(5.) [5] A induces B to permit his daughter C to go away by falsely pretending that he (A) will find a place for C. A abducts C.

(6.) [6] A takes B, a girl under sixteen, out of her father's possession, believing her upon good grounds to be eighteen. A has abducted B.

(7.) [7] A meets B, a girl under sixteen, in the street, gets her to stay with him some hours, during which interval he seduces her, takes her back to the place where he found her, and there leaves her. She returns home. A was not aware at the time that B had a father or mother living. A has not abducted B.

ARTICLE 262A.

ABDUCTION OF GIRLS UNDER EIGHTEEN.

[8] Every person commits a misdemeanor, and being convicted thereof is liable to two years imprisonment with hard labour, as a maximum punishment, who, with intent that any unmarried girl under the age of eighteen years should be unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, takes or causes to be taken such girl out of the possession and against the will of her father or mother, or any other person having the lawful care or charge of her.

It is a sufficient defence to any charge under this Article if it is made to appear to the Court or jury that the person so

[1] *R.* v. *Meadows*, 1 Car. & Kir. 399, as explained by note to *R.* v. *Kipps*, 4 Cox, C. C. 168; and *R.* v. *Mankletow*, Dears. C. C. 162.

[2] *R.* v. *Timmins*, Bell, 276.

[3] Founded on a dictum of Crompton, J., in *R.* v. *Timmins*.

[4] *R.* v. *Biswell*, 2 Cox, C. C. 259; and see *R.* v. *Robins*, 1 C. & K. 456.

[5] *R.* v. *Hopkins*, Car. & Mar. 254.

[6] *R.* v. *Prince*, L. R. 2 C. C. R. 154.

[7] *R.* v. *Hibbert*, L. R. 1 C. C. R. 144.

[8] 48 & 49 Vict. c. 69, s. 7.

charged had reasonable cause to believe that the girl was of or above the age of eighteen years.

ARTICLE 262B.

DETAINING WOMEN IN BROTHELS.

Every one commits a misdemeanor, and upon conviction thereof is liable to imprisonment with hard labour for two years as a maximum punishment, who detains any woman or girl against her will—

(1.) In or upon any premises with intent that she may be unlawfully and carnally known by any man, whether any particular man, or generally, or.

(2.) In any brothel.

Where a woman or girl is in or upon any premises for the purpose of having any unlawful carnal connexion, or is in any brothel, a person shall be deemed to detain such woman or girl in or upon such premises or in such brothel, if, with intent to compel or induce her to remain in or upon such premises or in such brothel, such person withholds from such woman or girl any wearing apparel or other property belonging to her, or, where wearing apparel has been lent or otherwise supplied to such woman or girl by or by the direction of such person, such person threatens such woman or girl with legal proceedings if she takes away with her the wearing apparel so lent or supplied.

No legal proceedings, whether civil or criminal, may be taken against any such woman or girl for taking away or being found in possession of any such wearing apparel as was necessary to enable her to leave such premises or brothel.

ARTICLE 263.

STEALING CHILDREN UNDER FOURTEEN.

[1] Every one is guilty of felony and is liable, upon conviction, to a maximum punishment of seven years penal servitude, who

[1] 24 & 25 Vict. c. 100, s. 56, W.

(1.) unlawfully, either by force or fraud, leads, or takes away, or decoys or entices away, or detains any child under the age of fourteen years; or

(2.) receives or harbours any such child, knowing it to have been so dealt with,

with intent to deprive any parent or guardian, or other person having the lawful care or charge of such child, of the possession of it, or with intent to steal any article about or upon the person of such child.

Provided that this Article does not extend to any person who gets possession of any child, or takes any child out of the possession of any one who has lawful charge of it, if such person either claims a right to the possession of the child, or (if it is an illegitimate child) is its mother or claims to be its father.

CHAPTER XXXI.

OFFENCES AGAINST CHILDREN BY PARENTS AND OTHERS.

ARTICLE 264.

NEGLECTING TO PROVIDE FOOD, ETC., FOR CHILDREN.

[1] Every one commits a misdemeanor who, being the parent or master, or mistress, of any child of tender years, and unable to provide for itself, refuses or neglects (being able to do so) to provide sufficient food, clothes, bedding, and other [2] necessaries for such child, so as thereby to injure the health of such child.

ARTICLE 265.

PARENTS NOT PROVIDING NECESSARIES FOR CHILDREN.

[3] Every one commits a misdemeanor, and is liable upon summary conviction thereof before two justices to a maximum punishment of six months imprisonment with hard labour, who, being a parent, wilfully neglects to provide adequate food, clothing, medical aid, or lodging, for his child, being in his custody, under the age of fourteen years, whereby the health of such child is, or is likely to be seriously injured.

The justices may suspend the sentence until further notice if the offender enters into his own recognizances, with or without one or more sureties, as the justices may think fit, to come up for judgment when called upon.

[1] *Friend's Case*, R. & R. 20; *R.* v. *Ryland*, L. R. 1 C. C. R. 99. It is necessary to prove actual injury to the child's health, *R.* v. *Philpott*, Dear. 179, and *R.* v. *Hogan*, 2 Den. 277, and that the defendant actually has, not merely that he might get from the relieving officer the means of providing for the child: *R.* v *Chandler*, Dear. 453.

[2] It is doubtful whether this includes medical attendance as regards any one but a parent who is under a statutory obligation to provide it. See Article 266; *R.* v. *Downes*, 1 Q. B. D. (C. C. R.) 25.

[3] 31 & 32 Vict. c. 122, s. 37.

The guardians of the union or parish in which the child may be living [1] must institute the prosecution, and pay the costs thereof out of their funds.

ARTICLE 266.

MASTERS NOT PROVIDING FOR APPRENTICES—ABANDONING CHILDREN UNDER TWO.

Every one commits a misdemeanor, and is liable upon conviction thereof to a maximum punishment of five years penal servitude,

[2] who unlawfully abandons or exposes any child being under the age of two years, whereby the life of such child is endangered or its health has been or is likely to be permanently injured.

The words "abandoned" and "expose" include a wilful omission to take charge of the child on the part of a person legally bound to do so, and any mode of dealing with it calculated to leave it exposed to risk without protection.

Illustrations.

(1.) [3] B, A's wife, living apart from A, leaves C their child, nine months old, lying in the road outside A's door. A, knowing its position, lets it lie there from 7 P.M. till 1 A.M. A's mother, D, knowing the child is there, and being in her house, acts in the same way as A. A has abandoned and exposed C, but D has not, as she was under no legal obligation to take charge of C.

(2.) [4] A sends B, her child five weeks of age, packed up in a hamper as a parcel, by railway to C, B's putative father, giving directions to the clerk to be very careful of the hamper, and send it by the next train. The child reaches C safely. A has abandoned and exposed B.

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[1] "Shall." Does this mean that no one else may do so?

[2] 24 & 25 Vict. c. 100, s. 27. Part of sect. 26 refers to the same subject. See Art. 239 (*d.*), p. 175.

[3] *R.* v. *White*, L. R. 2 C. C. R. 311.

[4] *R.* v. *Falkingham*, L. R. 2 C. C. R. 222.

CHAPTER XXXII.

LIBELS ON PRIVATE PERSONS.

ARTICLE 267.

DEFINITION OF LIBEL.

The word "libel" means

(*a.*) the offence defined in this Article.

(*b.*) Anything by the publication of which the offence is committed.

[1] Every one commits the misdemeanor called libel who maliciously publishes defamatory matter of any person, or body of persons, definite and small enough for its individual members to be recognised as such, in or by means of anything capable of being a libel in the second sense of the word.

The publication of a libel on the character of a dead person is not a misdemeanor unless it is intended to injure or provoke living persons.

* See Note X.

[1] The best modern statement on the law of libel is by Lord Blackburn in *Capital and Counties Bank* v. *Henty*, L. R. 7 App. Ca. 769–788. See also my History of the Criminal Law, vol., ii. p. 298–395 and 1 Hawk. P. C. 542. As to what can be a "libel" see Article 268. As to "publishes," see Article 270; "maliciously," see Article 271.

As to libels on the dead, see *R.* v. *Topham*, 4 T. R. 126; also *R.* v. *Labouchere*, L. R. 12 Q. B. D. 322–4. In February, 1887, I tried the case of *R.* v. *Ensor* at the assizes at Cardiff. The case was of a newspaper libel on a political opponent who had been dead for three years. It led to an assault by the dead man's sons upon his supposed libeller. I directed an acquittal on the ground that no evidence was offered to shew that the libel in any way referred to any living person. I ought to have added, but I did not do so clearly, that there was no evidence that the defendant wished to provoke the sons of the deceased. It was not even stated that he knew of their existence. I thought that an actual intent to injure (I should have added) or to provoke or annoy the sons was essential to the offence, and that a mere tendency to provoke or constructive intention inferred from the fact that the libel was calculated to hurt the feelings of any surviving relations of the deceased was not enough. I have altered the wording of this article accordingly.

Illustrations.

(1.) [1] A religious society called the S. Nunnery, consisting of certain nuns and other persons, may be libelled though no individual is specially referred to.

(2.) [2] A libel may be published against "certain persons lately arrived from Portugal and living near Broad Street," though no particular person is mentioned or referred to.

ARTICLE 268.

THINGS CAPABLE OF BEING LIBELS.

[3] Any words or signs conveying defamatory matter marked upon any substance, and any thing which by its own nature conveys defamatory matter, may be a libel in the second sense of the word before mentioned. Words spoken can in no case be a libel, although they may convey defamatory matter.

Illustration.

A letter or passage in a book or newspaper, words written on a wall, a picture, a gallows set up before a man's door, may be a libel.

ARTICLE 269.

DEFAMATORY MATTER.

[4] Defamatory matter is matter which, either directly or by insinuation or irony, tends to expose any person to hatred, contempt, or ridicule.

Illustrations.

The following are instances of defamatory matter:—

[5] A question suggesting that illegitimate children were born and murdered in a nunnery;

[6] "A adds to his other vices ingratitude";

[7] "A will not play the fool or the hypocrite" (meaning that he would);

[8] "A has the itch, and smells of brimstone";

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[1] *R.* v. *Gathercole*, 2 Lew. 237.

[2] *R.* v. *Osborne*, 2 Keb. 230.

[3] 3 Russ. Cr. (5th ed.) p. 178; 1 Hawk. P. C. 452; Folkard's Starkie, 151. As to cases in which words spoken amount to a criminal offence, see Articles 67, 91, 161.

[4] Folkard's Starkie, 156, 157.

[5] *R.* v. *Gathercole*, 2 Lew. C. C. 255.

[6] *Cox* v. *Lee*, L. R. 4 Ex. 284.

[7] 1 Hawk. P. C. 543.

[8] *Villars* v. *Moriston*, Holt, 216.

[1] An imputation that A (a clergyman) poisoned foxes in a hunting country and hung them by the neck, and was himself hung in effigy for so doing.

ARTICLE 270.

PUBLICATION DEFINED.

[2] To publish a libel is to deliver it, read it, or communicate its purport in any other manner, or to exhibit it to the person libelled, or any other person, [3]provided that if the person making the publication shews that he did not know, and had no opportunity of knowing, the contents of the libel, or that the newspaper or other publication of which it forms part is likely to contain libellous matter, his act is not deemed to amount to a publication.

[4] A libel published in the ordinary course of the business of any person whose trade it is to deal in articles of the kind to which the libel belongs, is deemed to be published, not only by the person who actually sells or exhibits it, but also by his master if his master has given him general authority to sell or exhibit for his master's profit articles of that kind.

[5] Provided that whenever, upon the trial of any person for the publication of a libel, evidence has been given which establishes a presumptive case of publication against the defendant by the act of any other person by his authority, the defendant may prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part.

[1] *R.* v. *Cooper*, 8 Q. B. 533. I think it might, under special circumstances, be a libel to say of a person a thing apparently quite inoffensive. Suppose, for instance, a man wrote of another "his name is A," meaning that his real name was A, and that the name of B, by which he passed, was falsely assumed, would not this be a libel?

[2] *R.* v. *Burdett*, 4 B. & Ald. 95. A libel published to the person libelled is a misdemeanor, because it tends to a breach of the peace, but it is not actionable, as it cannot injure the reputation of the person libelled.

[3] *Emmens* v. *Pottle*, L. R. 16 Q. B. D. 384.

[4] Cases in Folkard's Starkie, 427–8; and especially *R.* v. *Almond*, 5 Burr. 2686.

[5] 6 & 7 Vict. c. 96, s. 7. Probably the effect of such proof would be to excuse the master, though the Act does not say so. See *R.* v. *Almond* as to the rule before the statute.

[1] If the proprietor of a newspaper or other periodical work gives general authority to an editor to manage the paper, it is a question of fact whether the proprietor authorized the editor to publish the libel which is the subject of the indictment or imformation. Authorization is not to be presumed from the mere fact that the general control of the paper was left to the editor, but may be inferred from circumstances shewing that the proprietor permitted the editor to publish libels, or was indifferent as to whether libels were published by him or not.

Illustrations.

(1.) [2] A delivers to B an open letter, of which A is the author, containing matter defamatory of C. A has published a libel.

(2.) [2] A posts to B a sealed letter, of which A is the author, and which contains a libel on C. It seems that the posting of the letter is in itself a publication (*quære*).

(3.) [2] The postman delivers to B the letter mentioned in the last illustration. The postman has not published the letter, but A has.

(4.) A bookseller's shopman sells a libellous book over the counter in the ordinary course of business; both the shopman and the bookseller have published the libel.

ARTICLE 271.

WHEN A LIBEL IS MALICIOUS.

[3] The publication of a libel is malicious in every case which does not fall within the provisions of some one or more of the six articles next following.

ARTICLE 272.

PUBLICATION OF THE TRUTH.

[4] The publication of a libel is not a misdemeanor if the

[1] *R.* v. *Holbrook*, L. R. 4 Q. B. D. 42.

[2] All these Illustrations are founded on *R.* v. *Burdett*, 4 B. & Ald. 95. (1) is assumed by all the judges; (2) is doubted by Bayley, J., p. 153; (3) is given by Best, J., p. 126.

[3] In *Bromage* v. *Prosser*, 4 B. & C. 247, which is a leading case on the subject, Bayley, J., says, "Malice . . . in its legal sense means a wrongful act done intentionally and without just cause or excuse." From the nature of the case the publication of a libel must be an intentional act. The next six Articles sum up the different states of fact which have been held to constitute "just cause or excuse" for publishing libels. In *Bromage* v. *Prosser* and many other cases, much is said of malice in law and malice in fact, of privileged publications, &c., &c.; but a sufficiently simple and intelligible result has at last been reached by very circuitous roads. See Note X.

[4] Effect of 6 & 7 Vict. c. 96, s. 6.

defamatory matter is true, and if the publisher can shew that it was for the public benefit that such matter should be published.

Illustration.

[1] A writes of B, "Many years ago B committed immoral acts." The imputation is true. This is not a libel if the publisher can shew that it was for the public benefit that it should be published.

ARTICLE 273.

PUBLICATION OF MATTER HONESTLY BELIEVED TO BE TRUE.

[2] The publication of a libel is not a misdemeanor if the defamatory matter published is honestly believed to be true, by the person publishing it, and if the relation between the parties by and to whom the publication is made is such that the person publishing is under any legal, moral, or social duty to publish such matter to the person to whom the publication is made, or has a legitimate personal interest in so publishing it, provided that the publication does not exceed either in extent or in manner what is reasonably sufficient for the occasion, [3] and provided that the person who publishes is not in fact actuated in so doing by any indirect motive.

When the existence of the relation establishing the duty has been proved, the burden of proving that the statement was not honestly believed to be true, and that the defendant was in fact actuated by some indirect motive (both or either) is upon the prosecutor.

Illustrations.

(1.) [4] A being asked the character of B, who had been in his service, by C, who is about to engage B as a servant, writes of B in a letter to C, the words "B is a drunkard and a thief." If A honestly and on reasonable

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[1] *R.* v. *Newman*, 1 E. & B. 553; and see Dear. 85.

[2] See Folkard's Starkie, ch. xii. 249–291. I have gone carefully through these forty-two pages twice or more, and I cannot see that they contain anything beyond this principle and rather obvious illustrations of it expressed in a very complicated way. The leading case on the subject is *Harrison* v. *Bush*, 5 E. & B. 344–348.

[3] *Clark* v. *Molyneux*, L. R. 3 Q. B. D. 37.

[4] Many cases as to giving characters to servants are collected and abstracted in Folkard's edition of Starkie, pp. 250–7.

grounds believes that B is a drunkard and a thief, though in fact he is neither, this is not a libel.

If A published this letter in a newspaper it would be a libel.

As soon as the circumstances under which the letter was written are proved or appear the burden of proving that A did not honestly and on reasonable grounds believe B to be a drunkard and a thief is upon B in a prosecution or action by B.

(2.) [1] A, the private secretary of a general, being directed by the general to give an inspecting officer information as to the discipline of a body of troops, writes a letter to the inspector, in which he says that B, who had formerly commanded the troops, attempted to excite a mutiny when he was removed from his command. This is not a libel, though false, if A honestly believed it to be true, and if it was relevant to the subject on which A was directed to report.

(3.) [2] A writes a letter containing matter defamatory of B to C, A's mother-in-law, who is about to marry B. If A in good faith believes the imputations to be true, this is not a libel although the imputations are false.

(4.) [3] The mate of a ship writes a letter to A accusing the captain, B, of drunkenness and misconduct. A (who has nothing to do with the matter) forwards the letter to the owner of the ship believing the accusation to be true and thinking himself morally bound to report it. The accusation was in fact false. It is uncertain whether A has or has not libelled B.

(5.) A complains to the Privy Council of the conduct of a public officer whom the Privy Council had power to remove. If the statement was made with express malice it is libellous.[4]

ARTICLE 274.

FAIR CRITICISM.

[5] The publication of a libel is not a misdemeanor if the defamatory matter consist of comments upon persons who submit themselves, or upon things submitted by their authors or owners, to public criticism, provided that such comments are fair.

[6] A fair comment is a comment which is either true, or which, if false, expresses the real opinion of its author (as to the existence of matter of fact or otherwise), such opinion

[1] *Beatson* v. *Skene*, 5 H. & N. 838. This was an action for verbal slander, but the principle is the same.

[2] *Todd* v. *Hawkins*, 8 C. & P. 88.

[3] *Coxhead* v. *Richards*, 2 C. B. 569. The judges in this case were equally divided, Tindal, C.J., and Erle, J., thought the letter was not a libel. Coltman, J., and Cresswell, J., thought it was.

[4] *Procter* v. *Webster*, L. R. 16 Q. B. D. 112.

[5] Folkard's Starkie, ch. xi. pp. 223–248.

[6] *Hunter* v. *Sharpe*, 4 F. & F. 983; Folkard's Starkie, 232.

having been formed with a reasonable degree of care and on reasonable grounds.

[1] Every person who takes a public part in public affairs submits his conduct therein to criticism.

[2] Every person who publishes any book or other literary production, or any work of art, or any advertisement of goods, submits that book, or literary production, or work of art, or advertisement to public criticism.

[3] Every person who takes part in any dramatic performance, or other public entertainment, submits himself to public criticism to the extent to which he takes part in it.

Illustrations.

(1.) [4] A, by direction of the Lords of the Admiralty, published to the world at large an official report made to the Lords of the Admiralty by B, which report contains matter defaming the character of C as a naval architect. C, having submitted to the Lords of the Admiralty proposals and plans for converting wooden ships of war into armoured ships of war, and the official report being part of a collection of papers intended to give the public information as to the construction of ships of war, and the publication being made in good faith, A has not libelled B.

(2.) [5] A publishes a caricature of B, an author, intended to convey the impression that his books were dull and ridiculous. A has not libelled B.

(3.) [6] B exhibits a picture at the annual exhibition of the Royal Academy. A writes a criticism on the pictures so exhibited, and calls B's picture "a mere daub." If this expresses A's honest opinion, A has not libelled B.

(4.) [7] B publishes an advertisement about a bag sold by him and called "the Bag of Bags." A publishes a criticism on the advertisement, saying, "The title is very silly, very slangy, and very vulgar." This may be a libel if it is meant to convey an imputation of B's way of managing his business, but is not a libel if it is only an expression of A's honest opinion as to the title given by B to his bag.

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[1] Illustration (1).

[2] Illustrations (2), (3), and (4).

[3] *Dibdin* v. *Bostock*, 1 Esp. 28.

[4] *Henwood* v. *Harrison*, L. R. 7 C. P. 606.

[5] *Carr* v. *Hood*, 1 Camp. 354; Folkard's Starkie, 225–7; and see *Tabart* v. *Tipper*, 1 Camp. 350. *Carr* v. *Hood* is a strong case, because the caricature ridiculed not only the book but the author. It is one thing to say, "This book is absurd," another to say, "You are an absurd person because you have written this absurd book." This decision would cover (within limits) common political caricatures.

[6] *Thompson* v. *Shakell*, 1 M. & M. 187; Folkard's Starkie, 228.

[7] *Jenner* v. *A'Beckett*, L. R. 7 Q. B. 11; Folkard's Starkie, 231.

ARTICLE 275.

PARLIAMENTARY PROCEEDINGS AND FAIR COMMENTS THEREON.

[1] It is not a misdemeanor to publish such of the reports, papers, votes, or proceedings of either House of Parliament as such House of Parliament may deem fit or necessary to be published; or,

[2] any extract from or abstract of such report, paper, votes or proceedings, if it is shown by the party accused that such extract or abstract was published *bonâ fide* and without [3] malice; or

[4] a fair report of any debate in either House of Parliament, though any such publication may contain matter defamatory of the character of individuals; [5] [SUBMITTED] provided that the publisher is not actuated in making the publication by any indirect motive.

ARTICLE 275A.

REPORTS OF PROCEEDINGS OF PUBLIC MEETINGS.

[6] Any report published in any newspaper of the proceedings of a public meeting is privileged if such meeting was lawfully convened for a lawful purpose and open to the

[1] 3 & 4 Vict. c. 9, s. 1. The Act contains directions as to proof of the reports, &c.; see also *Stockdale* v. *Hansard*, 9 A. & E. 1. The existence of a narrower privilege than that conferred by the statute, viz. the privilege of publishing libellous papers to members of Parliament for their use, was never disputed; see *Lake* v. *King*, 1 Wms. Saunders, 137.

[2] 3 & 4 Vict. c. 9, s. 3.

[3] The word "malice" must here have its popular sense. In this connection, however, it has almost no meaning. A publishes an abstract of a parlimentary paper, which destroys the character of his deadly enemy B. He rejoices in the prospect of ruining B's character, and so publishes both *bonâ fide* and with malice. It is absurd to say he is indictable, yet if he is not, what is the sense of the word "malice"? It seldom has any meaning except a misleading one. It refers not to intention, but to motive, and in almost all legal inquiries intention, as distinguished from motive, is the important matter. Another objection to it is that its popular meaning is not barely ill will, but an ill will which it is immoral to feel. No one would describe legitimate indignation as "malice." The word is entirely avoided in the Indian Penal Code.

[4] *Wason* v. *Walter*, L. R. 4 Q. B. 73.

[5] Analogy of *Stevens* v. *Sampson*, L. R. 5 Ex. Div. 53.

[6] 44 & 45 Vict. c. 60, s. 2.

public, and if such report was fair and accurate and published without malice, and if the publication of the matter complained of was for the public benefit. The protection afforded by the enactment on which this Article is founded is not available as a defence in any proceeding if the plaintiff or prosecutor can shew that the defendant has refused to insert in the newspaper in which the report containing the matter complained of appeared a reasonable letter or document of explanation or contradiction by or on behalf of such plaintiff or prosecutor.

[1] It is a misdemeanor for any person to publish any such report otherwise than in a newspaper, even though the report is fair and accurate and the object of publication is to give information to the public.

ARTICLE 276.

PUBLICATION IN A COURT OF JUSTICE.

It is not a misdemeanor for a judge, counsel, witness or party to publish anything whatever in a judicial proceeding before a Court of competent jurisdiction, or in the discharge of any military duty, even if the person publishing knows the matter published to be false, and publishes it in order to injure the person to whom it relates.

Illustrations.

(1.) [2] A, before justices of the peace, exhibits articles of the peace against B, containing false and scandalous charges against B, in order to cause B to be bound over to good behaviour. This is not a libel.

(2.) [3] A in an action between himself and B, falsely and maliciously swears an affidavit, charging C with fraud. The affidavit is not a libel.

(3.) [4] A, a military witness before a military court of inquiry as to the conduct of B, makes in reference to the subject of that inquiry certain

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[1] *Davison* v. *Duncan*, 7 E. & B. 231.

[2] *Cutler* v. *Dixon*, 4 Co. 14 b.

[3] This is stated most strongly and explicitly in *Munster* v. *Lamb*, L. R. 11 Q. B. D. 588. *Henderson* v. *Broomhead*, 4 H. & N. 569, 576; see, too, *Dawkins* v. *Lord Rokeby*, L. R. 8 Q. B. 255, and authorities cited there. Compare *Seaman* v. *Netherclift*, 1 C. P. Div. 540, for an illustration of the same principle as regard slander.

[4] *Dawkins* v. *Lord Rokeby*, L. R. 7 H. L. 744.

written statements affecting B, which are false to A's knowledge, and are intended to injure B. This is not a libel.

(4.) [1] A being the military superior of D, and being as such under a military duty to make a report on B's conduct to C, their common superior, makes a report which he knows to be false in order to injure B. The report is not a libel.

ARTICLE 277.

FAIR REPORTS OF PROCEEDINGS OF COURTS.

[2] The publication of a fair report of the proceedings of a Court of justice is not a libel, merely because it defames the character of any private person; but such a publication may be an offence under Articles 91, 99, 161, or 172.

A report is said to be fair when it is substantially accurate, and when it is either complete or condensed in such a manner as to give a just impression of what took place, but this Article does not extend to comments made by the reporter, or to reports of observations made by persons not entitled to take part in the proceedings.

Reports of ex parte proceedings are within this Article if they are of a judicial nature, and proceedings before a magistrate under 11 & 12 Vict. c. 42, held with open doors, and with a view to the committal for trial of a suspected person, are judicial.

[3] Provided in all the cases aforesaid that the publisher is not actuated in making the publication by any indirect motive.

Illustrations.

(1.) [4] A publishes in a newspaper a fair report of the examination of a debtor before the registrar of a Bankruptcy Court. The examination contains irrelevant statements defaming B, who is a stranger to the proceedings. This is not a libel on B.

(2.) [5] A having been convicted of publishing a blasphemous libel, B

[1] *Dawkins* v. *Lord Paulet*, L. R. 5 Q. B. 94. Dissentiente Cockburn, C.J. I should doubt whether this law would be extended beyond the case of military duty.

[2] *Curry* v. *Walter*, 1 B. & P. 525; *Hoare* v. *Silverlock*, 9 C. B. 20; *Lewis* v. *Levy*, E. B. & E. 553. *Usill* v. *Hales*, L. R. 3 C. P. D. 319.

[3] *Stevens* v. *Sampson*, L. R. 5 Ex. Div. 53.

[4] *Regalis* v. *Leader*, L. R. 1 Ex. 296, 300.

[5] *R.* v. *Carlisle*, 3 B. & A. 167.

publishes the trial, the blasphemous matter being given in full. B publishes a blasphemous libel.

(3.) [1] A publishes a report of proceedings for perjury against B, and omits certain parts of the cross-examination of the witnesses. This raises a question for the jury whether the effect of the omission is to make the report partial and inaccurate.

(4.) [2] A, in the last illustration, begins his report with an account of the proceedings out of which the charge of perjury against B arose, and observes, "Evidence was given by C and D which entirely negatived B's story." This statement is not within the Article.

(5.) [3] A publishes in a newspaper an account of proceedings before a magistrate against B. The report contains a statement by the magistrate's clerk that B's alleged conduct was exceedingly improper under any circumstances. This observation is not within this Article.

(6.) [4] A publishes a fair report in a newspaper of a proceeding against B for perjury at a police court, which proceedings ended in the dismissal of the charge against B. This publication is not a libel.

(7.) [5] A publishes in a newspaper a fair report of statements of a defamatory kind, made before a magistrate extra-judicially, with a view to asking his advice. This publication may be a libel, as there is no judicial proceeding.

ARTICLE 278.

PUNISHMENT FOR LIBEL.

[6] Every one is liable to a maximum punishment of three years imprisonment and hard labour who

(*a.*) publishes, or threatens to publish, any libel; or

(*b.*) directly or indirectly proposes to abstain from, or offers to prevent the printing or publishing of any matter or thing touching any other person,

with intent

(i.) To extort any money, or security for money, or any valuable thing from such or any other person; or

(ii.) to induce any person to confer or procure for any person any appointment or office of profit or trust.

[1] *Lewis* v. *Levy*, E. B. & E. 551.

[2] *Lewis* v. *Levy*, E. B. & E. 539.

[3] *Delegal* v. *Highley*, 3 Bing. N. C. 960, 961.

[4] *Lewis* v. *Levy*, E. B. & E. 537; see, on the other hand, *Duncan* v. *Thwaites*, 3 B. & C. 556.

[5] *McGregor* v. *Thwaites*, 3 B. & C. 24.

[6] 6 & 7 Vict. c. 96, s. 3.

[1]Every one is liable to a maximum punishment of two years imprisonment, and to pay such fine as the Court directs, who maliciously publishes any defamatory libel knowing it to be false,

[2]or [if he does not know it to be false], to a maximum punishment of one year's imprisonment, and to pay such a fine as the Court may direct.

[1] 6 & 7 Vict. c. 96, s. 4.

[2] Ibid. s. 5. The words bracketed are not in the Act, but are required to complete the sense.

*PART VI.

[1]OFFENCES AGAINST RIGHTS OF PROPERTY AND RIGHTS ARISING OUT OF CONTRACTS.

[1]CHAPTER XXXIII.

PROPERTY—POSSESSION—ASPORTATION—BAILMENT.

ARTICLE 279.

OFFENCES AGAINST RIGHTS OF PROPERTY AND RIGHTS ARISING OUT OF CONTRACTS.

THE violation of rights of property, and rights arising from contracts, is a crime in the cases specified in this part.

* 3 Hist. Cr. Law, ch. xxviii. 121-176.

[1] This and the following chapter have I fear a somewhat abstract appearance, but it is impossible to understand the provisions of the Larceny Act without a knowledge of the doctrines which it presupposes—that is to say, the doctrine as to the definition of theft, and as to things capable of being stolen. The definition of

Such violation may be:

(1.) By taking away property from the owner without his consent

(*a.*) by violence to his person or habitation;

(*b.*) without such violence.

(2.) By persuading the owner by fraud to transfer his rights of property.

(3.) By the misappropriation of property entrusted by the owner to the offender.

(4.) By acts calculated to defraud, whether they actually defraud or not; that is to say—

(*a.*) Forgery.

(*b.*) Personation.

(*c.*) Coining and uttering bad money.

(5.) By wilful and malicious mischief done to property.

(6.) By breaches of certain kinds of contract and interference in certain cases with freedom of trade.

ARTICLE 280.

PROPERTY IN MOVEABLE THINGS.

[1] A person who has a right as against the world at large to do with or to any moveable thing anything which the law does not specifically forbid him to do with or to it, and the right to prevent all other persons from doing therewith or thereto anything whatever which they are not specifically authorized to do, either by law or by his consent, is said to be the general owner of that thing, and that thing is said to be his property, although he may have limited the above-mentioned rights respecting it as regards particular persons by contract.

[2] ARTICLE 281.

POSSESSION.

A moveable thing is said to be in the possession of a

theft, turns on the doctrine of possession (see Note XVII.), and this is unintelligible except in relation to the doctrine of property.

[1] 2 Austin, Jurisprudence, 876, 965.

[2] See Note X.

person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

A moveable thing is in the possession of the husband of any woman, or the master of any servant, who has the custody of it for him, and from whom he can take it at pleasure. The word "servant" here includes any person acting as a servant for any particular purpose or occasion.

The word "custody" means such a relation towards the thing as would constitute possession if the person having custody had it on his own account.

If a servant receives anything for his master from a third person, not being a fellow-servant, he has the possession as distinguished from the custody of it, until he has put it into his master's possession, by putting it into a place or thing belonging to his master, or by some other act of the same sort, whether the servant himself has or has not the custody of that place or thing.

If a servant receives anything belonging to his master from a fellow-servant who has received it from their common master, such thing continues to be in the possession of the master, unless the servant who delivered it delivered it with the intention to pass the property therein to the servant to whom it is delivered, having authority to do so from the master.

If a servant receives anything belonging to his master from a fellow-servant who has received it on the master's account, and has done no act to put it into the master's possession, it is in the possession of the servant who so receives it, and not in his custody merely.

Illustrations.

(1.)[1] A, the master of a house, gives a dinner party, the plate and other things on the table are in his possession, though from time to time they are in the custody of his guests or servants.

(2.)[2] A assigns the goods in his house to trustees for the benefit of his

[1] Founded on 1 Hale, P. C. 506.

[2] *R.* v. *Pratt*, Dear. 360.

creditors. The trustees leave him undisturbed and do not in any way interfere with the goods. A and not the trustees is in the possession of the goods.

(3.) [1] A produces a receipt stamp, and gets B to write a receipt on it in A's presence as for money paid by A to B. The stamp is in A's not B's possession.

(4.) [2] A buys a bureau from B at a sale with money in a secret drawer, of the existence of which neither A nor B is aware. The money is not in B's possession (though the bureau which contains it is) because B cannot be presumed to intend to act as the owner of it when he discovers it.

(5.) [3] A is clerk to B, a banker, money is paid to A on B's account, A keeps it for a short time, and then puts it into the till. The money is in A's possession till it is put into the till, when it passes into B's possession, though A may have the custody of it.

(6.) [4] B leaves a watch with its maker to be regulated. A writes to the maker to send the watch to B at a certain post-office. A then goes to the post-office, and pretending to be B, gets the watch. As soon as the watch reaches the post-office addressed to B, it is in B's possession, as the post-master, as regards the letter and watch, is the servant of the owner.

(7.) [5] B being prevented by a crowd from getting near the pay-place at a railway station, hands a sovereign to A, who is close to it, to pay for her ticket, and give her the change. The sovereign is in B's possession, but in A's custody.

(8.) [6] B sends his servant A with a cart of B's to fetch coals for B from C. A receives the coals from C, carries them in sacks on his back to the cart, puts them into the cart, and drives it back to B. The cart is throughout in B's possession, but in A's custody. The coals are in A's possession whilst he is carrying them on his back to the cart, but as soon as they are deposited in the cart they are in the possession of B, though both coals and cart continue to be in the custody of A.

(9.) [7] A, B's servant, obtains by false pretences B's money from C, another of B's servants. The money after such obtaining is still in B's possession.

(10.) [8] A, B's servant, obtains by false pretences from C, B's cashier, the

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[1] *R.* v. *John Smith*, 2 Den. 449.

[2] *Cartwright* v. *Green*, 8 Ves. 405; *Merry* v. *Green*, 7 M. & W. 623.

[3] *Bazeley's Case*, 2 Leach, 835. This case led to the first Act against embezzlement by clerks and servants. No opinion was publicly delivered on it, but the judges seem to have considered that the act was not felony. Several similar cases are quoted in the argument.

[4] *R.* v. *Kay*, D. & B. 236. See Bramwell, B.'s, remarks on this case in *R.* v. *Middleton*, L. R. 2 C. C. R. 58.

[5] *R.* v. *G. Thompson*, L. & C. 225.

[6] *R.* v. *Reed*, Dear. 168, 257.

[7] *R.* v. *Cooke*, L. R. 1 C. C. R. 295; and see *R.* v. *Robins*, Dear. 418.

[8] *R.* v. *H. Thompson*, L. & C. 233.

property in coins which belonged to B till C gave them to A. The possession of the coins is in A.

(11.) [1] A, B, and C are all servants to D. D's customers pay money to C, who pays it to A, who pays it to B. B, A, and C, each keep separate accounts of their receipts and payments, so as to be checks on each other. Money of D's paid by C to A is in A's possession, and not merely in his custody.

ARTICLE 282.

SPECIAL OWNER.

[2] Every person to whom the general owner of a moveable thing has given a right to the possession as against the general owner is said to be the special owner thereof, or to have a special property therein, and such special property is not divested if the special owner parts with the possession under a mistake.

ARTICLE 283.

POSSESSOR SPECIAL OWNER AS AGAINST STRANGER.

Every person who has obtained by any means the possession of any moveable thing is deemed to be the special owner thereof, as against any person who cannot show a better title thereto.

Illustrations.

(1.) [3] A finds a bezoar-stone in the street and shows it to B, a jeweller, to ascertain its value. B keeps it. A has a right to the stone as against B.

(2.) [4] A steals B's watch. C picks A's pocket of the watch. C steals from A.

ARTICLE 284.

TAKING AND CARRYING AWAY.

A thing is said to be taken and carried away when every

[1] *R.* v. *Masters*, 1 Den. C. C. 332. Mr. Greaves disapproves of this decision, and thinks that in such a case the money would be in the master's possession as soon as the first servant received it on his account. *R.* v. *Murray*, Ry. & Moo. 276, perhaps favours this view, but the whole doctrine of possession is so arbitrary and unreal that it is hard to say that one view is better or worse than another.

[2] *R.* v. *Vincent*, 2 Den. 464.

[3] *Armory* v. *Delamirie*, 1 S. L. C. 357.

[4] Founded on 1 Hale, P. C. 507.

part of it is moved from that specific portion of space which it occupied before it was moved (although the whole of it may not be moved from the whole of the space which it occupied), and when it is severed from any person or thing to which it was attached in such a manner that the taker has, for however short a time, complete control of it. An animal is said to be taken and driven or led away when it is caused to move from the place where it was before.

Illustrations.

(1.) [1] A removes a parcel from one end of a waggon to another. This is a taking and carrying away.

(2.) [2] A lifts a sword partly out of its scabbard. A has taken and carried away the sword.

(3.) [3] A causes a horse to be led out of a stable for him to mount. A has led away the horse.

(4.) [4] A, a postman, instead of delivering a letter in due course, or bringing it back in his pouch, which would be his duty if he could not deliver it, puts it in his pocket intending to steal it. This is a taking and carrying away.

(5.) [5] A snatches a diamond earring from a lady's ear, tearing it out of the ear; it drops from his hand into her hair, and is found there by her afterwards. A has taken and carried away the earring.

(6.) [6] Goods are tied to a string, one end of which is fastened to the bottom of a counter. A takes and carries them as far as the string will permit. A has not carried away the goods.

(7.) [7] A has gas-pipes in his house running through a meter, such pipes being his property. In order to prevent the gas from passing through the meter he puts a connecting pipe between the pipe leading to, and the pipe leading from, the meter, and so diverts the gas from its proper course. This is a taking and carrying away of the gas.

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[1] *Coslet's Case*, 1 Lea. 236.

[2] *R.* v. *Walsh*, 2 Russ. Cr. 153 (from MS. of Bayley, J.). An odd point would arise if the sword and scabbard were merely twisted round in the place which they occupied before they were touched. I suppose this would not be an asportation.

[3] *R.* v. *Pitman*, 2 C. & P. 423.

[4] *R.* v. *Poynton*, L. & C. 247.

[5] *Lafrier's Case*, 1 Lea. 320; *R.* v. *Simpson*, Dears. 421. In this case a watch and chain snatched out of one button-hole caught in another.

[6] 2 East, P. C. 556.

[7] *R.* v. *White*, Dear. 203.

ARTICLE 285.

BAILMENT DEFINED.

When one person delivers, or causes to be delivered, to another any moveable thing in order that it may be kept for the person making the delivery, or that it may be used, gratuitously or otherwise, by the person to whom the delivery is made, or that it may be kept as a pledge by the person to whom delivery is made, or that it may be carried, or that work may be done upon it by the person to whom delivery is made gratuitously or not, and when it is the intention of the parties that the specific thing so delivered, or the article into which it is to be made shall be delivered either to the person making the delivery or to some other person appointed by him to receive it, the person making the delivery is said to bail the thing delivered, the act of delivery is called a bailment; the person making the delivery is called the bailor; the person to whom it is made is called the bailee.[1]

ARTICLE 285*a*.

OFFENCES RELATING TO PROPERTY COMMITTED BY AND AGAINST MARRIED WOMEN.

[2]Every married woman, whether married before, on or after 1st January, 1883, has in her own name, against all persons whomsoever, including her husband, the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property as if such property belonged to her as a *feme sole*, provided that no criminal proceeding can be taken by any wife against her husband by virtue of the Married Woman's Property Act, 1882, while they are living together as to or concerning any

[1] *Coggs* v. *Bernard*, 2 S. L. C. 188, for bailment in general. For the application of the doctrine to criminal law, *R.* v. *Hassell*, L. & C. 58. It seems that a married woman may be a bailee: *R.* v. *Robson*, L. & C. 93. Since the Married Women's Property Act (33 & 34 Vict. c. 93) it would seem clear that in many cases she can.

[2] 45 & 46 Vict. c. 75, s. 12.

property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together concerning property claimed by the wife unless such property has been wrongfully taken by the husband when leaving or deserting, or about to leave or desert his wife.

[1] A wife doing any act with respect to the property of her husband, which if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife, under this article is in like manner liable to criminal proceedings by her husband.

[1] 45 & 46 Vict. c. 75, s. 16 (see Article 301, below).

CHAPTER XXXIV.

[1] *THINGS CAPABLE OR NOT OF BEING STOLEN.*

ARTICLE 286.

THINGS CAPABLE OF BEING STOLEN.

THINGS are or not capable of being stolen according to the provisions contained in this chapter.

ARTICLE 287.

MOVEABLE THINGS—LAND—THINGS FIXED TO LAND.

[2] All moveable things are capable of being stolen, whether they are naturally moveable or whether they were, before being severed therefrom, a part of, or built upon, or growing out of, or fixed in a permanent manner to, the soil of the earth.

The soil of the earth itself cannot be stolen, by removing landmarks, building so as to make permanent encroachments, or other means of the same kind.

Things growing out of, built upon, permanently attached to, or forming part of the soil, cannot be stolen whilst they continue to be so attached to it or to form part of it, or by the act of severance, [3] except in the cases provided for in Articles 326, 327 (*c*), (*d*), (*e*), and 328 (*h*), (*i*), (*k*), (*l*).

ARTICLE 288.

TITLE-DEEDS AND CHOSES IN ACTION.

[4] Documents which in any way relate to the title to real property, and documents which constitute evidence of

[1] 3 Hist. Cr. Law, ch. xxix. p. 121–176.
[2] 2 Russ. Cr. 251–260.
[3] See also Article 296, para. (3).
[4] 2 Russ. Cr. 260–278.

any right of action against any person, are not capable of being stolen, unless they fall within the terms of Article 323 or 327 (*a*); but documents of title to chattels and tokens which represent them are capable of being stolen.

Illustrations.

(1.) [1] An unstamped written agreement for building cottages under which work has been and is being carried on is not capable of being stolen.

(2.) [2] A pawnbroker's ticket is capable of being stolen.

ARTICLE 289.

WATER—GAS—ELECTRICITY.

[3] Running or standing water is not capable of being stolen [4] unless [it seems] it is stored in pipes or reservoirs for the purpose of sale or use, in which case it is capable of being stolen, although money penalties are provided for an improper use of it.

[5] Gas is capable of being stolen.

[6] Electricity is capable of being stolen.

ARTICLE 290.

TAME ANIMALS AND WILD ANIMALS IN CAPTIVITY.

(*a*.) [7] The following animals are capable of being stolen at common law:

[1] *R.* v. *Watts*, Dear. 326.

[2] *R.* v. *Morrison*, Bell, C. C. 158. It has been held that a railway ticket is capable of being stolen: *R.* v. *Boulton*, 1 Den. 508. In *R.* v. *Kilham* (L. R. 1 C. C. R. 264) it is said that "the reasons for this decision do not very clearly appear." It is, indeed, very hard to reconcile the decision with the established principle as to "choses in action," for what is a railway ticket except evidence of a contract by the railway to carry the holder?

[3] "Water is a moveable wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary transient usufructuary property therein" (Blackstone, 1 Steph. Com. 173, 5th ed.). As to water in standpipes, see *Ferens* v. *O'Brien*, L. R. 11 Q. B. D. 21.

[4] Would a man who drew a pail of water out of a reservoir covering many acres be guilty of theft? Hardly, I should think.

[5] *R.* v. *Firth*, L. R. 1 C. C. R. 172; *R.* v. *White*, Dear. 283.

[6] 45 & 46 Vict. c. 56, s. 23, and see Art. 327 (*g*).

[7] 2 Russ. Cr. 253–4 (5th ed.)

Tame animals, whether originally wild or not, birds, bees, and silkworms kept respectively for food, labour, or profit, their young and their produce;

Hawks kept for sport;

Wild animals in a state of captivity kept for food or profit, [1] but not wild animals kept in a state of captivity for curiosity.

(*b.*) The following animals are the subject of larceny by statute:

[2] Dogs, birds, beasts, and other animals ordinarily kept in a state of confinement, or for any domestic purpose.

(*c.*) [3] Animals of a base nature are not capable of being stolen either at common law or by statute unless they are ordinarily kept in a state of confinement, or for any domestic purpose, in which case they are the subjects of larceny by statute.

[3] An animal capable of being stolen, whatever may be its nature, does not cease to be capable of being stolen because it is permitted at certain times to wander abroad.

Illustrations.

(1.) [4] The milk of a cow, the wool on a sheep's back, honey in a hive, are the subjects of larceny at common law.

(2.) [5] Young partridges or pheasants reared under a domestic fowl are regarded as tame, and as such are the subjects of larceny at common law till they become wild.

(3.) [6] Deer in a paddock, rabbits in a hutch, are the subjects of larceny at

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[1] 2 Russ. Cr. 238 (5th ed.)

[2] 24 & 25 Vict. c. 96, ss. 18 and 21. See Article 328.

[3] Coke, 3rd Inst. 108, 9; 2 Russ. Cr. 278–82. Ferrets, so far as I know, are the only animals to which (c) has been applied in modern times. In *R* v. *Searing*, R. & R. 350, "It appeared in evidence that ferrets are valuable animals, and those in question were sold by the prisoner for 9*s*. The judges were of opinion (in 1818) that ferrets though tame and saleable could not be the subject of larceny." I know not whether a ferret would fall within (*b*) or not. It is necessary to mark the distinction between animals which are the subject of larceny at common law and those which are the subject of larceny by statute, because it is recognised in several statutes. See Articles 328 (*d*) and (*f*) and 329.

[4] 2 Russ. Cr. 233–4 (5th ed.)

[5] *R.* v. *Shickle*, L. R. 1 C. C. R. 158; *R.* v. *Cory*, 10 Cox, C. C. 23.

[6] 2 Russ. Cr. 233–4, 238 (5th ed.)

common law. Bears or monkeys kept in dens are the subjects of larceny by statute.

(4.) [1] Young partridges reared under a common hen do not cease, so long as they are practically under the dominion of their owner, to be the subjects of larceny at common law because they are allowed to wander abroad.

(5.) [2] Pigeons in a dovecot are the subjects of larceny at common law although they are allowed to fly about.

ARTICLE 291.

WILD ANIMALS LIVING AND DEAD.

[3] Living wild animals in the enjoyment of their natural liberty, whether they have escaped from confinement or not, are not capable of being stolen although they may be game, and although it may be an offence to pursue or kill them;[4] but the dead body of such an animal is capable of being stolen, and it becomes the property of the person on whose ground the animal dies.[5]

ARTICLE 292.

DEAD BODIES.

[6] The dead body of a human being is not capable of being stolen.

ARTICLE 293.

THINGS ABANDONED.

[7] Things of which the ownership has been abandoned are not capable of being stolen.

[1] *R.* v. *Shickle*, L. R. 1 C. C. R. 158.

[2] *R.* v. *Cheafor*, 2 Den. 361. It has not, however, been decided that pigeons can be stolen whilst actually flying about apparently at liberty. I suppose the question would turn on the knowledge of the offender that the pigeons were tame.

[3] 2 Russ. Cr. 236 (5th ed.)

[4] See Chapter XLII. Oysters are the subject of larceny by statute; see Art. 327 (*f*), but they can hardly be called "living wild animals."

[5] *Blades* v. *Higgs*, 11 H. L. C. 621; 34 L. J. (C.P.) 286. But see *R.* v. *Townley*, L. R. 1 C. C. R. 315, and Article 296, 3rd paragraph.

[6] *R.* v. *Raynes*, 2 East, P. C. 652. Can skeletons and anatomical preparations of parts of dead bodies, or which formerly formed parts of bodies when living, be stolen?—teeth, for instance, intended to be used as false teeth.

[7] 2 East, P. C. 606–7.

Illustrations.

(1.) [1] To convert treasure trove before office found is not theft.

(2.) [2] To convert wreck of the sea is not theft [if the owner is unknown].

(3.) [3] To convert goods absolutely lost to the owner, and as to which there is no reasonable ground for believing that the owner can be found, is not theft.

ARTICLE 294.

THINGS OF NO VALUE.

[4] Things of no value to any one are not capable of being stolen, but things valuable to no one but the owner are capable of being stolen.

Illustration.

[4] The paper and stamps of the notes of a firm of country bankers which have been paid by the London correspondent and which are capable of being re-issued by the country bankers may be stolen, because they are valuable to the country bankers (as saving the expense of printing new notes), though to no one else.

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[1] 3 Inst. 108. It is however a misdemeanor. See Article 342.

[2] 1 Hawk. P. C. 149, s. 38. This must be understood of wreck of the sea unclaimed, and now of wreck not forming part of or belonging to a vessel in distress, as to stealing which see Article 258 (*g*). Penalties for various offences as to wreck are contained in 17 & 18 Vict. c. 104, s. 477–9 (the Merchant Shipping Act, 1854).

[3] The law as to finding property is more fully stated in Article 302.

[4] *Clarke's Case*, 2 Lea. 1036.