MANSLAUGHTER.

(Section 230, post.)

Indictment.— The jurors that A. B. on at in the county did unlawfully kill and slay one

It need not conclude *contra formam statuti:* R. v. Chatburn, 1 Moo. 403. Nor is it necessary where the manslaughter arises from an act of omission, that such act of omission should be stated in the indictment: R. v. Smith, 11 Cox, 210.

Manslaughter is principally distinguishable from murder in this, that though the act which occasions the death is unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder is presumed to be wanting in manslaughter, the act being rather imputed to the infirmity of human nature: Roscoe, 638; Fost. 290.

In this species of homicide malice, which is the main ingredient and characteristic of murder, is considered to be wanting; and though manslaughter is in its degree felonious, yet it is imputed by the benignity of the law to human infirmity; to infirmity which, though in the eye of the law criminal, is considered as incident to the frailty of the human constitution. In order to make an abettor to a manslaughter a principal in the felony, he must be present aiding and abetting the fact committed. It was formerly considered that there could not be any accessories before the fact in any case of manslaughter, because it was presumed to be altogether sudden, and without premeditation. And it was laid down that if the indictment be for murder against A. and that B. and C. were counselling and abetting as accessories before only (and not as *present* aiding and abetting, for such are principals), if A. be found guilty only

of manslaughter, and acquitted of murder, the accessories before will be thereby discharged. But the position ought to be limited to these cases where the killing is sudden and unpremeditated, for there are cases of manslaughter where there may be accessories. Thus a man may be such an accessory by purchasing poison for a pregnant woman to take in order to procure abortion, and which she takes and thereby causes her death: R. v. Gaylor, Dears. & B. 288. If, therefore, upon an indictment against the principal and an accessory after the fact for murder the offence of the principal be reduced to manslaughter, the accessory may be convicted as accessory to the manslaughter: 1 Russ. 783.

Manslaughter is homicide not under the influence of malice: R. v. Taylor, 2 Lewin, 215.

The several instances of manslaughter may be considered in the following order: 1. Cases of provocation. 2. Cases of mutual combat. 3. Cases of resistance to officers of justice, to persons acting in their aid, and to private persons lawfully interfering to apprehend felons, or to prevent a breach of the peace. 4. Cases where the killing takes place in the prosecution of some criminal, unlawful or wanton act. 5. Cases where the killing takes place in consequence of some lawful act being criminally or improperly performed, or of some act performed without lawful authority: 1 Russ. *loc. cit.*

CASES OF PROVOCATION.

Whenever death ensues from the sudden transport of passion, or heat of blood upon a reasonable provocation, and without malice, it is considered as solely imputable to human infirmity and the offence will be manslaughter. It should be remembered that the person sheltering himself under this plea of provocation must make out the circumstances of alleviation to the satisfaction of the court and jury unless they arise out of the evidence produced against him, as the presumption of law deems all homicide to be malicious until the contrary is proved. The most grievous

words of reproach, contemptuous and insulting actions or gestures, or trespasses against lands or goods, will not free the party killing from the guilt of murder, if upon such provocation a deadly weapon was made use of, or an intention to kill, or to do some great bodily harm, was otherwise manifested. But if no such weapon be used, or intention manifested, and the party so provoked give the other a box on the ear or strike with a stick or other weapon not likely to kill, and kill him unluckily and against his intention, it will be only manslaughter. Where an assault is made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose, and the party so assaulted kills the aggressor, the crime will be reduced to manslaughter in case it appears that the assault was resented immediately, and the aggressor killed in the heat of blood, the *furor brevis* occasioned by the provocation. So if A. be passing along the street, and B. meeting him (there being convenient distance between A. and the wall) take the wall of him and jostle him, and thereupon A. kill B., it is said that such jostling would amount to provocation which would make the killing only manslaughter.

And again it appears to have been considered that where A. riding on the road B. whipped the horse of A. out of the track, and then A. alighted and killed B. it was only manslaughter. But in the two last cases it should seem that the first aggression must have been accompanied with circumstances of great violence or insolence; for it is not every trivial provocation which, in point of law, amounts to an assault, that will of course reduce the crime of the party killing to manslaughter. Even a blow will not be considered as sufficient provocation to extenuate in cases where the revenge is disproportioned to the injury, and outrageous and barbarous in its nature; but where the blow which gave the provocation has been so violent as reasonably to have caused a sudden transport of passion and heat of blood, the killing which ensued has been regarded as the consequence

of human infirmity, and entitled to lenient consideration: 1 Russ. 784. For cases on this defence of provocation: *see ante*, pp. 159, *et seq.*

In R. v. Fisher, 8 C. & P. 182, 1 Russ. 725, it was ruled that whether the blood has had time to cool or not is a question for the court and not for the jury, but it is for the jury to find what length of time elapsed between the provocation received, and the act done. But in R. v. Lynch, 5 C. & P. 324; R. v. Hayward, 6 C. & P. 157; R. v. Eagle, 2 F. &. F 827; the question, whether or not the blow was struck before the blood had time to cool and in the heat of passion, was left to the jury; and this seems now settled to be the law on the question. The English commissioners, 4th Report, p. XXV, are also of opinion that "the law may pronounce whether any extenuating occasion of provocation existed, but it is for the jury to decide whether the offender acted solely on that provocation, or was guilty of a malicious excess in respect of the instrument used or the manner of using it:" *see* s. 229, *post.*

Cases of mutual combat.—Where, upon words of reproach, or any other sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being sought or taken on either side, if death happen under such circumstances the offence of the party killing will amount only to manslaughter. If A. has formed a deliberate design to kill B. and after this they meet and have a quarrel and many blows pass, and A. kills B., this will be murder if the jury is of opinion that the death was in consequence of previous malice, and not of the sudden provocation: R. v. Kirkham, 8 C. & P. 115. If, after an exchange of blows on equal terms, one of the parties on a sudden and without any such intention at the commencement of the affray snatches up a deadly weapon and kills the other party with it, such killing will only amount to manslaughter; but it will amount to murder if he placed the weapon, before they began to fight, so that he might use it during

the affray: 1 Russ. 731; R. v. Kessal, 1 C. & P. 437; R. v. Whiteley, 1 Lewin, 173.

Where there had been mutual blows, and then, upon one of the parties being pushed down on the ground, the other stamped upon his stomach and belly with great force, and thereby killed him, it was considered only to be manslaughter: R. v. Ayes, R. & R. 166; *sed quære.*

If two persons be fighting, and another interfere with intent to part them but do not signify such intent, and he be killed by one of the combatants, this is but manslaughter.

A sparring match with gloves fairly conducted in a private room is not unlawful, and therefore death caused by an injury received during such a match does not amount to manslaughter: R. v. Young, 10 Cox, 371.

Cases of resistance to officers of justice, to persons acting in their aid, and to private persons lawfully interfering to apprehend felons or to prevent a breach of the peace. See s. 229, s-s. 4. Attempting illegally to arrest a man is sufficient to reduce killing the person making the attempt to manslaughter, though the arrest was not actually made, and though the prisoner had armed himself with a deadly weapon to resist such attempt, if the prisoner was in such a situation that he could not have escaped from the arrest; and it is not necessary that he should have given warning to the person attempting to arrest him before he struck the blow: R. v. Thompson, 1 Moo. 80; s. 229, *post.*

If a constable takes a man without warrant upon a charge which gives him no authority to do so, and the prisoner runs away and is pursued by J. S., who was with the constable at the time, and charged by him to assist, and the man kills J. S. to prevent his retaking him, it will not be murder but manslaughter only; because if the original arrest was illegal the recaption would have been so likewise: R. v. Curvan, 1 Moo. 132.

Where a common soldier stabbed a sergeant in the same regiment who had arrested him for some alleged misdemeanour, *held*, that as the articles of war were not produced, by which the arrest might have been justified, it was only manslaughter as no authority appeared for the arrest: R. v. Withers, 1 East, P. C. 295.

A warrant leaving a blank for the christian name of the person to be apprehended, and giving no reason for omitting it but describing him only as the son of J. S. (it appearing that J. S. had four sons, all living in his house), and stating the charge to be for assaulting A. without particularizing the time, place or any other circumstances of the assault, is too general and unspecific. A resistance to an arrest thereon, and killing the person attempting to execute it, will not be murder: R. v. Hood, 1 Moo. 281. *This is not now law*; s. 229, *post*.

A constable having a warrant to apprehend A. gave it to his son, who in attempting to arrest A. was stabbed by him with a knife which A. happened to have in his hand at the time, the constable then being in sight, but a quarter of a mile off: *held*, that this arrest was illegal, and that if death had ensued this would have been manslaughter only unless it was shown that A. had prepared the knife beforehand to resist the illegal violence: R. v. Patience, 7 C. & P. 795.

In order to justify an arrest even by an officer, under a warrant, for a mere misdemeanour, it is necessary that he should have the warrant with him at the time. Therefore, in a case where the officer, although he had seen the warrant, had it not with him at the time, and it did not appear that the party knew of it; *held*, that the arrest was not lawful; and the person against whom the warrant was issued resisting apprehension and killing the officer; *held*, that it was manslaughter only: R. v. Chapman, 12 Cox, 4; s. 32 *ante*.

"If a prisoner, having been lawfully apprehended by a police constable on a criminal charge, uses violence to the constable, or to any one lawfully aiding or assisting him, which causes death, and does so with intent to inflict grievous bodily harm, he is guilty of murder; and so if he does so only with intent to escape. But if, in the course of the struggle, he accidentally causes an injury it would be manslaughter. Suppose a constable, having a good and a bad warrant, arrest a man on the bad warrant only which he allows the man to read who sees it is void and resists his arrest on that ground, and the result is the death of the officer; if this had been the only authority the officer had the offence would have been only manslaughter; is the man guilty of murder by reason of the good warrant of which he knew nothing? It would seem that there are strong reasons for saying that he would not be guilty of murder. The ground on which the killing an officer is murder is that the killer is wilfully setting the law at defiance, and killing an officer in the execution of his duty. The ground on which the killing of an officer whilst executing an unlawful warrant is manslaughter is that every man has a right to resist an unlawful arrest, and that such an arrest is a sufficient provocation to reduce the killing to manslaughter. In the supposed case the killer would not be setting the law at defiance, but would be resisting to what appeared to him to be an unlawful arrest; and the actual provocation would be just as great as if the bad warrant alone existed. It is of the essence of a warrant that 'the party upon whom it is executed should *know* whether he is bound to submit to the arrest.' (*Per* Coltman, J., in Hoye v. Bush, citing R. v. Weir, 1 B. & C. 288.) And where an arrest is made without a warrant it is of the essence of the lawfulness of the arrest that the party arrested should have either express or implied notice of the cause of the arrest. Now, where a constable in the supposed case arrests on the void warrant, the party arrested has no express notice of the good warrant for it is not shown, and no implied notice of it for everything done by the constable is referable to the void warrant; and, besides, the conduct of the constable is calculated to mislead, and it may well be that the party is innocent, and knows nothing of the offence specified in the valid warrant. Lastly, it must be remembered that in such a case the

criminality of the act depends upon the intention of the party arrested, and that intention cannot in any way be affected by facts of which he is ignorant."

"On the other hand, it would seem to be clear that, where an officer has two or more warrants one of which is bad, and he shows all to the party to be arrested who kills the officer in resisting the arrest, it would be murder, for he was bound to yield obedience to the lawful authority." By Greaves, in notes on "arrest without warrant."—Cox & Saunder's Crim. Law Consol. Acts, p. lxxvii.

Cases where the killing takes place in the prosecution of some criminal, unlawful or wanton act.—Where from an action unlawful in itself, done deliberately and with mischievous intention, death ensues, though against or beside the original intention of the party, it will be murder; and if such deliberation and mischievous intention do not appear, which is matter of fact and to be attested from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter: R. v. Fenton, 1 Lewin, 179; R. v. Franklin, 15 Cox, 163; s. 227, *post*.

And if a person breaking an unruly horse ride him amongst a crowd of people, and death ensue from the viciousness of the animal, and it appear clearly to have been done heedlessly and incautiously only, and not with the intent to do mischief, the crime will be manslaughter: 1 Russ. 849.

Where one, having had his pocket picked, seized the offender, and being encouraged by a concourse of people threw him into an adjoining pond by way of avenging the theft by ducking him but without any intention of taking away his life, this was held to be manslaughter only: R. v. Fray, 1 East, P. C. 236.

Causing the death of a child by giving it spirituous liquors in a quantity quite unfit for its tender age amounts to manslaughter: R. v. Martin, 3 C. & P. 211.

If a man take a gun not knowing whether it is loaded or unloaded and, using no means to ascertain, fires it in the

direction of any other person and death ensues, this is manslaughter: R. v. Campbell, 11 Cox, 323.

The prisoner was charged with manslaughter. The evidence showed that the prisoner had struck the deceased twice with a heavy stick, that he had afterwards left him asleep by the side of a small fire in a country by-lane during the whole of a frosty night in January, and the next morning, finding him just alive, put him under some straw in a barn where his body was found some months after. The jury were directed that if the death of the deceased had resulted from the beating or from the exposure during the night in question, such exposure being the result of the prisoner's criminal negligence, or from the prisoner leaving the body under the straw ill but not dead, the prisoner was guilty of manslaughter: verdict, manslaughter: R. v. Martin, 11 Cox, 136; *see* R. v. Towers, 12 Cox, 530, as to causing death through frightening the deceased; and R. v. Dugal, 4 Q. L. R. 350; s. 223, *post*.

Cases where the killing takes place in consequence of some lawful act being criminally or improperly performed, or of some act performed without lawful authority.—Where a felony has been committed, or a dangerous wound given, and the party flies from justice, he may be killed in the pursuit if he cannot otherwise be taken. And the same rule holds if a felon, after arrest, break away as he is carried to gaol, and his pursuers cannot retake without killing him. But if he may be taken in any case without such severity, it is at least manslaughter in him who kills him, and the jury ought to inquire whether it were done of necessity or not: ss. 33, 58, *ante*.

In making arrests in cases of misdemeanour and breach of the peace (with the exception, however, of some cases of flagrant misdemeanours), it is not lawful to kill the party accused if he fly from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him, and generally speaking it will be murder; but

under some circumstances it may amount only to manslaughter, if it appear that death was not intended: 1 Russ. 858.

If an officer, whose duty it is to execute a sentence of whipping upon a criminal, should be so barbarous as to cause the party's death by excessive execution of the sentence, he will at least be guilty of manslaughter: Hawk. c. 29, s. 5.

Killing by correction.—Moderate and reasonable correction may properly be given by parents, masters and other persons, having authority in *foro domestico*, to those who are under their care; but if the correction be immoderate or unreasonable, either in the measure of it or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances of the case: ss. 55, 58, *ante*. If it be done with a dangerous weapon, likely to kill or maim, due regard being always had to the age and strength of the party, it will be murder; but if with a cudgel or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter: 1 Russ. 861.

A schoolmaster who, on the second day of a boy's return to school, wrote to his parent, proposing to beat him severely in order to subdue his alleged obstinacy, and and on receiving the father's reply assenting thereto beat the boy for two hours and a half secretly in the night, and with a thick stick, until he died, is guilty of manslaughter: R. v. Hopley, 2 F. & F. 202.

Where a person in *loco parentis* inflicts corporal punishment on a child, and compels it to work for an unreasonable number of hours and beyond its strength, and the child dies, the death being of consumption but hastened by the ill-treatment, it will not be murder but only manslaughter in the person inflicting the punishment, although it was cruel and excessive, and accompanied by violent and threatening language, if such person believed that the child

was shamming illness, and was really able to do the quantity of work required: R. v. Cheeseman, 7 C. & P. 454.

An infant, two years and a half old, is not capable of appreciating correction; a father therefore is not justified in correcting it, and if the infant dies owing to such correction the father is guilty of manslaughter: R. v. Griffin, 11 Cox, 402.

Death caused by negligence.—Where persons employed about such of their lawful occupation, from whence danger may probably arise to others, neglect the ordinary precautions, it will be manslaughter at least, if death is caused by such negligence: 1 Russ. 864; s. 213, *ante*.

That which constitutes murder when by design and of malice prepense, constitutes manslaughter when arising from culpable negligence. The deceased was with others employed in walling the inside of a shaft. It was the duty of the prisoner to place a stage over the mouth of the shaft, and the death of deceased was occasioned by the negligent omission on his part to perform such duty. He was convicted of manslaughter, and upon a case reserved the conviction was affirmed: R. v. Hughes, 7 Cox, 301; ss. 212, 213, 214, *ante*.

The prisoner, as the private servant of B., the owner of a tramway crossing a public road, was entrusted to watch it. While he was absent from his duty an accident happened and C. was killed. The private Act of Parliament, authorizing the road, did not require B. to watch the tramway: *Held*, that there was no duty between B. and the public, and therefore that the prisoner was not guilty of negligence: R. v. Smith, 11 Cox, 210.

Although it is manslaughter, where death was the result of the joint negligence of the prisoner and others, yet it must have been the direct result wholly or in part of the prisoner's negligence, and his neglect must have been wholly or in part the proximate and efficient cause of the death, and it is not so where the negligence of some other

person has intervened between his act or omission and the fatal result: R. v. Ledger, 2 F. & F. 857; R. v. Pocock, 17 Q. B. 34.

If a person is driving a cart at an unusually rapid rate, and drives over another and kills him, he is guilty of manslaughter though he called to the deceased to get out of the way, and he might have done so if he had not been in a state of intoxication: R. v. Walker, 1 C. & P. 320; s. 220, *post*.

And it is no defence to an indictment for manslaughter where the death of the deceased is shown to have been caused in part by the negligence of the prisoner, that the deceased was also guilty of negligence, and so contributed to his own death. Contributory negligence is not an answer to a criminal charge: R. v. Swindall, 2 Cox, 141.

In summing up in that case, Pollock, C.B., said:

"The prisoners are charged with contributing to the death of the deceased by their negligence and improper conduct; and, if they did so, it matters not whether the deceased was deaf, or drunk, or negligent, or in part contributed to his own death; for in this consists a great distinction between civil and criminal proceedings. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy for damages against the other. But in the case of loss of life, the law takes a totally different view; for there each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness and negligence of any one person has contributed to the death of another person."

In R. v. Dant, 10 Cox, 102, L. & C. 570, Blackburn, J., said: "I have never heard that upon an indictment for manslaughter, the accused is entitled to be acquitted because the person who lost his life was in some way to blame." And Erle, Channell, Mellor and Montague Smith, JJ., concurred.

And in R. v. Hutchinson, 9 Cox, 555, Byles, J., in his charge to the Grand Jury, said: "If the man had not been killed, and had brought an action for damages, or if his wife and family had brought an action, if he had in any degree contributed to the result an action could not be maintained. But in a criminal case it was different. The Queen was the prosecutor and could be guilty of no negligence; and if both the parties were negligent the survivor was guilty."

And the same learned Judge, in R. v. Kew, 12 Cox, 355, said: "It has been contended if there was contributory negligence on the part of the deceased, then the defendants are not liable. No doubt contributory negligence would be an answer to an action. But who is the plaintiff here? The Queen, as representing the nation; and if they were all negligent together I think their negligence would be no defence."

And Lush, J., in R. v. Jones, 11 Cox, 544, distinctly said that contributory negligence on the part of the deceased was no excuse in a criminal case.

In R. v. Birchall, 4 F. & F. 1087, Willes, J., however, held that where the deceased has contributed to his death by his own negligence, although there may have been negligence on the part of the prisoner, the latter cannot be convicted of manslaughter, observing that, until he saw a decision to the contrary, he should hold that a man was not criminally responsible for negligence for which he would not be responsible in an action. But that case has not been followed.

If a man undertakes to drive another in a vehicle he is bound to take proper care in regard to the safety of the man under his charge; and if by culpably negligent driving he causes the death of the other he will be guilty of manslaughter: R. v. Jones, 11 Cox, 544.

In order to convict the captain of a steamer of manslaughter in causing a death by running down another

vessel, there must be some act of personal misconduct or personal negligence shown on his part: R. v. Allen, 7 C. & P. 153; R. v. Green, 7 C. & P. 156; R. v. Taylor, 9 C. & P. 672.

On an indictment against an engine driver and a fireman of a railway train for the manslaughter of persons killed while travelling in a preceding train, by the prisoner's train running into it, it appeared that on the day in question special instructions had been issued to them, which in some respects differed from the general rules and regulations, and altered the signal for danger so as to make it mean not "stop" but "proceed with caution;" that the trains were started by the superior officers of the company irregularly, at intervals of about five minutes; that the preceding train had stopped for three minutes, without any notice to the prisoners except the signal for caution; and that their train was being driven at an excessive rate of speed, and that then they did not slacken immediately on perceiving the signal, but almost immediately, and that as soon as they saw the preceding train they did their best to stop but without effect: *Held*, first, that the special rules, so far as they were not consistent with the general rules, superseded them; secondly, that if the prisoners honestly believed they were observing them, and they were not obviously illegal, they were not criminally responsible; thirdly, that the fireman being bound to obey the directions of the engine driver, and, so far as appeared, having done so, there was no case against him: R. v. Trainer, 4 F. & F. 105.

Where a fatal railway accident had been caused by the train running off the line, at a spot where rails had been taken up without allowing sufficient time to replace them, and also without giving sufficient, or at all events effective, warning to the engine-driver; and it was the duty of the foreman of plate layers to direct when the work should be done: *Held*, that though he was under the general control

of an inspector of the district, the inspector was not liable but that the foreman was, assuming his negligence to have been a material and a substantial cause of the accident, even although there had also been negligence on the part of the engine-driver in not keeping a sufficient lookout: R. v. Benge, 4 F. & F. 504.

By medical practitioners and quacks.—If a person, *bona fide* and honestly exercising his best skill to cure a patient, performs an operation which causes the patient's death, he is not guilty of manslaughter, and it makes no difference whether such person is a regular surgeon or not, nor whether he has had a regular medical education or not: R. v. Van Butchell, 3 C. & P. 629. A person in the habit of acting as a man midwife tearing away part of the prolapsed uterus of one of his patients, supposing it to be part of the placenta, by means of which the patient dies, is not indictable for manslaughter unless he is guilty of criminal misconduct arising either from the grossest ignorance or from the most criminal inattention: R. v. Williamson, 3 C. & P. 635. A person acting as a medical man, whether licensed or unlicensed, is not criminally responsible for the death of a patient occasioned by his treatment unless his conduct is characterized either by gross ignorance of his art, or by gross inattention to his patient's safety: R. v. St. John Long, 4 C. & P. 398. Where a person undertaking the cure of a disease (whether he has received a medical education or not), is guilty of gross negligence in attending his patient after he had applied a remedy, or of gross rashness in the application of it, and death ensues in consequence of either, he is liable to be convicted of manslaughter: R. v. St. John Long (2nd case), 4 C. & P. 423; s. 212, *ante*.

Where a person grossly ignorant of medicine administers a dangerous remedy to one labouring under a disease, proper medical assistance being at the time procurable, and that dangerous remedy causes death, the person so administering it is guilty of manslaughter: R. v. Webb, 2 Lewin, 196.

In this case Lord Lyndhurst laid down the following rule: "In these cases there is no difference between a licensed physician or surgeon, and a person acting as physician or surgeon without license. In either case, if a party having a competent degree of skill and knowledge makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter."

If a medical man, though lawfully qualified to practice as such, causes the death of a person by the grossly unskilful, or grossly incautious, use of a dangerous instrument, he is guilty of manslaughter: R. v. Spilling, 2 M. & Rob. 107. Any person, whether a licensed medical practitioner or not, who deals with the life or health of any of Her Majesty's subjects is bound to have competent skill, and is bound to treat his or her patients with care, attention and assiduity; and if a patient dies for want of either the person is guilty of manslaughter: R. v. Spiller, 5 C. & P. 333; R. v. Simpson, 1 Lewin, 172; R. v. Ferguson, 1 Lewin, 181. In cases of this nature the question for the jury is always, whether the prisoner caused the death by his criminal inattention and carelessness: R. v. Crick, and R. v. Crook, 1 F. & F. 519, 521; R. v. Macleod, 12 Cox, 534. On an indictment for manslaughter by reason of gross ignorance and negligence in surgical treatment, neither on one side nor on the other can evidence be gone into of former cases treated by the prisoner: R. v. Whitehead, 3 C. & K. 202.

A mistake on the part of a chemist in putting a poisonous liniment into a medicine bottle, instead of a liniment bottle, in consequence of which the liniment was taken by

his customer internally with fatal results, the mistake being made under circumstances which rather threw the prisoner off his guard, does not amount to such criminal negligence as will warrant a conviction for manslaughter: R. v. Noakes, 4 F. &. F. 920. On an indictment for manslaughter against a medical man by administering poison by mistake for some other drug it is not sufficient for the prosecution merely to show that the prisoner who dispensed his own drugs supplied a mixture which contained a large quantity of poison; they are bound also to show that this happened through the gross negligence of the prisoner: R. v. Spencer, 10 Cox, 525. A medical man who administered to his mother for some disease, prussic acid, of which she almost immediately died, is not guilty of manslaughter, it not appearing distinctly what the quantity was which he administered, or what quantity would be too great to be administered with safety to life: R. v. Bull, 2 F. & F. 201. If an unskilled practitioner ventures to prescribe dangerous medicines of the use of which he is ignorant, that is culpable rashness for which he will be held responsible: R. v. Markuss, 4 F. & F. 356; R. v. Macleod, 12 Cox, 534.

The prisoner was indicted for the manslaughter of an infant child; the prisoner, who practiced midwifery, was called in to attend a woman who was taken in labour, and when the head of the child became visible the prisoner, being grossly ignorant of the art which he professed, and unable to deliver the woman with safety to herself and the child, as might have been done by a person of ordinary skill, broke and compressed the skull of the infant, and thereby occasioned its death immediately after it was born; the prisoner was found guilty; it was submitted that the child being *en ventre de sa mère* when the wound was given the prisoner could not be guilty of manslaughter; but, upon a case reserved, the judges were unanimously of opinion that the conviction was right: R. v. Senior, 1 Moo. 346; s. 219, *post*.

NEGLECT OF NATURAL DUTIES.

See Section 215, ante.

Lastly, there are certain natural and moral duties towards others which, if a person neglect without malicious intention, and death ensue, he will be guilty of manslaughter. Of this nature is the duty of a parent to supply a child with proper food. When a child is very young and not weaned the mother is criminally responsible if the death arose from her not suckling it when she was capable of doing so: R. v. Edwards, 8 C. & P. 611. But if the child be older the omission to provide food is the omission of the husband, and the crime of the wife can only be the omitting to deliver the food to the child after the husband has provided it: R. v. Saunders, 7 C. & P. 277.

A master is not bound by the common law to find medical advice for his servant; but the case is different with respect to an apprentice, for a master is bound during the illness of his apprentice to find him with proper medicines, and if he die for want of them it is manslaughter in the master: R. v. Smith, 8 C. & P. 153. Where a person undertakes to provide necessaries for a person who is so aged and infirm that he is incapable of doing it for himself, and through his neglect to perform his undertaking death ensues, he is criminally responsible. On an indictment for the murder of an aged and infirm woman by confining her against her will, and not providing her with meat, drink, clothing, firing, medicines and other necessaries, and not allowing her the enjoyment of the open air, in breach of an alleged duty, if the jury think that the prisoner was guilty of wilful neglect, so gross and wilful that they are satisfied he must have contemplated her death, he will be guilty of murder; but if they only think that he was so careless that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter: R. v. Marriott, 8 C. & P. 425.

To render a person liable to conviction for manslaughter through neglect of duty there must be such a degree of culpability in his conduct as to amount to gross negligence: R. v. Finney, 12 Cox, 625; R. v. Nicholls, 13 Cox, 75; R. v. Handley, 13 Cox, 79; R. v. Morby, 15 Cox, 35, Warb. Lead. Cas. 115; R. v. Elliott, 16 Cox, 710.

OTHER CASES OF MANSLAUGHTER.

Death resulting from fear, caused by menaces of personal violence and assault, though without battery, is sufficient in law to support an indictment for manslaughter: R. v. Dugal, 4 Q. L. R. 350; ss. 220, 223, *post*.

One who points a gun at another person, without previously examining whether it be loaded or not, will, if the weapon should accidentally go off and kill him towards whom it is pointed, be guilty of manslaughter: R. v. Jones, 12 Cox, 628; *see* R. v. Weston, 14 Cox, 346; s. 213, *ante*.

Three persons went out together for rifle practice. They selected a field near to a house, and put up a target in a tree at a distance of about a hundred yards. Four or five shots were fired, and by one of them a boy who was in a tree in a garden, at a distance of three hundred and ninety-three yards, was killed. It was not clear which of the three persons fired the shot that killed the boy. *Held*, that all three were guilty of manslaughter: R. v. Salmon, 14 Cox, 494, Warb. Lead. Cas. 113.

If an injury is inflicted by one man upon another, which compelled the injured man, under medical advice, to submit to an operation during which he dies, for that death the assailant is guilty of manslaughter: R. v. Davis, 15 Cox, 174; s. 226, *post*.

An indictment for manslaughter will not lie against the managing director of a railway company by reason of the omission to do something which the company, by its charter, was not bound to do, although he had personally promised to do it: *Ex parte* Brydges, 18 L. C. J. 141.

An indictment contained two counts, one charging the prisoner with murdering M. J. T. on the 10th of November, 1881, the other with manslaughter of the said M. J. T. on the same day. The grand jury found a "true bill." A motion to quash the indictment for misjoinder was refused, the counsel for the prosecution electing to proceed on the first count only. *Held*, affirming the judgment of the Supreme Court of New Brunswick, that the motion could not be granted: Theal v. R., 7 S. C. R. 397.

The prisoner was convicted of manslaughter in killing his wife, who died on the 10th Nov., 1881. The immediate cause of her death was acute inflammation of the liver which the medical testimony proved might be occasioned by a blow or fall against a hard substance. About three weeks before her death (17th October preceding), the prisoner had knocked his wife down with a bottle; she fell against a door and remained on the floor insensible for some time; she was confined to her bed soon afterwards and never recovered. Evidence was given of frequent acts of violence committed by the prisoner upon his wife, within a year of her death, by knocking her down and kicking her in the side. The following questions were reserved, viz., whether the evidence of assaults and violence committed by the prisoner upon the deceased, prior to the 10th Nov. or the 17th Oct., 1881, was properly received, and whether there was any evidence to leave to the jury to sustain the charge in the first count of the indictment. *Held*, affirming the judgment of the Supreme Court of New Brunswick, that the evidence was properly received and that there was evidence to submit to the jury that the disease which caused her death was produced by the injuries inflicted by the prisoner: *Id.*

A corporal was tried for murder and convicted of manslaughter. The evidence showed that W. (the deceased), having been confined for intoxication, defendant with two men was ordered by a sergeant to tie him so that he could

not make a noise. The order was not executed so as to stop the noise, and a second order was given to tie W. so that he could not shout. To effect this defendant caused W. to be tied in a certain manner, and he died in that position, *Held*, that whether the illegality consisted in the order of the sergeant, or in the manner in which it was carried out, the defendant might be properly convicted: *held*, also, that the jury were justified in finding that the death of W. was caused or accelerated by the way in which he was tied by defendant, or by his directions: R v. Stowe, 2 G. & O. (N. S.) 121.

In the North West Territories it is not necessary that a trial for murder should be based upon an indictment by a grand jury or a coroner's inquest: R. v. Connor, 2 Man. L. R. 235.

As to insanity as a defence in criminal cases: *see* R. v. Riel, 2 Man. L. R. 321.

Evidence of one crime may be given to show a motive for committing another; and where several felonies are part of the same transaction evidence of all is admissible upon the trial of an indictment for any of them; but where a prisoner indicted for murder, committed while resisting constables about to arrest him, had, with others, been guilty of riotous acts several days before, it is doubtful if evidence of such riotous conduct is admissible, even for the purpose of showing the prisoner's knowledge that he was liable to be arrested, and, therefore, had a motive to resist the officers: R. v. Chasson, 3 Pugs. (N. B.) 546.

As to the admissibility of dying declarations the most recent cases are: R. v. Morgan, 14 Cox, 337; R. v. Bedingfield, 14 Cox, 341; *see* same case in Warb. Lead. Cas. 254; R. v. Hubbard, 14 Cox, 565; R. v. Osman, 15 Cox, 1; R. v. Goddard, 15 Cox, 7; R. v. Smith, 16 Cox, 170; R. v. Gloster, 16 Cox, 471; R. v. Mitchell, 17 Cox, 503; *see* also R. v. Jenkins, 11 Cox, 250, Warb. Lead. Cas. 252, and cases there collected; R. v. McMahon, 18 O. R. 502.

Homicide in self-defence, *i.e.*, committed *se et sua defendendo* in defence of a man's person or property, upon some sudden affray, has been usually classed with homicide *per infortunium*, under the title of *excusable*, as distinct from *justifiable*, because it was formerly considered by the law as in some measure blameable, and the person convicted either of that or of homicide by misadventure forfeited his goods: Fost. 273.

Homicide *se defendendo* seems to be where one, who has no other possible means of preserving his life from one who combats with him on a sudden quarrel, or of defending his person from one who attempts to beat him (especially if such attempt be made upon him in his own house), kills the person by whom he is reduced to such inevitable necessity. And not only he who on assault retreats to a wall or some such straight, beyond which he can go no farther, before he kills the other is judged by the law to act upon unavoidable necessity; but also he who, being assaulted in such a manner and such a place that he cannot go back without manifestly endangering his life, kills the other without retreating at all: Hawk. c. 11, ss. 13-14; ss. 51, 52, *ante*.

In the case of justifiable self-defence the injured party may repel force by force in defence of his person, habitation or property against one who manifestly intendeth and endeavoureth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable: Fost. 273.

Before a person can avail himself of the defence that he used a weapon in defence of his life he must satisfy the jury that the defence was necessary, that he did all he could to avoid it, and that it was necessary to protect himself from such bodily harm as would give him a reasonable apprehension that his life was in immediate danger. If he

used the weapon having no other means of resistance and no means of escape, in such cases, if he retreated as far as he could, he would be justified: R. v. Smith, 8 C. & P. 160; R. v. Bull, 9 C. & P. 22.

Under the excuse of self-defence the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are justified, the act of the relation being construed as the act of the party himself: 1 Hale, 484; ss. 47, 51, 52, *ante*.

Chance medley, or as it was sometimes written, *chaud medley*, has been often indiscriminately applied to any manner of homicide by misadventure; its correct interpretation seems to be a killing happening in a sudden encounter; it will be manslaughter or self-defence according to whether the slayer was actually striving and combating at the time the mortal stroke was given, or had *bona fide* endeavoured to withdraw from the contest, and afterwards, being closely pressed, killed his antagonist to avoid his own destruction; in the latter case it will be justifiable or excusable homicide, in the former, manslaughter: 1 Russ. 888.

A man is not justified in killing a mere trespasser; but if, in attempting to turn him out of his house, he is assaulted by the trespasser he may kill him, and it will be *se defendendo*, supposing that he was not able by any other means to avoid the assault or retain his lawful possession, and in such a case a man need not fly as far as he can as in other cases of *se defendendo*, for he has a right to the protection of his own house: 1 Hale, 485; ss. 51 *et seq.*, *ante*.

But it would seem that in no case is a man justified in intentionally taking away the life of a mere trespasser, his own life not being in jeopardy; he is only protected from the consequences of such force as is reasonably necessary to turn the wrong-doer out. A kick has been

held an unjustifiable mode of doing so: Wild's Case, 2 Lewin, 214. Throwing a stone has been held a proper mode: Hinchcliffe's Case, 1 Lewin, 161; *see* R. v. Moir, *ante*, p. 25 under s. 53.

Homicide committed in prevention of a forcible and atrocious crime, amounting to felony, is justifiable. As if a man come to burn my house, and I shoot out of my house, or issue out of my house and kill him. So, if A. makes an assault upon B. a woman or maid, with intent to ravish her, and she kills him in the attempt, it is justifiable, because he intended to commit a felony. And not only the person upon whom a felony is attempted may repel force by force, but also his servant or any other person present may interpose to prevent the mischief; and if death ensue the party so interposing will be justified; but the attempt to commit a felony should be apparent and not left in doubt, otherwise the homicide will be manslaughter at least; and the rule does not extend to felonies without force, such as picking pockets, nor to misdemeanours of any kind: 2 Burn, 1314; ss. 51, 52, *ante*.

It should be observed that, as the killing in these cases is only justifiable on the ground of necessity, it cannot be justified unless all other convenient means of preventing the violence are absent or exhausted; thus a person set to watch a yard or garden is not justified in shooting one who comes into it in the night, even if he should see him go into his master's hen roost, for he ought first to see if he could not take measures for his apprehension; but if, from the conduct of the party, he has fair ground for believing his own life in actual and immediate danger, he is justified in shooting him: R. v. Scully, 1 C. & P. 319. Nor is a person justified in firing a pistol on every forcible intrusion into his house at night; he ought, if he have reasonable opportunity, to endeavour to remove him without having recourse to the last extremity: Meade's Case, 1 Lewin, 184.

As to justifiable homicide by officers of justice or other persons in arresting felons: *see ante*, p. 178. As to homicide by misadventure, 2 Burn, 816.

Petit treason was a breach of the lower allegiance of private and domestic faith, and considered as proceeding from the same principle of treachery in private life as would have led the person harbouring it to have conspired in public against his liege lord and sovereign. At common law the instances of this kind of crime were somewhat numerous and involved in some uncertainty; but by the 25 Edw. III. c. 2, they were reduced to the following cases: 1. Where a servant killed his master. 2. Where a wife killed her husband. 3. Where an ecclesiastical person, secular or regular, killed his superior, to whom he owed faith and obedience.

PART XVII.

HOMICIDE.

DEFINITION.

218. Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever.

WHEN A CHILD BECOMES A HUMAN BEING.

219. A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether it has breathed or not, whether it has an independent circulation or not, and whether the navel string is severed or not. The killing of such child is homicide when it dies in consequence of injuries received before, during or after birth.

See ss. 239, 240, 271 *post*; R. v. Poulton, 5 C. & P. 329; R. v. Brain, 6 C. & P. 349; R. v. Handley, 13 Cox, 79. If a mortal wound be given to a child whilst in the act of being born, for instance upon the head as soon as the head

appears and before the child has breathed, it may be murder if the child is afterwards born alive and dies thereof: R. v. Senior, 1 Moo. 346. But the entire child must actually have been born into the world in a living state, and the fact of its having breathed is not a conclusive proof thereof: R. v. Sellis, 7 C. & P. 850; R. v. Crutchley, 7 C. & P. 814. A child is born alive when it exists as a live child, breathing and living by reason of breathing through its own lungs alone, without deriving any of its living or power of living by or through any connection with its mother, but the fact of the child being still connected with the mother by the umbilical cord will not prevent the killing from being murder: R. v. Crutchley, 7 C. & P. 814; R. v. Trilloe, 2 Moo. 260; R. v. West, 2 C. & K. 784. *See post*, s. 697 as to evidence on a charge of murder of a bastard child by his mother.

CULPABLE HOMICIDE.

220. Homicide may be either culpable or not culpable. Homicide is culpable when it consists in the killing of any person, either by an unlawful act or by an omission, without lawful excuse, to perform or observe any legal duty, or by both combined, or by causing a person, by threats or fear of violence, or by deception, to do an act which causes that person's death, or by wilfully frightening a child or sick person.

2. Culpable homicide is either murder or manslaughter.

3. Homicide which is not culpable is not an offence.

This is the common law.

Sections 209, 210, 211, *ante*, when death results from the offences provided for thereby are instances of culpable homicide by omission without lawful excuse to perform a legal duty. Ss. 213 & 214 are nothing but additions to the definition of culpable homicide. S. 255, s-s. 2, *post*, as to any one meeting death by falling through a hole in the ice, unlawfully left unguarded, is also nothing but a corollary of the definition given in the above s. 220. Other illustrations appear *ante* under the headings of murder and manslaughter. It is proper to note here that the Imperial Commissioners, from whose report *all* these sections on homicide are taken *verbatim*, state positively that no altera-

tion is made thereby in the law on the subject as generally understood in modern times. (*See* their report *ante* p. 153.) An exception, however, as to the distinction between murder and manslaughter, and they doubt if it is one, is contained in what is reproduced, *post*, in s-s. 4 of s. 229, as to the killing of an officer of justice making an arrest.

Another exception is contained in what is s-s. 2 of that same s. 229, *post*, which the commissioners give as altering the rule that words can never amount to a provocation sufficient to reduce a killing from murder to manslaughter. (*There are cases to the contrary.*) *See ante*, pp. 159, *et seq.*

Section 237 *post*, is also an alteration of the law as to aiders and abettors to suicide. It is also not now law, though the Imperial Commissioners do not notice it specially as an alteration, that the killing of any one in the attempt to commit *any* felony is murder. This part of the law is modified by s. 228, *post*, and restricted to the killing of any one, whether the offender means or not death to ensue, or knows or not that death is likely to ensue, for the purpose of facilitating the commission of the offence (whether this offence has actually been committed or not) either of treason and the other offences provided for in ss. 65 to 78, or of piracy as provided for in ss. 127, 128, 129, or of escape or rescue from prison or lawful custody, or of resisting lawful apprehension, or of murder, or of rape, or of forcible abduction, or of robbery, or of burglary, or of arson, or for the purpose of facilitating the flight of an offender upon the commission or attempted commission of any of the aforesaid offences; to constitute murder in such cases, however, the killing, though not intentional, must result from an act done with intention to inflict grievous bodily harm for the purposes aforesaid: (*see* under s. 241, *post*, and R. v. Martin, 8 Q. B. D. 54; R. v. Clarence, 22 Q. B. D. 23, Warb. Lead. Cas. 130, as to what constitutes *to inflict grievous bodily harm*). To cause death by administering any stupefying or overpowering thing, or wilfully stopping the

breath of any one for the purpose of facilitating the commission of any of the above specified offences, or of facilitating the flight of an offender upon the commission or attempted commission of any of the said offences, is also murder under the provisions of s. 228. The other cases where homicide constitutes murder are specified in s. 227. All other criminal homicides constitute manslaughter: ss. 220, 223, 224, 225, 226, 229, 230; *see* annotation, pages 156, *et seq.*, *ante*.

PROCURING DEATH BY FALSE EVIDENCE.

221. Procuring by false evidence the conviction and death of any person by the sentence of the law shall not be deemed to be homicide.

This settles a point upon which some doubt has at times been thrown by some who, according to Foster, viewed the question "rather as divines and casuists than as lawyers": Fost. 132. Lord Coke said, "It is not holden for murder at this day": 3 Inst. 48. A special punishment for perjury in such a case is now provided for by section 146, *ante*.

DEATH WITHIN A YEAR AND A DAY.

222. No one is criminally responsible for the killing of another unless the death take place within a year and a day of the cause of death. The period of a year and a day shall be reckoned inclusive of the day on which the last unlawful act contributing to the cause of death took place. Where the cause of death is an omission to fulfil a legal duty the period shall be reckoned inclusive of the day on which such omission ceased. Where death is in part caused by an unlawful act and in part by an omission, the period shall be reckoned inclusive of the day on which the last unlawful act took place or the omission ceased, whichever happened last.

"This is the existing law": Imp. Comm. Rep.; 4 Blacks. 197.

KILLING BY INFLUENCE ON THE MIND.

223. No one is criminally responsible for the killing of another by any influence on the mind alone, nor for the killing of another by any disorder or disease arising from such influence, *save in either case by wilfully frightening a child or sick person.*

"This (the words in italics) obviates a possible doubt": Imp. Comm. Rep.; *see* 1 Hale, 428. The only difficulty is to prove the connection of the act with the result. It is not quite clear upon what principle this section limits to

the killing of a child, or a sick person the culpability of killing by fright.

In R. v. Towers, 12 Cox, 530, a man was convicted of manslaughter for frightening a child to death. In R. v. Dugal, 4 Q. L. R. 850, a man in Quebec was convicted of manslaughter upon evidence of death from syncope caused by threats of personal violence and assault without battery on the deceased. If magnetism and hypnotism become more commonly practiced, the law of this section may have to be altered.

ACCELERATION OF DEATH.

224. Every one who, by any act or omission, causes the death of another kills that person, although the effect of the bodily injury caused to such other person be merely to accelerate his death while labouring under some disorder or disease arising from some other cause.

This is a well recognized rule, and a common sense one. No one has the right to shorten the life of another. A contrary rule, it is obvious, would lead to singular consequences. *See* 1 Hale, 428; R. v. Martin, 5 C. & P. 128.

THAT DEATH MIGHT HAVE BEEN PREVENTED NO EXCUSE.

225. Every one who, by any act or omission, causes the death of another kills that person, although death from that cause might have been prevented by resorting to proper means.

That is common law.

A. injures B.'s finger. B. is advised by a surgeon to allow it to be amputated, but he refuses to do so, and dies of lockjaw. A. has killed B. When a wound, not in itself mortal, turns to a gangrene or fever, from neglect or want of proper applications, the party by whom the wound was given is guilty of a culpable homicide, murder or manslaughter, according to circumstances. The wound being the cause of the gangrene or fever is the immediate cause of death, *causa causati*.

TREATMENT OF INJURY CAUSING DEATH.

226. Every one who causes a bodily injury, which is of itself of a dangerous nature to any person, from which death results kills that person, although the immediate cause of death be treatment proper or improper applied in good faith.

That is common law. If one wounds another, and competent surgeons perform with ordinary skill an operation to cure the wound, which operation they in good faith think necessary but which results in death, this is a killing by the party who inflicted the wound, though the surgeons were mistaken as to the necessity of the operation, but if the surgeons had acted from bad faith, or had been guilty of negligence in the operation, the party who inflicted the wound is not guilty: *see* R. v. Pym, 1 Cox, 339, Warb. Lead. Cas. 105, and cases there cited.

PART XVIII.

MURDER, MANSLAUGHTER, ETC.

Murder—Definition.

227. Culpable homicide is murder in each of the following cases:

(*a*) If the offender means to cause the death of the person killed;

(*b*) If the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not;

(*c*) If the offender means to cause death or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed;

(*d*) If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

Murder Further Defined.

228. Culpable homicide is also murder in each of the following cases whether the offender means or not death to ensue, or knows or not that death is likely to ensue:

(*a*) If he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, or the

flight of the offender upon the commission or attempted commission thereof, and death ensues from such injury; or

(b) If he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof; or

(c) If he by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath.

2. The following are the offences in this section referred to:—Treason and the other offences mentioned in Part IV. of this Act, piracy and offences deemed to be piracy, escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape, forcible abduction, robbery, burglary, arson.

See R. v. Serné, 16 Cox, 311, Warb. Lead. Cas. 108, and remarks under s. 220, *ante;* also R. v. Handley, 13 Cox, 79. The shooting by A. at a fowl to steal it, by which B. is accidentally killed is clearly not now murder. A. criminally sets a house on fire not knowing that there is any one in it, there was, however, some one in it who perishes in the fire, A. will not now be guilty of murder.

PROVOCATION.

229. Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

2. Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

3. Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact. No one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

4. An arrest shall not necessarily reduce the offence from murder to manslaughter because the arrest was illegal, but if the illegality was known to the offender it may be evidence of provocation.

See R. v. Fisher, Warb Lead. Cas. 112, and cases there cited, and ss. 45, 46, 220 *ante;* also a note to R. v. Allen, in appendix, Stephen's Cr. L. Art. 225.

MANSLAUGHTER.

230. Culpable homicide, not amounting to murder, is manslaughter.

MURDER—PUNISHMENT.

231. Every one who commits murder is guilty of an indictable offence and shall, on conviction thereof, be sentenced to death. R. S. C. c. 162, s. 2; 24-25 V. c. 100, s. 1 (Imp.).

Not triable at Quarter Sessions, s. 540.

Indictment.— that on A. murdered B. (schedule one form F. F., *post*;) under s. 611.

In murder, no count charging any other offence allowed, s. 626, and if evidence proves manslaughter the jury may return a verdict of not guilty of murder but guilty of manslaughter, s. 713; and, on an indictment for child murder, of concealment of birth, if the evidence warrants it, s. 714. As to a previous conviction or acquittal of murder being a bar to an indictment for manslaughter for the same homicide, and *vice versa: see* s. 688 *post*.

ATTEMPTS TO COMMIT MURDER.

232. Every one is guilty of an indictable offence and liable to imprisonment for life, who does any of the following things with intent to commit murder; that is to say—

(*a*) Administers any poison or other destructive thing to any person, or causes any such poison or destructive thing to be so administered or taken, or attempts to administer it, or attempts to cause it to be so administered or taken; or

(*b*) By any means whatever wounds or causes any grievous bodily harm to any person; or

(*c*) Shoots at any person, or by drawing a trigger or in any other manner, attempts to discharge at any person any kind of loaded arms; or

(*d*) Attempts to drown, suffocate, or strangle any person; or

(*e*) Destroys or damages any building by the explosion of any explosive substance; or

(*f*) 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 chattels being therein; or

(*g*) Casts away or destroys any vessel; or

(*h*) By any other means attempts to commit murder. R. S. C. c. 162, ss. 8, 9, 10, 11, 12; 24-25 V. c. 100, ss. 11 to 15 (Imp.).

Not triable at quarter sessions, s. 540. "Explosive substance" defined, s. 3; "loaded arms" defined, s. 3.

The words "whether any bodily injury is effected or not" have been stricken out from the repealed clause, s. 11, R. S. C. c. 162.

It is not necessary on an indictment for wounding with intent to murder that the prosecutor should be in fact wounded in a vital part, for the question is not what the wound is, but what wound was intended: R. v. Hunt, 1 Moo. 93. There is no objection to insert counts on ss. 241, 242, 262 & 265: 3 Burn, 758; R. v. Strange, 8 C. & P. 172; R. v. Murphy, 1 Cox, 108. But it is not necessary, as by s. 713, on the trial of any indictment for wounding with intent to murder, if the intent be not proved the jury may convict of any of the offences falling under these sections. The defendant may also be found guilty of an attempt to commit the offence charged: s. 711; R. v. Cruse, 2 Moo. 53; R. v. Archer, 2 Moo. 283. An attempt to commit suicide is not an attempt to commit murder: R. v. Burgess, L. & C. 258.

Indictment under (a) for administering poison with intent to murder.— that J. S. on unlawfully did administer to one A. B. (*administer or cause to be administered to or to be taken by any person*), a large quantity, to wit, two drachms of a certain deadly poison called white arsenic, (*any poison or other destructive thing*), with intent thereby then unlawfully the said A. B. to kill and murder. (*Add counts stating that the defendant unlawfully, "did cause to be administered to" and unlawfully, "did cause to be taken by" a large quantity, etc., and if the description of poison be doubtful, add counts describing it in different ways and one count stating it to be "a certain destructive thing to the jurors aforesaid unknown."*) *Add a count with intent to commit murder.*

The indictment must allege the thing administered to be poisonous or destructive; and therefore an indictment for administering sponge mixed with milk, not alleging the

sponge to be destructive, was holden bad: R. v. Powles, 4 C. & P. 571.

If there be any doubt whether the poison was intended for A. B. add a count, stating the intent to be to "commit murder" generally: R. v. Ryan, 2 M. & Rob. 213; R. v. Duffin, R. & R. 365.

If a person mix poison with coffee, and tell another that the coffee is for her, and she takes it in consequence, it seems that this is an administering; and, at all events, it is causing the poison to be taken. In R. v. Harley, 4 C. & P. 369, it appeared that a coffee pot, which was proved to contain arsenic, mixed with coffee, had been placed by the prisoner by the side of the grate; the prosecutrix was going to put out some tea, but on the prisoner telling her that the coffee was for her, she poured out some for herself, and drank it, and in about five minutes became very ill. It was objected that the mere mixing of poison, and leaving it in some place for the person to take it was not sufficient to constitute an administering. Park, J., said: "There has been much argument whether, in this case, there has been an administering of this poison. It has been contended that there must be a manual delivery of the poison, and the law, as stated in Ryan & Moody's Report, goes that way: R. v. Cadman, 1 Moo. 114; but as my note differs from that report, and also from my own feelings, I am inclined to think that some mistake has crept into that report. It is there stated that the judges thought the swallowing of the poison not essential, but my recollection is that the judges held just the contrary. I am inclined to hold that there was an administering here; and I am of opinion that, to constitute an administering it is not necessary that there should be a delivery by the hand." 1 Russ. 988, and Greaves, note (*n*).

An indictment stating that the prisoner gave and administered poison is supported by proof that the prisoner gave the poison to A. to administer as a medicine to B.

with intent to murder B., and that A. neglecting to do so, it was accidentally given to B. by a child, the prisoner's intention to murder continuing: R. v. Michael, 2 Moo. 120.

Where the prisoner, having mixed corrosive sublimate with sugar, put it into a parcel, directing it to "*Mrs. Daws, Townhope,*" and left it on the counter of a tradesman, who sent it to Mrs. Daws who used some of the sugar, Gurney, J., held it to be an administering: R. v. Lewis, 6 C. & P. 161.

And if the indictment contains a count "*with intent to commit murder,*" generally the preceding case, R. v. Lewis, is clear law: Archbold, 653.

Evidence of administering at different times may be given to show the intent: Archbold, 650; 1 Russ. 1004, *et seq.* The intent to murder must be proved by circumstances from which that intent may be implied.

No verdict for assault can be given upon an indictment under s. 232 (*a*); R. v. Dilworth, 2 M. & Rob. 531; R. v. Draper, 1 C. &. K. 176; but a verdict for the offence, covered by section 245 or 246, or for the attempt to poison, may be given: ss. 711, 713.

Indictment under (*a*) *for attempting to poison with intent.*— unlawfully did attempt to administer (*attempt to administer to, or attempt to cause to be administered or to be taken by*) to one J. N. a large quantity, to wit, two drachms of a certain deadly poison called white arsenic (*any poison or other destructive thing*), with intent thereby then unlawfully the said J. N. to kill and murder,

(*Add a count stating the intent "to commit murder," generally. Add counts charging that the defendant "attempted to cause to be administered to" and that he "attempted to cause to be taken by J. N. the poison.*")

In R. v. Cadman, 1 Moo. 114, the defendant gave the prosecutrix a cake containing poison, which the prosecutrix merely put into her mouth, and spit out again, and did not

swallow any part of it. These circumstances would now support an indictment under the above clause.

Where the prisoner put salts of sorrel in a sugar basin, in order that the prosecutor might take it with his tea, it was held an attempt to administer: R. v. Dale, 6 Cox, 14.

Greaves on this clause remarks: "Where the prisoner delivered poison to a guilty agent, with directions to him to cause it to be administered to another in the absence of the prisoner, it was held that the prisoner was not guilty of an attempt to administer poison, within the repealed acts. R. v. Williams, 1 Den. 39; and the words 'attempt to cause to be administered to, or to be taken by' were introduced in this section to meet such cases."

Indictment under (b) for wounding with intent to murder.— one J. N. unlawfully did wound (*wound or cause any grievous bodily harm*) with intent, etc., (*as in the last precedent*). Add a count "with the intent to commit murder" generally.

The instrument or means by which the wound was inflicted need not be stated, and, if stated, would not confine the prosecutor to prove a wound by such means: R. v. Briggs, 1 Moo. 318.

As the general term "wound" includes every "stab" and "cut" as well as other wound, that general term has alone been used in these Acts. All, therefore, that it is now necessary to allege in the indictment is, that the prisoner did wound the prosecutor; and that allegation will be proved by any wound, whether it be a stab, cut, or other wound. *Greaves, Cons. Acts.* 45. The word "wound" includes incised wounds, punctured wounds, lacerated wounds, contused wounds, and gunshot wounds: Archbold, 664.

But to constitute a wound, within the meaning of this statute, the continuity of the skin must be broken: R. v. Wood, 1 Moo. 278.

The whole skin, not the mere cuticle or upper skin, must be divided: Archbold, 665.

But a division of the internal skin, within the cheek or lip, is sufficient to constitute a wound within the statute: Archbold, 665.

"The statute says 'by any means whatsoever,' so that it is immaterial by what means the wound is inflicted, provided it be inflicted with the intent alleged: R. v. Harris, R. v. Stevens, R. v. Murrow and Jenning's case, and other similar cases cannot therefore be considered as authorities under the present law": Greaves, Cons. Acts, 45.

Indictment under (c) for shooting with intent to murder.

a certain gun, then loaded with gunpowder and divers leaden shot, at and against one J. N. unlawfully did shoot, with intent thereby then unlawfully *(as in the last precedent.) (Add also counts stating "with intent to commit murder" generally. Also a count for shooting with intent to maim, etc.,)* under s. 241 *post.*

In order to bring the case within the above section it must be proved that the prisoner intended by the act charged to cause the death of the suffering party. This will appear either from the nature of the act itself, or from the conduct and expressions used by the prisoner: Roscoe, 720.

Upon an indictment for wounding Taylor with intent to murder him, it appeared that the prisoner intended to murder one Maloney, and, supposing Taylor to be Maloney, shot at and wounded Taylor; and the jury found that the prisoner intended to murder Maloney, not knowing that the party he shot at was Taylor, but supposing him to be Maloney, and that he intended to murder the individual he shot at, supposing him to be Maloney, and convicted the prisoner; and upon a case reserved, it was held that the conviction was right, for though he did not intend to kill the particular person, he meant to murder the man at whom he shot: R. v. Smith, Dears. 559; 1 Russ. 1001.

It seems doubtful whether it must not appear, in order to make out the intent to murder, that that intent existed in the mind of the defendant at the time of the offence, or whether it would be sufficient if it would have been murder had death ensued: Archbold, 652.

On this question, Greaves, *note* (*g*) 1 Russ. 1003, remarks: "It seems probable that the intention of the Legislature, in providing for attempts to commit murder, was to punish every attempt where, in case death had ensued, the crime would have amounted to murder. . . The tendency of the cases, however, seems to be that an actual intent to murder the particular individual injured must have been shown. . . Where a mistake of one person for another occurs, the cases of shooting, etc., may, perhaps, admit of a different consideration from the cases of poisoning. In the case of shooting at one person under the supposition that he is another, although there be a mistake, the prisoner must intend to murder that individual at whom he shoots; it is true he may be mistaken in fact as to the person, and that it may be owing to such mistake that he shoots at such person, but still he shoots with intent to kill that person. So in the case of cutting; a man may cut one person under a mistake that he is another person, but still he must intend to murder the man whose throat he cuts. In R. v. Mister, the only count charging an intent to murder was the first, and that alleged the intent to be to murder Mackreth; and although on the evidence it was perfectly clear that Mister mistook Mackreth for Ludlow, whom he had followed for several days before, yet he was convicted and executed, and I believe the point never noticed at all. The case of poisoning one person by mistake for another seems different, if the poison be taken in the absence of the prisoner; for in such case, he can have no actual intent to injure that person. These difficulties, however, seem to be obviated by the present statute, which, instead of using the words "with intent to murder such

person," has the words " with intent to commit murder "
. In all cases of doubt, as to the intention, it would be prudent to insert one count for shooting at A. with intent to murder him ; another " with intent to commit murder ; " and a third for shooting at A. with intent to murder the person really intended to be killed, and if the party intended to be killed were unknown, a count for shooting at A. with intent to murder a person to the jurors unknown.

A verdict under ss. 241 & 265 may be given, s. 713 ; also for attempt, if the evidence warrants it, s. 711 ; *see* remarks under preceding section.

The definition of the words "loaded arms" in s. 3, is reproduced with a slight alteration in words from c. 100, s. 19, 24 & 25 V. (Imp.), upon which Greaves remarks: "This clause is new and is intended to meet every case where a prisoner attempts to discharge a gun, etc., loaded in the barrel, but which misses fire for want of priming or of a copper cap, or from any like (other) cause. R. v. Carr, R. & R. 377; and R. v. Harris, 5 C. & P. 159, cannot therefore be considered as authorities under this Act": *see* R. v. Jackson, *post*, p. 220.

Indictment under (c) for attempting to shoot with intent, etc.— did, by drawing the trigger (drawing a trigger or in any other manner) of a certain pistol then loaded in the barrel with gun-powder and one leaden bullet (or with a ball cartridge) unlawfully attempt to discharge the said pistol at and against one J. N. with intent (as in the last precedent.) (*Add a count charging an intent to commit murder, and counts for attempting to shoot with intent to maim*, under s. 241, though the prisoner may be found guilty under that section without such a count: R. v. Baker, 1 C. & K. 254). A verdict of common assault may also in certain cases be given, s. 713. If one draws, during a quarrel, a pistol from his pocket, but is prevented from using it by another person, there is no offence against this section: R. v. St. George, 9 C. & P. 483; R. v. Brown, 15

Cox, 199. R. v. St. George is now overruled by R. v. Duckworth, 17 Cox, 495, [1892], 2 Q. B. 83.

See remarks under preceding form.

Upon an indictment for attempting to discharge a loaded arm with intent to murder, the prisoner may be found guilty of the charge upon evidence that he had pointed at the prosecutor a revolver loaded in some of its chambers with ball cartridges, but not in others, saying that he would shoot him, and that he had pulled the trigger of the revolver, but that the hammer had fallen upon a chamber which contained an empty cartridge: *per* Charles, J., R. v. Jackson, 17 Cox, 104.

Indictment under (d) for attempting to drown with intent to murder.— unlawfully did take one J. N. into both the hands of him the said J. S., and unlawfully did cast, throw, and push the said J. N. into a certain pond, wherein there was a great quantity of water, and did thereby then unlawfully attempt the said J. N. to drown and suffocate, with intent thereby then unlawfully the said J. N. to kill and murder, (*Add a count charging generally that the defendant did attempt to drown J. N. and counts charging the intent to be to commit murder.*)

It has been held that upon an indictment for attempting to drown it must be shown clearly that the acts were done with intent to drown. An indictment alleged that the prisoner assaulted two boys, and with a boat-hook made holes in a boat in which they were, with intent to drown them. The boys were attempting to land out of a boat they had punted across a river, across which there was a disputed right of ferry; the prisoner attacked the boat with his boat-hook in order to prevent them, and by means of the holes which he made in it caused it to fill with water, and then pushed it away from the shore, whereby the boys were put in peril of being drowned. He might have got into the boat and thrown them into the water; but he confined his attack to the boat itself, as if to prevent the

landing, but apparently regardless of the consequences. Coltman, J., stopped the case, being of opinion that the evidence against the prisoner showed his intention to have been rather to prevent the landing of the boys than to do them any injury: Sinclair's Case, 2 Lewin 49; R. v. Dart, 14 Cox, 143.

A verdict of common assault may be given, s. 718.

Indictment under (e). that on J. S. unlawfully did, by the explosion of a certain explosive substance, that is to say, gunpowder, destroy (*destroy or damage*) a certain building situate with intent thereby then unlawfully one J. N. to kill and murder. (*Add a count, stating the intent to be generally "to commit murder."*)

In R. v. Ryan, 2 M. & Rob. 213, Parke and Alderson held that a count alleging with intent to *commit murder*, generally, is sufficient.

The jury may return a verdict of guilty of an attempt to commit the offence, s. 711.

Indictment under (f) and (g). unlawfully did set fire to (*cast away or destroy*) a certain ship called with intent thereby then to kill and murder one. (*Add a count stating the intent to "commit murder" generally*).

Indictment under (h).— did, by then (*state the act*) attempt unlawfully one J. N. to kill and murder. (*Add a count charging the intent to be to commit murder.*)

Greaves says: "This section is entirely new, and contains one of the most important amendments in these Acts. It includes every attempt to murder not specified in any preceding section. It will therefore embrace all those atrocious cases where the ropes, chains or machinery used in lowering miners into mines have been injured with intent that they may break, and precipitate the miners to the bottom of the pit. So, also, all cases where steam engines are injured, set on work, stopped, or anything put into

them, in order to kill any person who may fall into it. So, also, cases of sending or placing infernal machines with intent to murder: *see* R. v. Mountford, 1 Moo. 441. Indeed, the malicious may now rest satisfied that every attempt to murder, which their perverted ingenuity may devise, or their fiendish malignity suggest, will fall within some clause of this Act, and may be visited with penal servitude for life. In any case where there may be a doubt whether the attempt falls within the terms of any of the preceding sections, a count framed on this clause should be added."

A verdict under ss. 241, 242 & 265 may be given, s. 713, if the evidence warrants it.

THREATS BY LETTER TO MURDER.

233. Every one is guilty of an indictable offence and liable to ten years' imprisonment who 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. R. S. C. c. 173, s. 7. 24-25 V. c. 100, s. 16 (Imp.).

Not triable at quarter sessions, s. 540.

A verdict of attempt allowed, s. 711, if the evidence warrants it. "Writing" defined, s. 3.

Indictment. that J. S. on at unlawfully did send to one J. N. a certain letter (*or writing*) directed to the said J. N., by the name and description of Mr. J. N. threatening to kill and murder the said J. N. he the said (*defendant*) then well knowing the contents of the said letter, which said letter is as follows, that is to say And the jurors aforesaid that the said on at unlawfully did utter a certain writing (*as in the first count*).

In R. v. Hunter, 2 Leach, 631, the court said: "In an indictment for sending a threatening letter, the letter must be set out in order that the court may judge from the face of the indictment whether it is or is not a threatening letter within the meaning of the statute on which the indictment is founded."

The same ruling had been held in R. v. Lloyd, 2 East, P. C. 1122.

Under s. 613 *post* an indictment would not be quashed for the omission of the letter, but it is undoubtedly more correct to set it out.

Greaves says on this clause: "The words *directly or indirectly causes to be received*, are taken from the 9 Geo. IV. c. 55, s. 8, and introduced here in order to prevent any difficulty which might arise as to a case not falling within the words *send, deliver or utter*. The words *to any other person* in the 10 & 11 V. c. 66, s. 1, were advisedly omitted, in order that ordering, sending, delivering, uttering, or causing to be received may be included. If, therefore, a person were to send a letter or writing without any address by a person with direction to drop it in the garden of a house in which several persons lived, or if a person were to drop such a letter or writing anywhere, these cases would be within this clause. In truth, this clause makes the offence to consist in sending, etc., any letter or writing which contains a threat to kill or murder any person whatsoever, and it is wholly immaterial whether it be sent, etc., to the person threatened or to any other person. The cases, therefore, of R. v. Paddle, R. & R. 484; R. v. Burridge, 2 M. & Rob. 296; R. v. Jones, 2 C. & K. 898, 1 Den. 218; and R. v. Grimwade, 1 Den. 30, are not to be considered as authorities on this clause, so far as they decide that the letter must be sent, etc., to the party threatened. In every indictment on this and the similar clauses in the other acts, a count should be inserted alleging that the defendant uttered the writing without stating any person to whom it was uttered."

Where the threat charged is to kill or murder, it is for the jury to say whether the letter amounts to a threat to kill or murder: R. v. Girdwood, 1 Leach, 142; R. v. Tyler, 1 Moo. 428.

The bare delivery of the letter, though sealed, is evidence of a knowledge of its contents by the prisoner in certain cases: R. v. Girdwood, 1 Leach, 142.

And in the same case, it was held that the offender may be tried in the county where the prosecutor received the letter, though he may also be tried in the county where the sending took place.

In R. v. Boucher, 4 C. & P. 562, the following letter was held to contain a threat to murder:—"You are a rogue, thief and vagabond, and if you had your deserts, you should not live the week out; I shall be with you shortly, and then you shall nap it, my banker. Have a care, old chap, or you shall disgorge some of your illgotten gains, watches and cash, that you have robbed the widows and fatherless of. Don't make light of this, or I'll make light of you and yours. Signed, *Cut-throat*."

Where an indictment contained three counts, each charging the sending of a different threatening letter, Byles, J., held that the prosecutor must elect on which count he would proceed, though any letter leading up to or explaining the letter on which the trial proceeded would be admissible: R. v. Ward, 10 Cox, 42; *see* s. 626, *post*.

CONSPIRACY TO MURDER.

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

(*a*) Conspires or agrees with any person to murder or to cause to be murdered any other person, whether the person intended to be murdered is a subject of Her Majesty or not; or is within Her Majesty's dominions or not; or

(*b*) Counsels or attempts to procure any person to murder such other person anywhere, *although such person is not murdered in consequence of such counselling or attempted procurement*. R. S. C. c. 162, s. 3. (*Amended*). 24-25 V. c. 100, s. 4 (Imp.).

Not triable at quarter sessions, s. 540. The words in italics are new, and unnecessary. As to conspiracies generally: *see* remarks under s. 527, *post*.

Indictment. that J. S., J. T., and E. T., on unlawfully and wickedly did conspire, confederate and agree together one J. N. unlawfully to kill and murder.

See 1 Russ. 967; 3 Russ. 664; R. v. Bernard, 1 F. & F. 240; 2 Stephen's Hist. 12.

In R. v. Banks, 12 Cox, 393, upon an indictment under this clause, the defendants were convicted of an attempt to commit the misdemeanour charged. In R. v. Most, 14 Cox, 583, the defendant having written a newspaper article encouraging the murder of foreign potentates, was found guilty of an offence under the corresponding clause of the Imperial Act.

Would any one conspiring in Canada with another person in the United States to himself murder any one in the United States be subject to indictment under s. 234?

ACCESSSORY AFTER THE FACT TO MURDER.

235. Every one is guilty of an indictable offence, and liable to imprisonment for life, who is an accessory after the fact to murder. R. S. C. c. 162, s. 4. 24-25 V. c. 100, s. 67 (Imp.).

Not triable at quarter sessions, s. 540. *See* remarks under s. 63, *ante*, and s. 532, *post*.

PUNISHMENT OF MANSLAUGHTER.

236. Every one who commits manslaughter is guilty of an indictable offence, and liable to imprisonment for life. R. S. C. c. 162, s. 5. (*Amended*). 24-25 V. c. 100, s. 5 (Imp.).

Indictment.— that A. B. on at unlawfully did kill and slay one and thereby committed manslaughter.

The evidence is the same as in murder, with this exception, that in murder the prosecutor need only prove the homicide without going into evidence of the circumstances under which it was committed in manslaughter; he must give evidence of all the facts in the case, so as to prove the homicide to be manslaughter. As to the cases in which a homicide amounts to manslaughter only, and not to murder, *see ante*, ss. 229, 230, and remarks pages 181 *et seq*. A summary conviction for assault under s. 42 of 24 & 25 V. c. 100, is not a bar to a subsequent indictment for manslaughter, upon the death of the man assaulted consequent

upon the same assault: R. v. Morris, 10 Cox, 480; R. v. Friel, 17 Cox, 325; *see* ss. 866 & 969, *post*.

AIDING AND ABETTING SUICIDE. (*New*).

237. Every one is guilty of an indictable offence and liable to imprisonment for life who counsels or procures any person to commit suicide, actually committed in consequence of such counselling or procurement, or who aids or abets any person in the commission of suicide.

This is new. By the common law suicide is murder, and if one encourage another to commit suicide, and is present abetting him while he does so, such person is guilty of murder as a principal, and if two persons encourage each other to self murder and one kills himself, and the other one fails, the latter is a principal in the murder of the other: R. v. Dyson, R. & R. 523; R. v. Russell, 1 Moo. 356; R. v. Alison, 8 C. & P. 418; R. v. Jessop, 16 Cox, 204. Now, under analogous facts, he would be indictable under this s. 237 for counselling the other to commit suicide, and also under the next section for attempting himself to commit suicide.

A *felo de se*, or felon of himself, is a person who, being of sound mind and of the age of discretion, voluntarily killeth himself: 3 Inst. 54.

If a man give himself a wound, intending to be *felo de se*, and dieth not within a year and a day after the wound, he is not *felo de se: Id.*

The following passages from Hale and Hawkins may be usefully inserted here:—

"It is not every melancholy or hypochondriacal distemper that denominates a man *non compos*, for there are few who commit this offence but are under such infirmities, but it must be such an alienation of mind that renders them to be madmen, or frantic, or destitute of the use of reason; a lunatic killing himself in a fit of lunacy is not *felo de se;* otherwise it is, if it be at another time:" 1 Hale, 412.

"But here, I cannot but take notice of a strange notion which has unaccountably prevailed of late, that every one

who kills himself must be *non compos* of course; for it is said to be impossible that a man in his senses should do a thing so contrary to nature and all sense and reason. If this argument be good self-murder can be no crime, for a madman can be guilty of none; but it is wonderful that the repugnancy to nature and reason, which is the highest aggravation of this offence, should be thought to make it impossible to be any crime at all, which cannot but be the necessary consequence of this position that none but a madman can be guilty of it. May it not, with as much reason, be argued that the murder of a child or of a parent is against nature and reason, and consequently that no man in his senses can commit it": 1 Hawk. c. 9, s. 2.

In England the attempt to commit suicide is not an attempt to commit murder, within 32 & 33 V. c. 20, but still remains a common law misdemeanour: R. v. Burgess, L. & C. 258; R. v. Doody, 6 Cox, 463.

An aider and abettor, called a principal in the second degree, is one who is actually or constructively present when an offence is committed; one who counsels or procures the commission of an offence, but is absent when it is committed, is called at common law an accessory before the fact. Both are now treated as principals: s. 61, *ante*; but that section does not apply as to punishment where the offence of counselling or of aiding and abetting is made a distinct offence. As to what is a counselling or procurement *see* remarks under the said section.

Indictment.— that on at one A. B. committed suicide, and that on divers days before the said offence was committed by the said A. B., as aforesaid, C. D. did unlawfully move, procure, aid, counsel, hire and command the said A. B. the said offence and suicide to do and commit *(or, that C. D. was present and aiding and abetting the said A. B. in the commission of the said offence and suicide.)*

If the suicide was not committed yet the inciting to it is an offence: R. v. Gregory, L. R. 1 C. C. R. 77; so is the conspiracy by two persons to commit suicide together, s. 527.

See R. v. Dyson, R. & R. 523; R. v. Russell, 1 Moo. 356. This last case applies only to an accessory, not to an aider and abettor: R. v. Towle, R. & R. 314.

A. and B. go out together with a gun to kill D. A. fires the shot, but his gun bursts and kills himself (A). A. has committed suicide, and B. was aider and abettor to that suicide.

ATTEMPT TO COMMIT SUICIDE. (*New*).

238. Every one who attempts to commit suicide is guilty of an indictable offence and liable to two years' imprisonment.

See remarks under preceding section; fine, s. 958.

Indictment.— that A. B. on unlawfully and wilfully did attempt and endeavour to unlawfully kill himself and thereby to commit suicide.

NEGLECT BY A MOTHER IN CHILD-BIRTH TO OBTAIN ASSISTANCE. (*New*).

239. Every woman is guilty of an indictable offence who, with either of the intents hereinafter mentioned, being with child and being about to be delivered, neglects to provide reasonable assistance in her delivery, if the child is permanently injured thereby, or dies, either just before, or during, or shortly after birth, unless she proves that such death or permanent injury was not caused by such neglect, or by any wrongful act to which she was a party, and is liable to the following punishment:

(*a*) If the intent of such neglect be that the child shall not live, to imprisonment for life;

(*b*) If the intent of such neglect be to conceal the fact of her having had a child, to imprisonment for seven years.

See ante, remarks under s. 219.

This is new. It is taken from the English bill of 1880. The Imperial Commissioners reported thereon as follows:

"The subject of child-murder is one as to which the existing law seems to require alteration. At present no distinction is made between the murder of a new-born infant by its mother, and the murder of an adult. Practically this severity defeats itself, and offences which are really cases of child murder are

often treated as cases of concealment of birth simply. . . . This section will afford a means of punishment for child murder where there would be a practical difficulty in obtaining a conviction for that offence."

Under a charge of child murder the accused cannot be found guilty of this new offence created by s. 239. A verdict of concealment of birth may be given if the evidence warrants it, s. 713. The punishment would then be under next section.

If R. v. Handley, 13 Cox, 79, is good law, the offence covered by this s. 239 would at common law, when the child dies after birth, be murder or manslaughter.

It is not easy to imagine a case where it would be possible to obtain a conviction under this section, where a child dies *before*, even if it is only *just before*, his birth. The expression itself "dies before his birth" is not a happy one; *see* s. 219, *ante*.

The words "unless she proves," etc., are utterly useless. Either the prosecutor's case must be proved or not. If it is, the jury must convict; if not, they must acquit; and it is not if it is not proven that the death or injury was caused by the neglect.

Indictment under (*a*).— that A. B. on at a then and there being with child and about to be delivered, did unlawfully, with intent that her said child should not live, neglect to provide reasonable assistance in her delivery, whereby her said child was permanently injured, (*or died during or shortly after birth.*) A verdict of guilty under s-s. (*b*) may be given upon this indictment if the evidence warrants it.

CONCEALING DEAD BODY OF A CHILD.

240. Every one is guilty of an indictable offence, and liable to *two years'* imprisonment, who disposes of the dead body of any child in any manner, with intent to conceal the fact that its mother was delivered of it, whether the child died before, or during, or after birth. R. S. C. c. 162, s. 49. (*Amended*). 24-25 V. c. 100, s. 60 (Imp.).

Fine, s. 958. A conviction for this offence may be given upon an indictment for child murder, s. 714.

The enactment applies not only to a mother, but to every one who disposes of the dead body of a child with intent to conceal its birth. The repealed clause had the words "by any *secret disposition*."

Indictment.— that A. B., on was delivered of a child; and that subsequently, on , the said child having died, the said A. B. did unlawfully dispose of the dead body of the said child by secretly burying it with intent to conceal the fact that she had been delivered of it. (*State the means of concealment specially.*)

In R. v. Berriman, 6 Cox, 388, Erle, J., told the jury that this offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth that it might have been a living child. But in a later case, R. v. Colmer, 9 Cox, 506, Martin, J., ruled that the offence is complete on a fœtus delivered in the fourth or fifth month of pregnancy, not longer than a man's finger, but having the shape of a child.

Final disposition of the body is not material, and hiding it in a place from which a further removal was contemplated would support the indictment: R. v. Goldthorpe, 2 Moo. 244; R. v. Perry, Dears. 471.

Leaving the dead body of a child in two boxes, closed but not locked or fastened, one being placed inside the other in a bedroom but in such a position as to attract the attention of those who daily resorted to the room, is not a secret disposition of the body within the meaning of the statute: R. v. George, 11 Cox, 41.

What is a secret disposition of the dead body of a child within the statute is a question for the jury, depending on the circumstances of the particular case. Where the dead body of a child was thrown into a field, over a wall 4½ feet high separating the yard of a public house from the field,

and a person looking over the wall from the yard might have seen the body, but persons going through the yard or using it in the ordinary way would not, it was held, on a case reserved, that this was an offence within the statute: R. v. Brown, 11 Cox, 517, Warb. Lead. Cas. 94.

Although the fact of the prisoner having placed the dead body of her newly-born child in an unlocked box is not of itself sufficient evidence of a criminal concealment of birth, yet all the attendant circumstances of the case must be taken into consideration in order to determine whether or not an offence has been committed: R. v. Cook, 11 Cox, 542.

In order to convict a woman of attempting to conceal the birth of her child, under s. 711, *post*, a dead body must be found and identified as that of the child of which she is alleged to have been delivered. A woman, apparently pregnant, while staying at an inn, at *Stafford*, received by post, on the *28th of August, 1870, a Rugby newspaper with the Rugby post mark upon it.* On the same day, her appearance and the state of her room seemed to indicate that she had been delivered of a child. She left for Shrewsbury next morning, carrying a parcel. That afternoon a parcel was found in a waiting room at *Stafford* station. It contained the dead body of a newly-born child, wrapped in *a Rugby Gazette, of August 27th, bearing the Rugby postmark.* There is a railway from Stafford to Shrewsbury, but no proof was given of the woman having been at Stafford Station: *Held*, that this evidence was not sufficient to identify the body found as the child of which the woman was said to have been delivered, and would not therefore justify her conviction for concealment o birth: R. v. Williams, 11 Cox, 684.

Where death not proved conviction is illegal: R. v. Bell, 8 Ir. R. C. L. 542.

A, being questioned by a police-constable about the concealment of a birth, gave an answer which caused the

officer to say to her, "It might be better for you to tell the truth and not a lie." *Held*, that a further statement made by A. to the policeman after the above inducement was inadmissible in evidence against her, as not being free and voluntary. A. was taken into custody the same day, placed with two accomplices, B. and C. and charged with concealment of birth. All three then made statements. *Held*, that those made by B. and C. could not be deemed to be affected by the previous inducement to A. and were, therefore, admissible against B. and C. respectively, although that made by A. was not so. The prisoners were sent for trial, but before their committal they received the formal caution from the magistrate as to anything they might wish to say. Whereupon A. made a statement which was taken down in writing, as usual, and attached to the deposition: *Held*, that this latter statement of A. might be read at the trial as evidence against herself. Mere proof that a woman was delivered of a child and allowed two others to take away its body is insufficient to sustain an indictment against her for concealment of birth: R. v. Bate, 11 Cox, 686.

A woman delivered of a child born alive endeavoured to conceal the birth thereof by depositing the child while alive in a corner of a field, when it died from exposure. *Held*, that she could not be indicted under the above section: R. v. May, 16 L. T. 362.

The prisoner who lived alone had placed the dead body of her new born child behind a trunk in the room she occupied, between the trunk and the wall. On being charged with having had a child she at first denied it. *Held*, sufficient to support a conviction for concealment of birth: R. v. Pichè, 30 U. C. C. P. 409.

See other cases under s. 714 *post*, and R. v. Handley 13 Cox, 79.

PART XIX.

BODILY INJURIES, AND ACTS AND OMISSIONS CAUSING DANGER TO THE PERSON.

WOUNDING WITH INTENT.

241. Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, unlawfully by any means wounds or causes any grievous bodily harm to any person, or shoots at any person, or, by drawing a trigger, or in any other manner, attempts to discharge any kind of loaded arms at any person. R. S. C. c. 162, s. 13 (*Amended*); 24-25 V. c. 100, s. 18 (Imp.).

The repealed clause contained the words "unlawfully *and maliciously* by any means *whatsoever*."

"Loaded arms" defined, s. 3: *see* R. v. Latimer, 16 Cox, 70, Warb. Lead. Cas. 117; and R. v. Clarence, Warb. Lead. Cas. 130, 22 Q. B. D. 23.

An indictment under the English clause charging that the prisoner did "inflict" grievous bodily harm instead of "cause" is sufficient: R. v. Bray, 15 Cox, 197.

Indictment for wounding with intent to maim.—

that J. S. on one J. N. unlawfully did wound, with intent in so doing him the said J. N. thereby there to maim

(add count stating "with intent to disfigure" and one "with intent to disable." Also one stating "with intent to do some grevious bodily harm." And if necessary, one "with intent to prevent (or resist) the lawful apprehension of.) *See* form F. F. schedule one under s. 611 *post*, in which the words "did actual bodily harm" are quite wrong.

An indictment under the repealed act, charging the act to have been done "feloniously, wilfully and maliciously" was held bad, the words of the statute, then being "unlawfully and maliciously:" R. v. Ryan, 2 Moo. 15. In practice the first count of the indictment is generally for wounding with intent to murder. These counts are allowed to be joined in the same indictment.

This clause includes every wounding done without lawful excuse with any of the intents mentioned in it; from the act itself malice will be inferred: R. v. Latimer, 17 Q. B. D. 359, Warb. Lead. Cas. 117, and cases there cited.

The instrument or means by which the injury was inflicted need not be stated in the indictment, and if stated need not be proved as laid: R. v. Briggs, 1 Moo. 318. And in the same case it was held that upon an indictment which charged a wound to have been inflicted by striking with a stick and kicking with the feet, proof that the wound was caused either by striking with a stick or kicking was sufficient, though it was uncertain by which of the two the injury was inflicted.

In order to convict of the offence the intent must be proved as laid; hence the necessity of several counts charging the offence to have been committed with different intents. If an indictment alleged that the defendant cut the prosecutor with intent to disable, and to do some grievous bodily harm, it will not be supported by proof of an intention to prevent a lawful apprehension: R. v. Duffin, R. &. R. 365; R. v. Boyce, 1 Moo. 29; unless for the purpose of affecting his escape the defendant also harboured one of the intents stated in the indictment: R. v. Gillow, 1 Moo. 85; for where both intents exist it is immaterial which is the principal and which the subordinate. Therefore where, in order to commit a rape, the defendant cut the private parts of an infant, and thereby did her grievous bodily harm, it was holden that he was guilty of cutting with intent to do her grievous bodily harm, notwithstanding his principal object was to commit the rape: R. v. Cox, R. & R. 362. So also, if a person wound another in order to rob him, and thereby inflict grievous bodily harm, he may be convicted on a count charging him with an intent to do grievous bodily harm.

An indictment charging the prisoner with wounding A. with intent to do him grievous bodily harm, is good although it is proved that he mistook A. for somebody else, and that he intended to wound another person: R. v. Stopford, 11 Cox, 643: *see* R. v. Hunt 1 Moo. 93.

The prisoner was indicted for shooting at A. with intent to do him grievous bodily harm. He fired a pistol into a group of persons who had assaulted and annoyed him, among whom was A., without aiming at A. or any one in particular, but intending generally to do grievous bodily harm, and wounded A. *Held*, on a case reserved, that he was rightly convicted: R. v. Fretwell, L. & C. 443.

With respect to the intents mentioned in the statute it may be useful to observe that to *maim* is to injure any part of a man's body which may render him in fighting less able to defend himself, or annoy his enemy; to disfigure is to do some external injury which may detract from his personal appearance; and to disable is to do something which creates a permanent disability, and not merely temporary injury: Archbold, 666. It is not necessary that a grievous bodily harm should be either permanent or dangerous; if it be such as seriously to interfere with health or comfort that is sufficient; and, therefore, where the defendant cut the private parts of an infant, and the wound was not dangerous, and was small, but bled a good deal, and the jury found that it was a grievous bodily harm, it was holden that the conviction was right: R. v. Cox, R. & R. 362.

Where the intent laid is to prevent a lawful apprehension it must be shown that the arrest would have been lawful; and where the circumstances are not such that the party must know why he is about to be apprehended it must be proved that he was apprised of the intention to apprehend him: Archbold, 667.

While the defendant was using threatening language to a third person a constable in plain clothes came up and

interfered. The defendant struck the constable with his fist, and there was a struggle between them. The constable went away for assistance, and was absent for an hour; he changed his plain clothes for his uniform and returned to defendant's house with three other constables. They forced the door and entered the house. The defendant refused to come down, and threatened to kill the first man who came up to take him. The constables ran upstairs to take him, and he wounded one of them in the struggle that took place. *Held*, upon a case reserved, that the apprehension of the prisoner at the time was unlawful, and that he could not be convicted of wounding the constable with intent to prevent his lawful apprehension: R. v. Marsden, 11 Cox, 90.

Upon an indictment for an assault with intent to do grievous bodily harm a plea of guilty to a common assault may be received if the prosecution consents: R. v. Roxburgh, 12 Cox, 8.

Upon an indictment for any offence under this clause the jury may find a verdict of guilty of an attempt to commit it, s. 711.

A verdict of common assault may also be found, s. 713.

And, if the prosecutor fail in proving the intent, the defendant may be convicted of unlawfully wounding, and sentenced under the next section.

And where three are indicted for malicious wounding with intent to do grievous bodily harm the jury may convict two of the offence under s. 241, and the third of unlawfully wounding under s. 242: R. v. Cunningham, Bell, 72.

Where a prisoner was indicted for feloniously wounding with intent to do grievous bodily harm: *Held*, that the intention might be inferred from the act: R. v. LeDante, 2 G. & O. (N. S.) 401.

L. was tried on an indictment under 32 & 33 V. c. 20, containing four counts. The first charged that he did

unlawfully, etc., kick, strike, wound and do grievous bodily harm to W., with intent, etc., to maim; the second charged an assault, as in first, with intent to disfigure; the third charged intent to disable; the fourth charged the intent to do some grievous bodily harm. The prisoner was found guilty of a common assault. *Held*, that L. was rightly convicted, s. 51 of the Act, 32 & 33 V. c. 20, authorizing such conviction: R. v. Lackey, 1 P. & B. (N. B.) 194.

An indictment for doing grievous bodily harm, which alleged that the prisoner did "feloniously" stab, cut and wound, etc., instead of alleging, in the terms of the 17th section of 32 & 33 V. c. 20, that he did "unlawfully" and "maliciously" stab, etc., is good: a defective indictment is amendable under 32 & 33 V. c. 29, s. 32, and any objection to it for any defect apparent on the face thereof must be taken by demurrer or motion to quash the indictment before the defendant has pleaded and not afterwards: R. v. Flynn, 2 P & B. (N. B.) 321.

UNLAWFUL WOUNDING.

242. Every one is guilty of an indictable offence and liable to *three years'* imprisonment who unlawfully wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument. R. S. C. c. 162, s. 14 (*Amended*). 24-25 V. c. 100, s. 20 (Imp.).

The repealed clause contained the words "and maliciously." Fine, s. 958.

Indictment for unlawfully wounding.— one J. N unlawfully did wound (*wound or inflict any grievous bodily harm upon*). (*Add a count charging that the defendant "did inflict grievous bodily harm upon J. N.*")—

The act must have been done maliciously. Malice would in most cases be presumed: 3 Burn, 754; R. v. Martin, 14 Cox, 633, 8 Q. B. D. 54.

See remarks under preceding section and R. v. Martin, 8 Q. B. D. 54.

But general malice alone constitutes the offence. Malice against the person wounded is not a necessary in-

gredient of the offence. So if any one, intending to wound A., accidentally wounds B., he is guilty of an offence under this clause: R. v. Latimer, 16 Cox, 70, 17 Q. B. D. 359.

Upon an indictment for assaulting, beating, wounding and inflicting grievous bodily harm, the prisoner may be convicted of a common assault: R. v. Oliver, Bell, 287.

Upon an indictment charging that the prisoner "unlawfully and maliciously did assault one H. R., and did then and there unlawfully and maliciously kick and wound him, the said H. R., and thereby then and there did unlawfully and maliciously inflict upon the said H. R. grievous bodily harm, against" the jury may return a verdict of guilty of a common assault merely: R. v. Yeadon, L. & C. 81.

In R. v. Taylor, 11 Cox, 261, the indictment was as follows:— "That Taylor on unlawfully and maliciously did wound one Thomas and the jurors that the said Taylor did unlawfully and maliciously inflict grievous bodily harm upon the said Thomas."

Upon this indictment the jury returned a verdict of common assault, and upon a case reserved the conviction was affirmed.

In R. v. Canwell, 11 Cox, 268, a verdict of common assault was also given upon an indictment containing only one count for maliciously and unlawfully inflicting grievous bodily harm, and the conviction was affirmed upon a case reserved.

The defendant may be found guilty of the attempt to commit the offence charged, s. 711.

To cause any one by threats of violence to do an act, under the impulsion of fright, by which he is grievously injured is a criminal offence under this section: R. v. Halliday, 6 Times, L. R. 109.

A man does not inflict grievous bodily harm on his wife within the meaning of this section by communicating to

her a venereal disease: R. v. Clarence, 16 Cox, 511, 22 Q. B. D. 23, Warb. Lead. Cas. 130; *see* Hegarty v. Shine, 14 Cox, 124. A previous conviction for an assault bars an indictment for unlawful wounding based on the same facts: R. v. Miles, 17 Cox, 9.

SHOOTING AT HER MAJESTY'S VESSELS—WOUNDING AN OFFICER ON DUTY.

243. Every one is guilty of an indictable offence and liable to *fourteen years'* imprisonment who wilfully—

(*a*) Shoots at any vessel belonging to Her Majesty or in the service of Canada; or

(*b*) Maims or wounds *any public officer* engaged in the execution of his duty or any person acting in aid of such officer. R. S. C. c. 32, s. 213; c. 34, s. 99 (*Amended*).

"Public officer" defined, s. 3. The punishment is altered. The repealed enactments applied only to customs or inland revenue officers.

CHOKING OR DRUGGING WITH INTENT.

244. Every one is guilty of an indictable offence and liable to *imprisonment for life* and to be whipped, who with intent thereby to enable himself or any other person to commit, or with intent thereby to assist any other person in committing any indictable offence—

(*a*) By any means whatsoever, attempts to choke, suffocate or strangle any other person, or by any means calculated to choke, suffocate or strangle, attempts to render any other person insensible, unconscious or incapable of resistance; or

(*b*) Unlawfully applies or administers to, or causes to be taken by, or attempts to apply or administer to, or attempts or causes to be administered to or taken by, any person, any chloroform, laudanum or other stupefying or overpowering drug, matter or thing. R. S. C. c. 162, ss. 15 & 16 (*Amended*). 24-25 V. c. 100, ss. 21, 22. 26-27 V. c. 44 (Imp.).

Indictment for attempting to choke.— unlawfully did attempt by then (*state the means*), to choke, suffocate and strangle one J. N. (*suffocate or strangle any person, or*), with intent thereby then to enable him, the said A. B., the monies, goods, and chattels of the said J. N., from the person of the said J. N., unlawfully to steal. (*Add counts varying the statement of the overt acts, and of the intent.*)

This clause is new, and is directed against those attempts at robbery which have been accompanied by violence to the throat: Greaves, Cons. Acts, 54.

In certain cases a verdict of common assault may be given upon an indictment for this offence, s. 713. .

Indictment for attempting to drug.— unlawfully did apply and administer to one J. N. (*or cause*) certain chloroform with intent thereby (*intent as in the last precedent*).

If it be not certain that it was chloroform, or laudanum, that was administered, add a count or counts stating it to be "a certain stupefying and overpowering drug and matter to the jurors aforesaid unknown." Add also counts varying the intent if necessary.

As to what constitutes an "administering, or attempting to administer": *see* remarks under s. 232, *ante*.

ADMINISTERING POISON SO AS TO ENDANGER LIFE.

245. Every one is guilty of an indictable offence and liable to *fourteen years'* imprisonment who unlawfully 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, R. S. C. c. 162, s. 17; 24-25 V. c. 100, s. 23 (Imp.).

The words "and maliciously" were in the repealed section after "unlawfully": *see* remarks under next section, and under ss. 241 and 242, *ante*.

ADMINISTERING POISON WITH INTENT TO INJURE.

246. Every one is guilty of an indictable offence and liable to *three years'* imprisonment who unlawfully administers to, 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. R. S. C. c. 162, s. 18, 24-25 V. c. 100, s. 24 (Imp.).

The words "and maliciously" were in the repealed section after "unlawfully."

Fine, s. 958.

Under an indictment under s. 245 the jury may find the prisoner guilty of the offence provided for in s. 246.

Indictment under s. 245 for administering poison so as to endanger life.— unlawfully did administer to one J. N. (*or cause*), a large quantity, to wit, two

drachms of a certain deadly poison called white arsenic, and thereby then did endanger the life of the said J. N.

Add a count stating that the defendant "did cause to be taken by J. N. a large quantity of " and if the kind of poison be doubtful, add counts describing it in different ways, and also stating it to be "a certain destructive thing, (or a certain noxious thing) to the jurors aforesaid unknown." There should be also a set of counts stating that the defendant thereby "inflicted upon J. N. grievous bodily harm."

Administering cantharides to a woman with intent to excite her sexual passion, in order to obtain connexion with her, is an administering with intent to injure, aggrieve or annoy, within the meaning of s. 246: R. v. Wilkins, L. & C. 89.

If the poison is administered merely with intent to injure, aggrieve or annoy, which in itself would merely amount to an offence under s. 246, yet if it does, in fact, inflict grievous bodily harm, this amounts to an offence under s. 245: Tulley v. Corrie, 10 Cox, 640.

But to constitute this offence the thing administered must be noxious in itself, and not only when taken in excess: R. v. Hennah, 13 Cox, 547.

"An intent to injure, in strictness, means more than an intent to do harm. It connotes an intent to do wrongful harm": *per* Bowen, L.J., Mogul Co. v. McGregor, 23 Q. B. D. 598.

CAUSING BODILY INJURIES BY EXPLOSIVES.

247. Every one is guilty of an indictable offence and liable to *imprisonment for life* who unlawfully and by the explosion of any explosive substance burns, maims, disfigures, disables or does any grievous bodily harm to any person. R. S. C. c. 162, s. 21. 24-25 V. c. 100, s. 28 (Imp.).

The words "and maliciously" were in the repealed section after "unlawfully."

See remarks under next section.

248. Every one is guilty of an indictable offence and liable, in case (*a*) to *imprisonment for life* and in case (*b*) to *fourteen years'* imprisonment, who unlawfully—

(*a*) With intent to burn, maim, disfigure or disable any person, or to do some grievous bodily harm to any person, whether any bodily harm is effected or not—

(i) Causes any explosive substance to explode;

(ii) Sends or delivers to, or causes to be taken or received by, any person any explosive substance, or any other dangerous or noxious thing;

(iii) Puts or lays at any place, or casts or throws at or upon, or otherwise applies to, any person any corrosive fluid, or any destructive or explosive substance; or

(*b*) Places or throws in, into, upon, against or near any building, ship or vessel any explosive substance, with intent to do any bodily injury to any person, *whether or not any explosion takes place* and whether or not any bodily injury is effected. R. S. C. c. 162, ss. 22 and 23. 24-25 V. c. 100, ss. 29 & 30 (Imp.).

The words in italics are not in the Imperial Act.

"Explosive substance" defined, s. 3.

The words "and maliciously" were in the repealed section after "unlawfully."

Indictment under s. 248 for sending an explosive substance with intent, etc. unlawfully did send (*or deliver to or cause to be taken or received by*) to one J. N., a certain explosive substance and dangerous and noxious thing, to wit, two drachms of fulminating silver, and two pounds weight of gunpowder, with intent in so doing him the said J. N. thereby then to burn (*maim, disfigure or disable, or do some grievous bodily harm*). (*Add counts varying the injury and intent*).

Indictment under s. 248 for throwing corrosive fluid, with intent, etc. unlawfully did cast and throw upon one J. N. a certain corrosive fluid, to wit, one pint of oil of vitriol, with intent in so doing him the said J. N., thereby then to burn. (*Add counts varying the injury and the intent.*)

In R. v. Crawford, 1 Den. 100, the prisoner was indicted for maliciously throwing upon P. C., certain destructive matter, to wit, one quart of boiling water, with intent, etc. The prisoner was the wife of P. C., and when he was asleep she, under the influence of jealousy, boiled a quart of water, and poured it over his face and into one of his ears, and

ran off boasting she had boiled him in his sleep. The injury was very grievous. The man was for a time deprived of sight, and had frequently lost for a time the hearing of one ear. The jury having convicted, the judges held that the conviction was right.

In R. v. Murrow, 1 Moo. 456, it was held, where the defendant threw vitriol in the prosecutor's face, and so wounded him, that this wounding was not the "wounding" meant by the 9 Geo. IV. c. 31, s. 12; but it would now fall under this statute. The question of intent is for the jury: R. v. Saunders, 14 Cox, 180.

Indictment under s. 247 for burning by gunpowder.—

unlawfully, by the explosion of a certain explosive substance, that is to say, gunpowder, one J. N. did burn (*Add counts varying the statement of the injury, according to circumstances.*)

Indictment charged defendants with having unlawfully, knowingly and wilfully deposited in a room in a lodging or boarding house (described) in the city of Halifax, near to certain streets or thoroughfares and in close proximity to divers dwelling houses, excessive quantities of a dangerous and explosive substance called dynamite, in excessive and dangerous quantities, by reason whereof the inhabitants, etc., were in great danger: *Held*, good, without alleging carelessness, or that the quantities deposited were so great that care would not produce safety: R. v. Holmes, 5 R. & G. (N. S.) 498.

SETTING SPRING GUNS, TRAPS, ETC., ETC.

249. Every one is guilty of an indictable offence and liable to *five years'* imprisonment who sets or places, or causes to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy, or inflict grievous bodily harm upon any trespasser or other person coming in contact therewith.

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

3. This section does not extend to any gun or trap usually set or placed with the intent of destroying vermin or *noxious animals*. R. S. C. c. 162, s. 24. 24-25 V. c. 100, s. 31 (Imp.).

The last three words are new: *see* Wootton v. Dawkins, 2 C. B. N. S. 412; Bird v. Holbrook, 4 Bing. 628; Ilott v. Wilkes, 3 B. & Ald. 304; Jordin v. Crump 8 M. & W. 782.

Fine, s. 958.

The English Act has the following additional proviso: "Provided also that nothing in this section shall be deemed to make it unlawful to set or place or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring-gun, man-trap, or other engine which shall be set or placed, or caused or continued to be set or placed, in a dwelling-house for the protection thereof."

Indictment.— unlawfully did set and place, and caused to be set and placed, in a certain garden situate a certain spring-gun which was then loaded and charged with gunpowder and divers leaden shot, with intent that the said spring-gun, so loaded and charged as aforesaid, should inflict grievous bodily harm upon any trespasser who might come in contact therewith.

Prove that the defendant placed or continued the spring-gun loaded in a place where persons might come in contact with it; and if any injury was in reality occasioned state it in the indictment, and prove it as laid. The intent can only be inferred from circumstances, as the position of the gun, the declarations of the defendant, and so forth; any injury actually done will, of course, be some evidence of the intent: Archbold.

A dog-spear set for the purpose of preserving the game is not within the statute, if not set with the intention to do grievous bodily harm to human beings: 1 Russ. 1052.

The instrument must be calculated to destroy life or cause grievous bodily harm, and proved to be such; and, if the prosecutor, while searching for a fowl among some bushes

in the defendant's garden, came in contact with a wire which caused a loud explosion, whereby he was knocked down, and slightly injured about the face, it was held that the case was not within the statute, as it was not proved what was the nature of the engine or substance which caused the explosion, and it was not enough that the instrument was one calculated to create alarm: 1 Russ. 1053.

INJURIES TO RAILWAYS, ETC.

250. Every one is guilty of an indictable offence and liable to *imprisonment for life* who unlawfully—

(*a*) With intent to injure or to endanger the safety of any person travelling or being upon any railway,

(i) Puts or throws upon or across such railway any wood, stone, or other matter or thing;

(ii) Takes up, removes or displaces any rail, railway switch, sleeper or other matter or thing belonging to such railway, or injures or destroys any track, bridge or fence of such railway, or any portion thereof;

(iii) Turns, moves or diverts any point or other machinery belonging to such railway;

(iv) Makes or shows, hides or removes any signal or light upon or near to such railway;

(v) Does or causes to be done any other matter or thing with such intent; or

(*b*) Throws, or causes to fall or strike at, against, into or upon any engine, tender, carriage or truck used and in motion upon any railway any wood, stone or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage or truck, or in or upon any other engine, tender, carriage or truck of any train of which such first mentioned engine, tender, carriage or truck forms part. R. C. S. c. 162, ss. 25 & 26. 24-25 V. c. 100, s. 32-33 (Imp.).

The words "and maliciously" were in the repealed section after "unlawfully."

See remarks under next section.

ENDANGERING SAFETY OF PERSON ON RAILWAY.

251. Every one is guilty of an indictable offence and liable to *two years'* imprisonment who, by any unlawful act, or by any wilful omission or neglect *of duty*, endangers or causes to be endangered the safety of any person conveyed or being in or upon a railway, or aids or assists therein. R. S. C. c. 162, s. 27. 24-25 V. c. 100, s. 34 (Imp.).

Fine, s. 958. A verdict of attempt may be given, if the evidence warrants it, s. 711.

The words "of duty" in this last section are not in the English Act.

Indictment under s. 251 for endangering by wilful neglect the safety of railway passengers. that J. S. on unlawfully did, by a certain wilful omission and neglect of his duty, that is to say, by then wilfully omitting and neglecting to turn certain points in and upon a certain railway called in the parish which points it was then the duty of him, the said J. S., to turn, endanger the safety of certain persons then conveyed and being in and upon the said railway . (*Add counts varying the statement of defendant's duty, etc.*)

An acquittal of the offence under s. 250 was no bar to an indictment for the offence under s. 251: R. v. Gilmore, 15 Cox, 85; but now it would be as a verdict for the offence provided for in s. 251 can be given on an indictment under s. 250: s. 713, *post*.

See post, remarks under s. 489. The forms of indictments there given may form a guide for indictments under the present section.

Prove that it was the duty of the defendant to turn the points; that he wilfully omitted and neglected to do so; and that, by reason of such omission and neglect, the safety of the passengers or other persons conveyed or being on the railway was endangered (which words will include, not only passengers, but officers and servants of the railway company): Archbold.

In R. v. Holroyd, 2 M. & Rob. 339, it appeared that large quantities of earth and rubbish were found placed across the railway, and the prosecutor's case was that this had been done by the defendant wilfully and in order to obstruct the use of the railway; and the defendant's case was that the earth and rubbish had been accidentally dropped on the railway: Maule, J., told the jury, that if the rubbish had been dropped on the rails by mere accident the defendant was not guilty; but "it was by no

means necessary, in order to bring the case within this Act, that the defendant should have thrown the rubbish on the rails expressly with the view to upset the train of carriages. If the defendant designedly placed these substances, having a tendency to produce an obstruction, not caring whether they actually impeded the carriages or not, that was a case within the Act." And on one of the jury asking what was the meaning of the term "wilfully," then used in the statute, the learned judge added "he should consider the act to have been *wilfully* done, if the defendant *intentionally* placed the rubbish on the line, knowing that it was a substance likely to produce an obstruction; if, for instance, he had done so in order to throw upon the company's officers the necessary trouble of removing the rubbish." This decision may afford a safe guide to the meaning of the term *wilful* in this clause, 251: Greaves, Cons. Acts, 62. In the other clauses the word *wilfully* is now replaced by *unlawfully*.

On s. 250 (*b*) Greaves says:—"The introduction of the word *at* extends this clause to cases where the missile fails to strike any engine or carriage. Other words were introduced to meet cases where a person throws into or upon one carriage of a train, when he intended to injure a person being in another carriage of the same train, and similar cases. In R. v. Court, 6 Cox, 202, the prisoner was indicted for throwing a stone against a tender with intent to endanger the safety of persons on the tender, and it appeared that the stone fell on the tender but there was no person on it at the time, and it was held that the section was limited to something thrown upon an engine or carriage having some person therein, and consequently that no offence within the statute was proved; but now this case would clearly come within this clause."

In R. v. Bradford, Bell, 268, it was held that a railway not yet opened for passengers, but used only for the carriage of materials and workmen, is a railway within the statute.

In R. v. Bowray, 10 Jur. 211, 1 Russ. 1058, on an indictment for throwing a stone on a railway so as to endanger the safety of passengers, it was held that the intention to injure is not necessary, if the act was done wilfully, and its effect be to endanger the safety of the persons on the railway.

It is not necessary that the defendant should have entertained any feeling of malice against the railway company, or against any person on the train; it is quite enough to support an indictment under the statute if the act was done mischievously, and with a view to cause an obstruction of a train: R. v. Upton, 5 Cox, 298.

Two boys went upon premises of a railway company, and began playing with a heavy cart which was near the line. Having started the cart it ran down an embankment by its own impetus. One boy tried to divert its course; the other cried to him "let it go." The cart ran on without pushing until it passed through a hedge, and a fence of posts and rails, and over a ditch on to the railway; it rested so close to the railway lines as to obstruct any carriages passing upon them. The boys did not attempt to remove it: *Held*, that as the first act of moving the cart was a trespass, and therefore an unlawful act, and as the jury found that the natural consequence of it was that the cart ran through the hedge and so on to the railway, the boys might be properly convicted: R. v. Monaghan, 11 Cox, 608.

Indictment under s. 250 (b). that on at A. B. unlawfully did throw (*or cause to fall or strike against, into or upon*) upon a certain carriage (*engine, tender, carriage, or truck*), then and there used upon a certain railway there, called a certain large piece of wood (*any wood, stone, or other matter or thing*) with intent thereby then and there to endanger the safety of one C. D., then and there being in (*in or upon*) the said carriage (*engine, tender, carriage or truck*): *see* a form in schedule one, *post*, form F. F., under s. 611.