TITLE IV.

OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE.

PART XII.

OFFENCES AGAINST RELIGION. (*New*).

170. Every one is guilty of an indictable offence and liable to one year's imprisonment who publishes any blasphemous libel.

2. Whether any particular published matter is a blasphemous libel or not is a question of fact. But no one is guilty of a blasphemous libel for expressing in good faith and in decent language, or attempting to establish by arguments used in good faith and conveyed in decent language, any opinion whatever upon any religious subject.

Fine and sureties, section 958; special enactment as to indictments for libel, section 615.

The truth of a blasphemous libel cannot be pleaded as a defence: *see* cases under section 123, *ante;* also R. v. Hicklin, L. R. 3 Q. B. 360, and Archbold, 813.

A blasphemous libel is triable at Quarter Sessions, though not a defamatory nor a seditious libel, section 540. This is new law.

"This section provides a punishment for blasphemous libels, which offence we deem it inexpedient to define otherwise than by the use of that expression. As, however, we consider that the essence of the offence (regarded as a subject for criminal punishment) lies in the outrage which it inflicts upon the religious feelings of the community and not in the expression of erroneous opinions, we have added a proviso to the effect that no one shall be convicted of a blasphemous libel only for expressing in good faith and decent language any opinion whatever upon any religious subject.

"We are informed that the law was stated by Mr. Justice Coleridge to this effect in the case of R. v. Pooley, tried at Bodmin in 1857. We are not aware of any later authority on the subject."—Imp. Comm. Rep.

OBSTRUCTING CLERGYMEN, ETC., ETC.

171. Everyone is guilty of an indictable offence and liable to two years' imprisonment who—

(*a*) By threats or force, unlawfully obstructs or prevents, or endeavours to obstruct or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-house, *school-house* or other place *for* divine worship, or in or from the performance of his duty in the lawful burial of the dead in any church-yard or other burial place. 24-25 V. c. 100, s. 36, (Imp.).

172. Every one is guilty of an indictable offence and liable to two years' imprisonment who strikes or offers any violence to, or upon any civil process or under the pretense of executing any civil process, arrests any clergyman or other minister who is engaged in or, to the knowledge of the offender, is about to engage in, any of the rites or duties in the next preceding section mentioned, or who, to the knowledge of the offender, is going to perform the same, or returning from the performance thereof.

These two sections are a re-enactment of s. 1, c. 156, R. S. C. Fine or sureties, section 958.

The word *school-house* in the first section is not in the English Act, and the words *for* divine worship are substituted for *of* divine worship. In the Revised Statutes it was "used for."

Indictment for obstructing a clergyman in the discharge of his duty— unlawfully did by force (*threats or force*) obstruct and prevent one J. N., a clergyman, then being the vicar of the parish of B., in the county of M., from celebrating divine service in the parish church of the said parish *(or in the performance of his duty in the lawful burial of the dead in the church-yard of the parish church of the said parish.)*

Prove that J. N. is a clergyman and vicar of the parish of B., as stated in the indictment; that the defendant by force obstructed and prevented him from celebrating divine service in the parish church, etc., etc., or assisted in doing so: Archbold.

Indictment for arresting a clergyman about to engage in the performance of divine service.— unlawfully did arrest one J. N., a clergyman, upon certain civil process, whilst he, the said J. N., as such clergyman as aforesaid,

was going to perform divine service, he the said *(defendant)* then well knowing that the said J. N. was a clergyman, and was so going to perform divine service as aforesaid.

DISTURBING PUBLIC WORSHIP.

173. Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding fifty dollars and costs, and in default of payment to one month's imprisonment, who wilfully disturbs, interrupts or disquiets any assemblage of persons met for religious worship, or for any moral, social or benevolent purpose, by profane discourse, by rude or indecent behaviour, or by making a noise, either within the place of such meeting or so near it as to disturb the order or solemnity of the meeting. R. S. C. c. 156, s. 2.

The Imperial Statutes corresponding to this clause are 52 Geo. III. c. 155, s. 12; 15-16 V. c. 36; 23-24 V. c. 32.

The offences against it are punishable by summary conviction. It seems to be based on c. 92, s. 18, C. S. Can. and c. 22, s. 3. C. S. L. C.

PART XIII.

OFFENCES AGAINST MORALITY.

UNNATURAL OFFENCES.

174. Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature. R. S. C. c. 157, s. 1. 24-25 V. c. 100, s. 61, (Imp.).

Indictment.— in and upon one J. N. did make an assault, and then wickedly, and against the order of nature had a venereal affair with the said J. N., and then carnally knew him, the said J. N., and then wickedly, and against the order of nature, with the said J. N., did commit and perpetrate that detestable and abominable crime of buggery.

Sodomy or buggery is a detestable and abominable sin, amongst Christians not to be named, committed by carnal

knowledge against the ordinance of the Creator and order of nature by mankind with mankind, or with brute and beast, or by womankind with brute beast: 3 Inst. 58.

If the offence be committed on a boy under fourteen years of age, it is felony in the agent only: 1 Hale, 670. If by a boy under fourteen on a man over fourteen, it is felony in the patient only: Archbold, 752.

The evidence is the same as in rape, with two exceptions: first, that it is not necessary to prove the offence to have been committed against the consent of the person upon whom it was perpetrated; and secondly, both agent and patient (if consenting) are equally guilty: 5 Burn's Just. 644.

In R. v. Jacobs. R. & R. 331, it was proved that the prisoner had prevailed upon a child, a boy of seven years of age, to go with him in a back-yard; that he, then and there, forced the boy's mouth open with his fingers, and put his private parts into the boy's mouth, and emitted in his mouth; the judges decided that this did not constitute the crime of sodomy.

In one case the majority of the judges were of opinion that the commission of the crime with a woman was indictable; also by a man with his wife: 1 Russ. 939; R. v. Jellyman, Warb. Lead. Cas. 57.

As in the case of rape, penetration alone is sufficient to constitute the offence.

The evidence should be plain and satisfactory in proportion as the crime is detestable.

Upon an indictment under this section, the prisoner may be convicted of an attempt to commit the same, section 711.

The punishment would then be under the next section.

The defendant may also be convicted of either of the offences created by sections 178, 260 or 265, if the evidence warrants it; section 713. *See* section 261 as to indecent assaults on persons under fourteen.

Indictment for bestiality.— with a certain *cow (any animal)* unlawfully, wickedly and against the order of nature had a venereal affair, and then unlawfully, wickedly and against the order of nature, with the said cow did commit and perpetrate that detestable and abominable crime of buggery.

ATTEMPT TO COMMIT SODOMY.

175. Every one is guilty of an indictable offence and liable to ten years' imprisonment who attempts to commit the offence mentioned in the next preceding section. R. S. C. c. 157, s. 2; 24-25 V. c. 100, s. 62, (Imp.).

Indictment.— in and upon one J. N. did make an assault, and him, the said J. N. did then beat, wound and ill-treat, with intent that detestable and abominable crime called buggery with the said J. N. unlawfully, wickedly, diabolically, and against the order of nature to commit and perpetrate.

Where there is consent there cannot be an assault in point of law: R. v. Martin, 2 Moo. 123. A man induced two boys above the age of fourteen years to go with him in the evening to an out of the way place, where they mutually indulged in indecent practices on each others' persons; *Held*, on a case reserved, that under these circumstances, a conviction for an indecent assault could not be upheld: R. v. Wollaston, 12 Cox, 180. But *see* now section 178, *post*.

But the definition of an assault that the act must be *against the will* of the patient implies the possession of an active will on his part, and, therefore, mere submission by a boy eight years old to an indecent assault and immoral practices upon his person, without any active sign of dissent, the child being ignorant of the nature of the assault, does not amount to consent so as to take the offence out of the operation of criminal law: R. v. Lock, 12 Cox, 244. But *see* now section 261, *post*.

The prisoner was indicted for an indecent assault upon a boy of about fourteen years of age. The boy had con-

sented. *Held, on the authority of* R. v. Wollaston, 12 Cox, 180, that the charge was not maintainable: R. v. Laprise, 3 L. N. 139. *See* now section 261, *post.*

Assault with intent to commit sodomy, section 260, *post.*

INCEST.

176. Every parent and child, every brother and sister, and every grandparent and grandchild, who cohabit or have sexual intercourse with each other, shall each of them, if aware of their consanguinity, be deemed to have committed incest, and be guilty of an indictable offence and liable to fourteen years' imprisonment, and the male person shall also be liable to be whipped: Provided that, if the court or judge is of opinion that the female accused is a party to such intercourse only by reason of the restraint, fear or duress of the other party, the court or judge shall not be bound to impose any punishment on such person under this section. 53 V. c. 37, s. 8.

Incest is not an offence at common law. It is a capital offence in Scotland: Wharton L. Lex. v. Incest.

In New Brunswick, by c. 145, Rev. Stat., unrepealed, it is indictable, punishment fourteen years. In Prince Edward Island also, under the Act 24 V. c. 27, unrepealed, incest is indictable, punishment twenty-one years. Also, in Nova Scotia, c. 160, R. S. N. S., punishment two years.

A verdict of common or indecent assault may be given, sections 259, 261, 265, if the evidence warants it, section 713.

Or a verdict of assault with intent to commit an indictable offence, section 263.

A verdict of attempt to commit incest might also under certain circumstances be given, section 711. In the United States, in a case of The People v. Murray, 14 Cal. 159, the court seems to have thought that such a verdict could be given. In Commonwealth v. Goodhue, 2 Met. 193, it was held that one indicted for rape on the person of his daughter might be convicted of incest. But this would not be allowed under this code on a trial for rape, except if the indictment contained also a count for incest: section 626. Then, the verdict would be on the count for incest, if the prisoner had been tried on both counts together.

The *scienter* must be alleged in the indictment. If one of the parties is not aware of the consanguinity he is not guilty. In Bergen v. The People, 17 Ill. 426, it was held that the defendant's admission of relationship with the person with whom he held incestuous intercourse was sufficient proof of such relationship.

Indictment.— that on at A. B. did unlawfully have sexual intercourse with his daughter, C. B., then and there knowing the said C. B. to be his daughter. (*Add another count with "cohabit" instead of "have sexual intercourse." And another one with "commit incest," instead of "have sexual intercourse"*: Baumer v. The State, 49 Ind. 544, Hawley, American Crim. Rep. vol. 1, 354.

Indictment against father and daughter jointly.— that on at A. B. and C. B. father and daughter, did unlawfully have sexual intercourse (*in another count, "did cohabit," and in a third one, "did commit incest"*) together and with one another, the said A. B. then and there knowing the said C. B. to be his daughter, and the said C. B. then and there knowing the said A. B. to be her father.

INDECENT ACTS.

177. Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine of fifty dollars or to six months' imprisonment with or without hard labour, or to both fine and imprisonment, who wilfully—

(*a*) In the presence of one or more persons does any indecent act in any place to which the public have or are permitted to have access; or

(*b*) *Does any indecent act in any place intending thereby to insult or offend any person.* 53 V. c. 37, s. 6.

Section 6 of 53 V. c. 37, is unrepealed. Sub-section (*b*) is given as new by the Imperial Commission. *See* Archbold, 1051; R. v. Holmes, Dears. 207; R. v. Wellard, 14 Q. B. D. 63.

On an indictment at common law for indecent exposure of the person, *Held*, that the exposure must be in an open and public place, but not necessarily generally public and open; if a person indecently exposed his person in a private

yard, so that he might be seen from a public road where there were persons passing, an indictment would lie: R. v. Levasseur, 9 L. N. 386; *Ex parte* Walter, Ramsay's App. Cas. 183; R. v. Harris, 11 Cox, 659.

See R. v. Reed, 12 Cox, 1, *post*, under section 208; R. v. Crunden, Warb. Lead. Cas. 99.

ACTS OF GROSS INDECENCY BY A MALE PERSON WITH ANOTHER MALE.

178. Every male person is guilty of an indictable offence and liable to five years' imprisonment and to be whipped who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person. 53 V. c. 37, s. 5. 48-49 V. c. 69, s. 11 (Imp.).

Fine and sureties, section 958. Verdict of attempt on an indictment to commit the offence in certain cases, section 711; *see* R. v. Jellyman, Warb. Lead. Cas. 57.

The facts proved in R. v. Wollaston, 12 Cox, 180, would now be indictable under this section. So would the facts proved in R. v. Rowed, 3 Q. B. 180. A verdict of attempt to commit sodomy cannot be given on an indictment under this section. The indictment may simply charge that on at A. B., a male person, *in public* (*in another count "in private"*) committed (*or was a party to the commission of*), (*or procured*), (*or attempted to procure the commission of*) an act of gross indecency with C. D., another male person. An indictment charging an attempt by a male person to commit an act of gross indecency with another male person lies under section 529, *post*. Also under section 260, for an indecent assault by a male person on another male person.

PUBLISHING OBSCENE MATTER. (*New*).

179. Every one is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful justification or excuse—

(*a*) Publicly sells, or exposes for public sale or to public view, any obscene book, or other printed or written matter, or any picture, photograph, model or other object, tending to corrupt morals; or

(*b*) Publicly exhibits any disgusting object or any indecent show;

(*c*) Offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any medicine, drug or article intended or represented as a means of preventing conception or causing abortion.

2. No one shall be convicted of any offence in this section mentioned if he proves that the public good was served by the acts alleged to have been done.

3. It shall be a question of law whether the occasion of the sale, publishing, or exhibiting is such as might be for the public good, and whether there is evidence of excess beyond what the public good requires in the manner, extent or circumstances in, to or under which the sale, publishing or exhibition is made, so as to afford a justification or excuse therefor; but it shall be a question for the jury whether there is or is not such excess.

4. The motives of the seller, publisher or exhibitor shall in all cases be irrelevant.

Fine or sureties, section 958. Allegations in indictments, section 615. The corresponding article of the Imperial draft code covered obscene libels.

"We believe that this section as to obscene publications expresses the existing law, but it puts it into a much more definite form than at present. We do not, however, think it desirable to attempt any definition of obscene libel other than that conveyed by the expression itself."—Imp. Comm. Rep.

Sub-section (*c*,) section 207, *post*, covers offences which, in certain cases, would fall under sub-section (*b*) of this section 179.

See R. v. Bradlaugh, 3 Q. B. D. 607; Stephen's Cr. L. Art. 172; R. v. Adams, 16 Cox, 544, 22 Q. B. D. 66, Warb. Lead. Cas., 58; R. v. Saunders, 13 Cox, 116.

POSTING IMMORAL BOOKS, ETC.

180. Every one is guilty of an indictable offence and liable to *two* years' imprisonment who posts for transmission or delivery by or through the post—

(*a*) Any obscene or immoral book, pamphlet, newspaper, picture, print, engraving, lithograph, photograph or other publication, matter or thing of an indecent or immoral character; or

(*b*) Any letter upon the outside or envelope of which, or any post card or post band or wrapper upon which, there are words, devices, matters or things of the character aforesaid; or

(*c*) Any letter or circular concerning schemes devised or intended to deceive and defraud the public or for the purpose of obtaining money under false pretenses. R. S. C. c. 35, s. 103. (*Amended*). 47-48 V. c. 76, s. 4, (Imp.).

Fine and sureties, section 958. Indictment, section 616.

This section does not cover letters or writings of an immoral character. The posting to be indictable under this section must be made within Canada, but whether to be

delivered out of Canada or not is immaterial. R. v. McKay, 28 N. B. Rep. 564.

SEDUCTION OF GIRLS BETWEEN FOURTEEN AND SIXTEEN.

181. Every one is guilty of an indictable offence and liable to two years' imprisonment who seduces or has illicit connection with any girl of previously chaste character, of or above the age of fourteen years and under the age of sixteen years. R. S. C. c. 157, s. 3; 53 V. c. 37, s. 3. (*Amended*). 48-49 V. c. 69, s. 5, (Imp.).

Fine and sureties, section 958. Limitation, one year, section 551. One witness only not sufficient if not corroborated, section 684.

Indictment.—. . . . that A. B. on . . . . unlawfully seduced and had illicit connection with one C. D. a girl of previously chaste character, and then being of, (*or above the age of*) fourteen years and under the age of sixteen years.

As to evidence of age *see* R. v. Nicholls, 10 Cox, 476, R. v. Weaver, L. R. 2 C. C. R. 85; R. v. Wedge, 5 C. & P. 298.

If it is proved that the girl was under fourteen the prisoner must be acquitted. He may then be indicted under section 269.

Previous chastity, according to a case in the United States, is not to be presumed; it has to be proved. West v. The State, 1 Wis. 209; *see* Bishop, Stat. Cr. 639. A contrary opinion is held in Archbold. The United States case seems to be correct.

SEDUCTION UNDER PROMISE OF MARRIAGE.

182. Every one, above the age of twenty-one years, is guilty of an indictable offence and liable to two years' imprisonment who, under promise of marriage, seduces *and* has illicit connection with any unmarried female of previously chaste character and under twenty-one years of age. 50-51 V. c. 48, s. 2.

Fine, section 958. Limitation, one year, section 551.

One witness must be corroborated, section 684; subsequent marriage between the parties a good defence, section 184, (*New*).

Indictment.—That A. B. being then above the age of twenty-one years, did seduce under promise of marriage one C. D. then an unmarried female of previously chaste character and then being, the said C. D., under twenty-one years of age, and had illicit connection with her the said C. D.

As to proof of a previous chaste character *see* under preceding section. If the man is married and the girl knows it there can be no offence under this section. The People v. Alger, 1 Parker, 333; Bishop, Stat. Cr. 647.

SEDUCTION OF WARD.

183. Every one is guilty of an indictable offence and liable to two years' imprisonment who, being a guardian, seduces *or* has illicit connection with his ward, and every one who seduces *or* has illicit connection with any woman or girl of previously chaste character and under the age of twenty-one years who is in his employment in a factory, mill or workshop, or who, being in a common employment with him in such factory, mill or workshop, is, in respect of her employment or work in such factory, mill or workshop, under or in any way subject to his control or direction. 53 V. c. 37, s. 4.

Fine, section 958; limitation one year, section 551. Evidence of one witness must be corroborated, section 684. Subsequent marriage between the parties a defence, section 184. Verdict of attempt in certain cases, section 711.

The offence by a guardian on his ward need not have been seduction. Illicit intercourse with his ward constitutes an offence even if his ward was not of a previously chaste character.

Indictment.—That on A. B. being the guardian of one C. D. unlawfully did seduce and have illicit connection with the said C. D. his ward. (*Add another count charging illicit connection only.*)

The offence by an employer on his employee is seduction; the illicit connection must have been with a woman or girl of previously chaste character. Through an error, however, as the section reads, there is no offence whatever of the kind provided for.

SEDUCTION OF FEMALE PASSENGERS ON VESSELS.

184. Every one is guilty of an indictable offence and liable to a fine of one hundred dollars, or to one year's imprisonment, who, being the master or

other officer or a seaman or other person employed on board of any vessel, while such vessel is in any water within the jurisdiction of the Parliament of Canada, under promise of marriage, or by threats, or by the exercise of his authority, or by solicitation, or the making of gifts or presents, seduces *and* has illicit connection with any female passenger.

2. The subsequent intermarriage of the seducer and the seduced is, if pleaded, a good defence to any indictment for any offence against this or either of the two next preceding sections, except in the case of a guardian seducing his ward. R. S. C. c. 65, s. 37.

Evidence of one witness must be corroborated, section 684, (*New*).

Verdict of attempt in certain cases, section 711.

UNLAWFULLY DEFILING WOMEN.

185. Every one is guilty of an indictable offence, and liable to two years' imprisonment with hard labour, who—

(*a*) Procures, or attempts to procure, any girl or woman under twenty-one years of age, not being a common prostitute or of known immoral character, to have unlawful carnal connection, either within or without Canada, with any other person or persons; or

(*b*) Inveigles or entices any such woman or girl to a house of ill-fame or assignation for the purpose of illicit intercourse or prostitution, or knowingly conceals in such house any such woman or girl so inveigled or enticed; or

(*c*) Procures, or attempts to procure, any woman or girl to become, either within or without Canada, a common prostitute; or

(*d*) Procures, or attempts to procure, any woman or girl to leave Canada with intent that she may become an inmate of a brothel elsewhere; or

(*e*) Procures any woman or girl to come to Canada from abroad with intent that she may become an inmate of a brothel in Canada; or

(*f*) Procures, or attempts to procure, any woman or girl to leave her usual place of abode in Canada, such place not being a brothel, with intent that she may become an inmate of a brothel within or without Canada; or

(*g*) By threats or intimidation procures, or attempts to procure, any woman or girl to have any unlawful carnal connection, either within or without Canada; or

(*h*) By false pretenses or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection, either within or without Canada; or

(*i*) Applies, administers to, or causes to be taken by any woman or girl any drug, intoxicating liquor, matter, or thing with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connection with such woman or girl. 53 V. c. 39, s. 9; R. S. C. c. 157, s. 7.

Limitation, one year, section 551. Fine, section 958.

The 53 V. c. 39, cited under this section, is an Act respecting the Toronto Board of Trade.

Search warrant, section 574. Evidence of one witness must be corroborated, section 684. As to indictments charging false pretenses, fraud or fraudulent means, section 616.

This section is a re-enactment of sections 2 & 3 of 48-49 V. c. 69,(Imp.) except (*b*) which is taken from section 7, chapter 157, R. S. C. Under (*a*) and (*b*), the woman or girl must be under twenty-one years of age.

Forms of indictments.—(*A*) . . . that A. B., on etc., at etc., unlawfully did procure (*or attempt to procure*) one C. D., a girl (*or woman*) then being, the said C. D., under the age of twenty-one years, and not a common prostitute or of known immoral character, to have unlawful carnal connection with another person (*or other persons.*)

(*B*) . , . that A. B., on . . . . at . . . . unlawfully inveigled and enticed one C. D., a girl (*or woman*) then being under the age of twenty-one years, she the said C. D. not being then a common prostitute or of known immoral character, to a house of ill-fame (*or assignation*) for the purpose of illicit intercourse and prostitution . . . . . (*or*, that on . . . . at . . . . . A. B. unlawfully concealed in a house of ill-fame (*or assignation*) one C. D., a girl (*or woman*) then being, the said C. D., under the age of twenty-one years and not a common prostitute or of known immoral character, and which said C. D. had been unlawfully inveigled and enticed to the said house of ill-fame (*or assignation*) for the purpose of illicit intercourse and prostitution). . . .

(*C.*) . . . . That the said A. B., on etc., at etc., unlawfully did procure (*or attempt to procure*) one C. D., a woman (*or girl*) to become a common prostitute: R. v. McNamara, 20 O. R. 489.

(*D.*) That the said A. B., on etc., at etc., unlawfully did procure (*or attempt to procure*) C. D., a woman (*or girl*) to leave Canada with intent unlawfully that she might become an inmate of a brothel elsewhere.

(*E*) . . . . . that A. B., at . . . . on . . . . unlawfully procured (*or attempted to procure*) one C. D. a woman (*or girl*) to come to Canada from abroad with intent unlawfully that she might become an inmate of a brothel in Canada.

(*F*) . . . that on . . . at . . . A. B., unlawfully procured (*or attempted to procure*) C. D., a woman (*or girl*) to leave her usual place of abode in Canada, to wit, at (*naming her abode*) such place not being a brothel, with intent that she should for the purposes of prostitution become an inmate of a brothel.

(*G.*) . . . . That A. B. on etc., at etc., unlawfully by threats (*or intimidation*) procured (*or attempted to procure*) C. D., a woman (*or girl*) to have unlawful carnal connection with men.

(*H.*) . . . . That A. B. by false pretenses (*or false representations*) unlawfully procured C. D., a woman (*or girl*) not being a common prostitute or of known immoral character, to have unlawful carnal connection with men.

(*I.*) That A. B. on, etc., at etc., unlawfully applied to (*or administered to, or caused to be taken by*) C. D., a woman (*or girl*) a certain drug, intoxicating liquor (*or matter or thing*) with intent to stupefy (*or overpower*) her so as thereby to enable a man to have unlawful carnal connection with her the said C. D.

PARENT OR GUARDIAN PROCURING DEFILEMENT OF WARD.

186. Every one who, being the parent or guardian of any girl or woman,—

(*a*) Procures such girl or woman to have carnal connection with any man other than the procurer; or

(*b*) Orders, is party to, permits or knowingly receives the avails of the defilement, seduction or prostitution of such girl or woman,

Is guilty of an indictable offence, and liable to fourteen years' imprisonment if such girl or woman is under the age of fourteen years, and if such girl or woman is of or above the age of fourteen years to five years' imprisonment. 53 V. c. 37, s. 9.

Limitation, one year, section 551. *One* witness must be corroborated, section 684.

A stranger to a girl under fourteen is liable *to imprisonment for life* if he procures such girl to have carnal connection with any man: sections 61-269; but *a mother* who so procures her child to have carnal connection with a man is punishable by *fourteen years* only. And, in the case of a girl between fourteen and sixteen, the mother who procures her prostitution is punishable by five years whilst a stranger is liable only to two; sections 61-181. This last provision is not a wrong one taken by itself, but to find it in the same section with the first one shows with what carelessness this legislation has been enacted. For a mother to procure the prostitution of her daughter is *less* criminal than if done by a stranger to her daughter, if that daughter is less than fourteen years old. But when the daughter is over fourteen and less than sixteen, the procurement of her prostitution by her mother is *more* criminal than if done by a stranger! and a guardian who is accessory to the prostitution of his seventeen years old ward is liable to five years, but only to two years if he himself seduces that ward: ss. 183-186.

HOUSEHOLDER PERMITTING DEBAUCHERY ON HIS PREMISES.

187. Every one who, being the owner *and* occupier of any premises, or having, or acting or assisting in the management or control thereof, induces or knowingly suffers any girl of such age as in this section mentioned to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man, or generally, is guilty of an indictable offence and—

(*a*) Is liable to ten years' imprisonment if such girl is under the age of fourteen years; and

(*b*) Is liable to two years' imprisonment if such girl is of or above the age of fourteen and under the age of sixteen years. R. S. C. c. 157, s. 5; 53 V., c. 37, s. 3; 48-49 V. c. 69, s. 6, (Imp.).

Limitation, one year, section 551. One witness must be corroborated, section 684.

A proviso in the Imperial Act, and in chapter 157 of the R. S. C. s. 5, making it a sufficient defence if it appears that the accused had reasonable cause to believe that the girl was above sixteen, has been struck out: *see* R. v. Packer, 16 Cox, 57; R. v. Prince, 13 Cox, 138, Warb. Lead. Cas. 89.

Indictment under (*a*) . . . . that A. B., on . . . . then being the owner *and* occupier (*the Imperial statute has* ("*or occupier*") (*or having, or acting, or assisting in the management or control*) of certain premises, to wit, a house (*describe it by street and number, or as minutely as possible*) did unlawfully induce (*or unlawfully and knowingly suffered*) a certain girl, to wit, one C. D., then being under the age of fourteen years, to resort to (*or to be in, or upon*) the said premises for the purpose of being unlawfully and carnally known by a man named W. M. (*or by a man*) or by men generally. *Vary in different counts.* If it is proved that the girl is above fourteen, but under sixteen, the conviction may be under (*b*): *see* R. v. Webster, 16 Q. B. D. 136; R. v. Barrett, L. & C. 263, and R. v. Stannard, L. & C. 349. If it is proved that the girl is above sixteen the conviction may be, if the evidence warrants it, under section 185.

CONSPIRACY TO DEFILE. *(New).*

188. Every one is guilty of an indictable offence and liable to two years' imprisonment who conspires with any other person by false pretenses, or false representations or other fraudulent means, to induce any woman to commit adultery or fornication.

Fine, section 958; requirements of indictment, section 616; one witness must be corroborated, section 684: *See* R. v. Lord Grey, 3 St. Tr. 519; R. v. Mears, 2 Den. 79; R. v. Delaval, 3 Burr. 1435. Adultery is an indictable offence in New Brunswick: R. v. Egre, 1 P. & B. 189; R. v. Ellis, 22 N. B. Rep. 440. But it being unlawful, though not indictable in the other provinces, the above section has only the effect of reducing the punishment which, on an indictment at common law, for such conspiracy would be punishable by five years under section 951.

Indictment for conspiracy to procure a woman to have illicit connection with a man.—That *A. B.* and *C. D.*, being persons of wicked and depraved mind and disposition, and contriving, craftily and deceitfully, to debauch and corrupt the morals of *E. F.*, a woman, on the day

of , did conspire, combine, confederate, and agree together, wickedly, knowingly, designedly, and unlawfully, by false pretenses, false representations, and other fraudulent means, to induce the said *E. F.* to have illicit carnal connection and commit fornication with a man, whose name is to the jurors unknown, (*or with A. D.*).

CARNALLY KNOWING IDIOTS.

189. Every one is guilty of an indictable offence and liable to four years' imprisonment who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of any female idiot or imbecile, insane or *deaf and dumb* woman or girl, under circumstances which do not amount to rape but which prove that the offender knew, at the time of the offence, that the woman or girl was an idiot, or imbecile, or insane or *deaf and dumb*. R. S. C. c. 157, s. 3. 50-51 V. c. 48, s. 1. 48-49 V. c. 69, s. 5, (Imp.).

The words in italics are new: *see* R. v. Berry, 1 Q. B. D. 447. Fine, section 958; one witness must be corroborated, section 684; verdict of attempt in certain cases when full offence charged, section 711.

Indictment.— . . . . that A. B. on . . . . at . . . . unlawfully did indecently assault, and unlawfully and carnally did know (*or did attempt to have unlawful carnal knowledge of*) a certain female idiot called C. D. (*or imbecile and insane woman or girl*) called C. D. (*or deaf and dumb woman or girl*) called C. D. under circumstances that do not amount to rape, he, the said A. B., well knowing at the time of the said offence that the said woman (*or girl*) was an idiot, or (*as the case may be.*)

See R. v. Pressy, 10 Cox, 635, and R. v. Arnold, 1 Russ. 9.

Consent by the female is not a defence. A verdict of common assault or indecent assault may be given, section 713, but not a verdict of attempt to commit rape. If rape or attempt to commit rape is proved the judge may order that the offender be indicted accordingly.

PROSTITUTION OF INDIAN WOMEN.

190. Every one is guilty of an indictable offence and liable to a penalty not exceeding one hundred dollars and not less than ten dollars, or six months' imprisonment—

(*a*) Who, being the keeper of any house, tent or wigwam, allows or suffers any *unenfranchised* Indian woman to be or remain in such house, tent or wigwam, knowing or having probable cause for believing that such Indian woman is in or remains in such house, tent or wigwam with the intention of prostituting herself therein; or

(*b*) Who, being an Indian woman, prostitutes herself therein; or

(*c*) Who, being an *unenfranchised* Indian woman, keeps, frequents or is found in a disorderly house, tent or wigwam used for any such purpose.

2 Every person who appears, acts or behaves as master or mistress, or as the person who has the care or management, of any house, tent or wigwam in which any such Indian woman is or remains for the purpose of prostituting herself therein, is deemed to be the keeper thereof, notwithstanding he or she is not in fact the real keeper thereof. R. S. C. c. 43, ss. 106 & 107. 50-51 V. c. 33, s. 11.

Section 684, *post*, applies. Under c. 33, s. 11, 50-51 V. the enactment contained in this section applied only to Indians. The word "unenfranchised" is new.

PART XIV.

NUISANCES.

Common Nuisance.

191. A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all Her Majesty's subjects.

4 Blac. Comm. 166; 1 Russ. 421; Stephen's Cr. L. Art. 176 *et seq*, and cases there cited; R. v. Moore, 3 B. & C. 184; R. v. Medley, 6 C. & P. 292; R. v. Henson, Dears. 24; R. v. Lister, Dears. & B. 209; R. v. Stephens, L. R. 1 Q. B. 702; R. v. Brewster, 8 U. C. C. P. 208; Hillyard v. G. T. R. 8 O. R. 583; R. v. Dunlop, 11 L. C. J. 186; R. v. Bruce, 10 L. C. R. 117; R. v. Patton, 13 L. C. R. 311; R. v. Brice, 15 Q. L. R. 147; Brown & Gugy, 14 L. C. R. 213; R. v. The Mayor of St. John, Chipman MSS. 155; 3 Burn's Just. v. Nuisance, 1026, 1068.

"With regard to nuisances we have, in section 151 and section 152, (192, 193, *post*), drawn a line between such nuisances as are and such as are not to be regarded as criminal offences. It seems to us anomalous and objectionable upon all grounds that the law should in any way countenance the proposition that it is a criminal offence not to repair a highway when the liability to do so is disputed in perfect good faith. Nuisances which endanger the life, safety, or health of the public stand on a different footing."

"By the present law, when a civil right such as a right of way is claimed by one private person and denied by another, the mode to try the question is by an action. But when the right is claimed by the public, who are not competent to bring an action, the only mode of trying the question is by an indictment or information, which is, in form, the same as an indictment or information for a crime. But it was very early determined that, though it was in form a prosecution for a crime, yet that, as it involved a remedy for a civil right, the Crown's pardon could not be pleaded in bar: *see* 3 Inst 237. And the legislature, so recently as in the statute 40 and 41 V. c. 14, (allowing defendant to be a witness) again recognized the distinction."

"The existing remedy in such cases is not convenient, but it is not within our province to suggest any amendment."—Imp. Comm. Rep.

Indictment.— . . . . . that A. B. . . . . on . . . . . and on divers other days and times as well before as afterwards, at . . . . . (*set forth the nuisance*) (*the defendant will be entitled to particulars. R.* v. *Purwood, 3 Ad. & El. 815, sections 611, 629, post*) and the same nuisance so as aforesaid done, doth yet continue and suffer to remain to the great damage and common nuisance of all the liege subjects of Her Majesty. And the jurors aforesaid present that the said A. B. on the day and year aforesaid did commit a common nuisance which endangered the lives, safety, health, property or comfort (*as the case may be*) of the public (*or by which the public are obstructed in the exercise or enjoyment of a right common to all Her Majesty's subjects, to wit, the right of*) to the great damage and

common nuisance of all the subjects of Her Majesty. Special forms in 3 Burn, *loc. cit.;* R. v. Lister, Dears. & B. 209; R. v. Mutters, L. & C. 491, Saunder's Precedents, 192, *et. seq.*

PENALTY FOR COMMON NUISANCE. *(New).*

192. Every one is guilty of an indictable offence and liable to one year's imprisonment or a fine who commits any common nuisance which endangers the lives, safety or health of the public, *or which occasions injury to the person of any individual.*

See under preceding section. The words in italics are new law. They are in contradiction with the definition given in the preceding section.

NUISANCES OF A PARTICULAR CHARACTER. *(New).*

193. Any one convicted upon any indictment or information for any common nuisance other than those mentioned in the preceding section, shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right.

See annotation under section 191, *ante.*

SELLING THINGS UNFIT FOR FOOD. *(New).*

194. Every one is guilty of an indictable offence and liable to one year's imprisonment who knowingly and wilfully exposes for sale, or has in his possession with intent to sell, for human food, articles which he knows to be unfit for human food.

2. Every one who is convicted of this offence after a previous conviction for the same crime shall be liable to two years' imprisonment.

Fine, section 958. A common law misdemeanour: *see* Shillito v. Thompson, 1 Q. B. D. 12; 1 Russ. 169, and cases there cited. The offence is already covered by chapter 107, R. S. C.: Form, 2 Chit. 555.

COMMON BAWDY HOUSE DEFINED. *(New).*

195. A common bawdy-house is a house, room, set of rooms or place of any kind kept for purposes of prostitution.

COMMON GAMING HOUSE DEFINED. *(New).*

196. A common gaming-house is—

(*a*) A house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance; or

(*b*) A house, room or place kept or used for playing therein at any game of chance, or any mixed game of chance and skill, in which—

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

(ii) In which any game is played the chances of which are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the game is managed, or against whom the other players stake, play or bet. 8-9 V. c. 109, s. 2 (Imp.).

Every place where gaming in stocks is carried on is a gaming house: ss. 198 and 201, *post*, and notes thereunder; *see* Jenks v. Turpin, 13 Q. B. D. 505.

COMMON BETTING HOUSE DEFINED.

197. A common betting-house is a house, office, room or other place—

(*a*) Opened, kept or used for the purpose of betting between persons resorting thereto and—

(i) The owner, occupier, or keeper thereof;

(ii) Any person using the same;

(iii) Any person procured or employed by, or acting for or on behalf of, any such person;

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

(*b*) Opened, kept or used for the purpose of any money or valuable thing being received by or on behalf of any such person as aforesaid, as or for the consideration,

(i) For any assurance or undertaking, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of, or relating to, any horse-race or other race, fight, game or sport; or

(ii) For securing the paying or giving by some other person of any money or valuable thing on any such event or contingency. 16-17 V. c. 119 (Imp.).

See Doggett v. Catterns, 19 C. B. N. S. 765; Haigh v. Sheffield, L. R. 10 Q. B. 102; R. v. Preedy, 17 Cox, 433; Whitehurst v. Fincher, 17 Cox, 70; Davis v. Stephenson, 17 Cox, 73; Snow v. Hill, 15 Cox, 737, 14 Q. B. D. 588; Caminada v. Hulton, 17 Cox, 307; Hornsby v. Raggett, 17 Cox, 428.

BAWDY-HOUSE, COMMON GAMING OR BETTING-HOUSE, PUNISHMENT. (*New*).

198. Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house or common betting-house, as hereinbefore defined.

2. Any one who appears, acts, or behaves as master or mistress, or as the person having the care, government or management, of any disorderly house shall be deemed to be the keeper thereof, and shall be liable to be prosecuted

and punished as such, although in fact he or she is not the real owner or keeper thereof. 25 Geo. II. c. 36, s. 8. 16-17 V. c. 119. 17-18 V. c. 38 (Imp.).

A common law misdemeanour. Ss. 9 & 10 of chapter 158, R. S. C., "an Act respecting Gaming Houses," as to evidence in such cases, are unrepealed. Fine, s. 958. S. 207, *post*, also provides for the offence of keeping a disorderly house.

Section 575, *post*, as to search warrants; ss. 702, 703, as to evidence in such cases, and ss. 783 & 784, as to summary trial.

Husband and wife may be indicted together: R. v. Williams, 1 Salk. 383; R. v. Dixon, 10 Mod. 335; R. v. Warren, 16 O. R. 590. *See* R. v. Crawshaw, Bell, 303; R. v. Barrett, L. & C. 263; R. v. Rogier, 1 D & R. 284; Jenks v. Turpin, 13 Q. B. D. 505; R. v. McNamara, 20 O. R. 489; R. v. Stannard, L. & C. 349; R. v. Newton, 11 Ont. P. R. 101; R. v. Rice, Warb. Lead. Cas. 101, as to what is a bawdy house, or a common gaming house.

PLAYING OR LOOKING ON IN GAMING-HOUSE.

199. Every one who plays or looks on while any other person is playing in a common gaming-house is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars and not less than twenty dollars, and in default of payment to two months' imprisonment. R. S. C. c. 158, s. 6.

See. R. v. Murphy, 17 O. R. 201

OBSTRUCTING PEACE OFFICER ENTERING GAMING-HOUSE.

200. Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars, and to six months' imprisonment, with or without hard labour, who—

(*a*) Wilfully prevents any constable or other officer duly authorized to enter any disorderly house, as mentioned in section one hundred and ninety-eight, from entering the same or any part thereof; or

(*b*) Obstructs or delays any such constable or officer in so entering; or

(*c*) By any bolt, chain or other contrivance secures any external or internal door of, or means of access to, any common gaming-house so authorized to be entered; or

(*d*) Uses any means or contrivance whatsoever for the purpose of preventing, obstructing or delaying the entry of any constable or officer, authorized as aforesaid, into any such disorderly house or any part thereof. R. S. C. c. 158, s. 7.

GAMING IN STOCKS AND MERCHANDISE.

201. Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine of five hundred dollars, who, with the intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking, either in Canada or elsewhere, or of any goods, wares or merchandise—

(*a*) Without the *bona fide* intention of acquiring any such shares, goods, wares or merchandise, or of selling the same, as the case may be, makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise; or

(*b*) Makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the *bona fide* intention to make or receive such delivery.

2. But it is not an offence if the broker of the purchaser receives delivery on his behalf, of the article sold, notwithstanding that such broker retains or pledges the same as security for the advance of the purchase money or any part thereof.

3. Every office or place of business wherein is carried on the business of making or signing, or procuring to be made or signed, or negotiating or bargaining for the making or signing of such contracts of sale or purchase as are prohibited in this section is a common gaming-house, and every one who as principal or agent occupies, uses, manages or maintains the same is the keeper of a common gaming-house. 51 V. c. 42. ss. 1 & 3.

This is a re-enactment of the Act against bucket shops. *See* section 704, *post*, as to evidence.

FREQUENTING PLACES WHERE GAMING IN STOCKS IS CARRIED ON.

202. Every one is guilty of an indictable offence and liable to one year's imprisonment who habitually frequents any office or place wherein the making or signing, or procuring to be made or signed, or the negotiating or bargaining for the making or signing, of such contracts of sale or purchase as are mentioned in the section next preceding is carried on. 51 V. c. 42, s. 1. s-s. 2.

Fine, section 958.

GAMBLING IN PUBLIC CONVEYANCES.

203. Every one is guilty of an indictable offence and liable *to one year's* imprisonment who—

(*a*) In any railway car or steamboat, used as a public conveyance for passengers, by means of any game of cards, dice or other instrument of gambling, or by any device of like character, obtains from any other person any money, chattel, valuable security or property; or

(*b*) Attempts to commit such offence by actually engaging any person in any such game with intent to obtain money or other valuable thing from him.

2. Every conductor, master or superior officer in charge of, and every clerk or employee when authorized by the conductor or superior officer in charge of, any railway train or steamboat, station or landing place in or at which any such offence, as aforesaid, is committed or attempted, *must*, with or without warrant, arrest any person whom he has good reason to believe to have committed or attempted to commit the same, and take him before a justice of the peace, and make complaint of such offence on oath, in writing.

3. Every conductor, master or superior officer in charge of any such railway car or steamboat, who makes default in the discharge of any such duty is liable, on summary conviction, to a penalty not exceeding one hundred dollars and not less than twenty dollars.

4. Every company or person who owns or works any such railway car or steamboat must keep a copy of this section posted up in some conspicuous part of such railway car or steamboat.

5. Every company or person who makes default in the discharge of such duty is liable to a penalty not exceeding one hundred dollars and not less than twenty dollars. R. S. C. c. 160, ss. 1, 3, 6. (*Amended*).

Fine, section 958.

BETTING AND POOL-SELLING.

204. Every one is guilty of an indictable offence, and liable to one year's imprisonment, and to a fine not exceeding one thousand dollars, who

(*a*) Uses or knowingly allows any part of any premises under his control to be used for the purpose of recording or registering any bet or wager, or selling any pool; or

(*b*) Keeps, exhibits, or employs, or knowingly allows to be kept, exhibited or employed, in any part of any premises under his control, any device or apparatus for the purpose of recording any bet or wager, or selling any pool; or

(*c*) Becomes the custodian or depositary of any money, property or valuable thing staked, wagered or pledged; or

(*d*) Records or registers any bet or wager, or sells any pool, upon the result—

(i) Of any political or municipal election;

(ii) Of any race;

(iii) Of any contest or trial of skill or endurance of man or beast.

2. The provisions of this section shall not extend to any person by reason of his becoming the custodian or depositary of any money, property or valuable thing staked, to be paid to the winner of any lawful race, sport, game, or exercise, or to the owner of any horse engaged in any lawful race, or to bets between individuals *or made on the race course of an incorporated association during the actual progress of a race meeting.* R. S. C. c. 159, s. 9.

The words in italics are new. Section 783, *post*, as to summary trial of offences under this section: *see* Fulton v. James, 5 U. C. C. P. 182; R. v. Dillon, 10 Ont. P. R. 352; R. v. Smiley, 22 O. R. 686.

LOTTERIES.

205. Every one is guilty of an *indictable* offence and *liable to two years' imprisonment and to a fine not exceeding two thousand dollars*, who—

(*a*) Makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan for advancing, lending, giving, selling or in any way disposing of any property, by lots, cards, tickets, or any mode of chance whatsoever; or

(*b*) Sells, barters, exchanges or otherwise disposes of, or causes or procures, or aids or assists in, the sale, barter, exchange or other disposal of, or offers for sale, barter or exchange, any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property by lots, tickets or any mode of chance whatsoever.

2. Every one is guilty of an offence and liable on summary conviction to a penalty of twenty dollars, who buys, takes or receives any such lot, ticket or other device as aforesaid.

3. Every sale, loan, gift, barter or exchange of any property, by any lottery, ticket, card or other mode of chance depending upon or to be determined by chance or lot, is void, and all such property so sold, lent, given, bartered or exchanged, is liable to be forfeited to any person who sues for the same by action or information in any court of competent jurisdiction.

4. No such forfeiture shall affect any right or title to such property acquired by any *bona fide* purchaser for valuable consideration, without notice.

5. This section includes the printing or publishing, or causing to be printed or published, of any advertisement, scheme, proposal or plan of any foreign lottery, and the sale or offer for sale of any ticket, chance or share in any such lottery, or the advertisement for sale of such ticket, chance or share.

6. This section does not apply to—

(*a*) The division by lot or chance of any property by joint tenants or tenants in common, or persons having joint interests (*droits indivis*) in any such property; or

(*b*) Raffles for prizes of small value at any bazaar held for any charitable object, if permission to hold the same has been obtained from the city or other municipal council, or from the Mayor, reeve or other chief officer of the city, town or other municipality, wherein such bazaar is held and the articles raffled for thereat have first been offered for sale and none of them are of a value exceeding fifty dollars; or

(*c*) Any distribution by lot among the members or ticket holders of any incorporated society established for the encouragement of art, of any paintings, drawings or other work of art produced by the labour of the members of, or published by or under the direction of, such incorporated society.

(*d*) *The Credit Foncier du Bas-Canada* or *to the Credit Foncier Franco-Canadien*. R. S. C. c. 159.

"Property" defined, section 3. The words in italics are new. By the repealed statute the penalty was only twenty dollars punishable on summary conviction: *see* s. 575, as to

search warrants: R. v. Dodds, 4 O. R. 390; Cronyn v. Widder, 16 U. C. Q. B. 356; R. v. Jamieson, 7 O. R. 149; Power v. Caniff, 18 U. C. Q. B. 403; La Société St. Louis v. Villeneuve, 21 L. C. J. 309; R. v. Crawshaw, Bell, 303.

MISCONDUCT IN RESPECT OF DEAD BODIES. (*New*).

206. Every one is guilty of an indictable offence and liable to five years' imprisonment who—

(*a*) Without lawful excuse, neglects to perform any duty either imposed upon him by law or undertaken by him with reference to the burial of any dead human body or human remains; or

(*b*) Improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not.

A common law offence. Fine, section 958. To dig up a dead body and sell it for purposes of dissection is an offence: R. v. Lynn, 1 Leach, 497. *See* R. v. Price, 12 Q. B. D. 247; R. v. Stephenson, 13 Q. B. D. 331, 15 Cox, 679, Warb. Lead. Cas. 97; R. v. Sharpe, Dears. & B. 160; R. v. Feist, Dears. & B. 590.

Indictment— that A. B. on the day of in the year of our Lord the churchyard of and belonging to the parish church of the parish of in the said county of unlawfully and wilfully did break and enter, and the grave there in which the body of one C. D., deceased, had lately before then been interred, and there was, unlawfully, wilfully and indecently did dig open, and the body of him the said C. D. out of the grave aforesaid, unlawfully, wilfully and indecently did then take and carry away; *2nd count* (*after* "*open*"), and indecently interfered with the said dead human body; *3rd count*, charging "improperly" instead of "indecently."

PART XV.

VAGRANCY.

207. Every one is a loose, idle or disorderly person or vagrant who—

(*a*) Not having any visible means of maintaining himself lives without employment;

(*b*) Being able to work and thereby or by other means to maintain himself and family wilfully refuses or neglects to do so;

(*c*) Openly exposes or exhibits in any street, road, highway or public place any indecent exhibition. (*Amended*).

(*d*) Without a certificate signed, within six months, by a priest, clergyman or minister of the Gospel, or two justices of the peace, residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wanders about and begs, or goes about from door to door, or places himself or herself in any street, highway, passage or public place to beg or receive alms;

(*e*) Loiters on any street, road, highway or public place, and obstructs passengers by standing across the footpath, or by using insulting language, or in any other way;

(*f*) Causes a disturbance in or near any street, road, highway or public place, by screaming, swearing or singing, or by being drunk, or by impeding or incommoding peaceable passengers;

(*g*) By discharging firearms, or by riotous or disorderly conduct in any street or highway, wantonly disturbs the peace and quiet of the inmates of any dwelling-house near such street or highway;

(*h*) Tears down or defaces signs, breaks windows, or doors or door plates, or the walls of houses, roads or gardens, or destroys fences;

(*i*) Being a common prostitute or night walker, wanders in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and does not give a satisfactory account of herself;

(*j*) Is a keeper or inmate of a disorderly house, bawdy-house or house of ill-fame, or house for the resort of prostitutes;

(*k*) Is in the habit of frequenting such houses and does not give a satisfactory account of himself or herself; or

(*l*) Having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution. R. S. C. c. 157, s. 8.

208. Every loose, idle or disorderly person or vagrant is liable, on summary conviction before two justices of the peace, to a fine not exceeding fifty dollars or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both. R. S. C. c. 157, s. 8.

The following section of c. 157, R. S. C. is unrepealed by section 983 and appendix, though repealed by schedule 2.

(4) If provision is made therefor by the laws of the province in which the conviction takes place, any such loose, idle or disorderly person may, instead of being committed to the common gaol or other public prison, be committed to any house of industry or correction, alms house, work house or reformatory prison.

A conviction under 32 & 33 V. c. 28, (D.) for that V. L. on was a common prostitute, wandering in the public streets of the city of Ottawa, and not giving a satisfactory account of herself contrary to this statute: *Held*, bad, for not shewing sufficiently that she was asked, before or at the time of being taken, to give an account of herself and did not do so satisfactorily: R. v. Levecque, 30 U. C. Q. B. 509. *See* R. v. Arscott, 9 O. R. 541, and Arscott & Lilly, 11 O. R. 153; R. v. Remon, 16 O. R. 560. There may be a joint conviction against husband and wife for keeping a house of ill-fame: R. v. Warren, 16 O. R. 590; R. v. Williams, 1 Salk. 383.

Held, that under the Vagrant Act it is not sufficient to allege that the accused was drunk on a public street, without alleging further that he caused a disturbance in such street by being drunk: *Ex parte* Despatie, 9 L. N. 387.

It is unlawful for men to bathe, without any screen or covering, so near to a public footway frequented by females that exposure of their persons must necessarily occur, and they who so bathe are liable to an indictment for indecency: R. v. Reed, 12 Cox, 1.

To keep a booth on a race course for the purpose of an indecent exhibition is a crime: R. v. Saunders, 13 Cox, 116.

A conviction under 32 & 33 V. c. 28, for keeping a house of ill-fame, imposed payment of a fine and costs to be collected by distress, and in default of distress ordered imprisonment. *Held*, good: R. v. Walker, 7 O. R. 186.

The charge again a prisoner, who was brought up on a writ of habeas corpus, was "for keeping a bawdy house for the resort of prostitutes in the City of Winnipeg."

"Keeping a bawdy house" is, in itself, a substantial offence; so is "keeping a house for the resort of prostitutes." *Held*, nevertheless, that there was but one offence charged and that the commitment was good: R. v. Mackenzie, 2 Man. L. R. 168.

See R. v. Rice, 10 Cox, 155, L. R. 1 C. C. R. 21, Warb. Lead. Cas. 101; R. v. Bassett, 10 Ont. P. R. 386; Pointon v. Hill, 12 Q. B. D. 306: R. v. Daly, 24 L. C. J. 157; R. v. Newton 11 Ont. P. R. 101; R. v. Organ, 11 Ont. P. R. 497; Smith v. R., M. L. R. 4 Q. B. 325.

See s. 576, p. 644, *post*, as to search warrant.

TITLE V.

OFFENCES AGAINST THE PERSON AND REPUTATION.

PART XVI.

DUTIES TENDING TO THE PRESERVATION OF LIFE.

DUTIES—DEFINITION.

209. Every one who has charge of any other person unable, by reason either of detention, age, sickness, insanity or any other cause to withdraw himself from such charge, and unable to provide himself with the necessaries of life, is, whether such charge is undertaken by him under any contract, or is imposed upon him by law, or by reason of his unlawful act, under a legal duty to supply that person with the necessaries of life, and is criminally responsible for omitting, without lawful excuse, to perform such duty if the death of such person is caused, or if his life is endangered, or his health has been or is likely to be permanently injured, by such omission.

See section 215, *post*: R. v. Friend, R. & R. 20; R. v. Shepherd, L. & C. 147; R. v. Smith, L. & C. 607; R. v. Marriott, 8 C. & P. 425; R. v. Ryland, L. R. 1 C. C. R. 99; R. v. Morby, Warb. Lead. Cas. 115.

DUTY OF PARENT OR GUARDIAN, ETC.

PUNISHMENT, ETC.

210. Every one who as parent, guardian, or *head of a family* is under a legal duty to provide *necessaries* for any child *under the age of sixteen years* is criminally responsible for omitting, without lawful excuse, to do so *while such child remains a member of his or her household, whether such child is helpless or not*, if the death of such child is caused, or if his life is endangered or his health is or is likely to be permanently injured, by such omission.

2. Every one who is under a legal duty to provide *necessaries* for his wife, is criminally responsible for omitting, without lawful excuse, so to do, if the death of his wife is caused, or if her life is endangered, or her health is or is likely to be permanently injured by such omission.

See section 215, *post.*

211. Every one who, *as master or mistress*, has contracted to provide necessary food, clothing or lodging for any servant or apprentice *under the age of sixteen years* is under a legal duty to provide the same, and is criminally responsible for omitting, without lawful excuse, to perform such duty, if the

death of such servant or apprentice is caused, or if his life is endangered, or his health has been or is likely to be permanently injured by such omission.

See section 215, *post*.

212. Every one who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill and care in doing any such act, and is criminally responsible for omitting, without lawful excuse, to discharge that duty if death is caused by such omission.

213. Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

OMISSIONS DANGEROUS TO LIFE.

214. Every one who undertakes to do any act, the omission to do which is or may be dangerous to life, is under a legal duty to do that act, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform that duty.

PUNISHMENT.

215. Every one is guilty of an indictable offence and liable to three years' imprisonment who, being bound to perform any duty specified in sections two hundred and nine, two hundred and ten and two hundred and eleven without lawful excuse neglects or refuses to do so, unless the offence amounts to culpable homicide. (*Amendment of 1893*).

R. S. C. c. 162, s. 19, 24-25 V. c. 100, s. 26 and 31-32 V. c. 122, s. 37, (Imp.). *See* Williams v. E. I. Co., 3 East, 192; R. v. Nicholls, 13 Cox, 75; R. v. Pelham, 8 Q. B. 959.

Fine in addition to or in lieu of punishment, section 958.

Sections 210 & 211, which replace section 19 of chapter 162, R. S. C., introduce changes in this part of the statutory law.

1. In section 210 the words or "head of a family" are added to the words "parent or guardian." 2. The word "necessaries" in section 210, relating to parent and child and husband and wife, is substituted to the words "necessary food, clothing or lodging," whilst the words "necessary food, clothing or lodging" are retained in section 211, relating to master and servant or apprentice. 3. The words "while such child remains a member of his or her

household, whether such child is helpless or not," in section 210, are new. 4. In both sections the words "under the age of sixteen years" are new. 5. In section 211 the words "has contracted to provide" are substituted to the words "being legally liable."

These three clauses, 209, 210 & 211, are taken, word for word, from the draft of the Imperial Code, with the exception of sub-section 2 of section 210, which is an addition. The Commissioners say in their report, as to these clauses:—

"We believe that this part of the draft code will be found to state in a clear and compendious form the unwritten law upon the subject to which it relates. Section 161, (211 *ante*) is a re-enactment of 24-25 V. c. 100, s. 26, which was itself a re-enactment of 14-15 V. c. 11. That statute was passed in the excitement consequent on the case of R. v. Sloane, Annual Register, vol. 92, p. 144, and was framed so as to embrace all cases where there was a contract to supply a servant of whatever age with food, clothing and lodging. It has been thought better to limit it to servants and apprentices under the age of sixteen, but it is right to point out that it is not the existing law. Section 160, (210 *ante*) puts the head of the family under the same criminal responsibility towards members of his household under the age of sixteen as a master is to a servant of the same age."

The difference in these two sections, 210 and 211, between necessaries and necessary food, clothing or lodging, is a right one. A parent is obliged to supply his child, or a husband his wife, with all the necessaries of life, which would include medical attendance (209 & 210 combined) (*see* R. v. Downes, 1 Q. B. D. 25), whilst a master is only obliged to provide his servant or apprentice with the necessary food, clothing or lodging which he has contracted to so provide.

The only change of importance in the two sections is contained in the words "under sixteen years of age," which require no explanation. The provision of the repealed

section 19 of chapter 162, R. S. C., as to any bodily harm by a master to his apprentice or servant, now forms a separate section, section 217, *post.*

Indictment under sections 209-215 against a gaoler for not providing a prisoner with the necessaries of life. . . . . . that A. B. at . . . . on . . . . and on divers other days before and after, was the keeper of the common gaol for the District of . . . then and there situate, and as such had charge of all the prisoners therein confined; and was under a legal duty to provide all said prisoners with the necessaries of life; that one C. D. was then and there a prisoner detained in the said gaol and as such under the charge of the said A. B.; that the said C. D. was, by reason of his said detention, unable to withdraw himself from such charge and unable to provide himself with the necessaries of life; that the said A. B. was then and there under a legal duty to provide the said C. D. with the necessaries of life, but that the said A. B. not regarding his duty on that behalf, then and there unlawfully did refuse, omit and neglect, without lawful excuse, to provide the said C. D. with the necessaries of life, by means whereof the life of the said C. D. was and is endangered and his health was and is permanently injured (*or is likely to be permanently injured.*)

Indictment under sections 210-215, against a father, for not providing necessaries to his child— . . . . that A. B., the father of one C. D., at . . . . . on . . . . and on divers other days, after and before that day, unlawfully did refuse, neglect and omit, without lawful excuse, to provide for and find the said C. D., his child, with sufficient food, clothing and lodging, and other necessaries of life, the said C. D. being then and there a member of the household of his father, the said A. B., and being, then and there, under the age of sixteen years, and the said A. B. being then and there by law in duty bound to provide food, clothing and other necessaries of life for the said

C. D., his child as aforesaid, by means of which refusal, neglect and omission, the life of the said C. D. was and is endangered, and the health of the said C. D. was and is (*or is likely to be*) permanently injured.

Indictment under sections 210-215 against a husband for not providing necessaries for his wife . . . . that on . . . . at . . . . , and on divers other days before and after, A. B. the husband of one C. D., being then and there under a legal duty to provide necessary food, clothing, lodging, and all other necessaries for the said C. D., his wife, unlawfully did refuse, neglect and omit without lawful excuse to provide for her the necessary food, clothing, lodging and other necessaries, so that the life of the said C. D. was and is thereby endangered, and her health was and is permanently injured *(or is likely to be permanently injured)*. . . . .

Indictment under sections 211-215 against a master for not providing an apprentice with necessary food.— . . . . That J. S. on . . . . then being the master of J. N. his apprentice, the said J. N. being then under the age of 16 years, and the said J. S. having before the said day contracted to provide for the said J. N. as his apprentice as aforesaid, necessary food (*clothing or lodging*) unlawfully and without lawful excuse, did refuse, omit and neglect to provide the same, so that the life of the said J. N. was and is thereby endangered, (*or the health of the said J. N. has been or is likely to be permanently injured*). (*Add counts varying the statement of the injuries sustained*).

Prove the apprenticeship, if it was by deed by production and proof of the execution of the deed, or in case it be in the possession of the defendant, and there be no counterpart, by secondary evidence of its contents, after due notice given to the defendant, to produce it. In England, it is said in Archbold that the legal liability of the defendant to provide his apprentice with necessary food, clothing or lodging will be inferred, even if it be not expressly stipulated

for, from the apprenticeship itself, but in Canada, upon an indictment under section 211, it must be proved that the defendant had contracted to provide for it, either by parol or in writing. Prove the wilful refusal or neglect of the defendant to provide the apprentice with necessary food, etc., as stated in the indictment, and that by such neglect the prosecutor's life was in danger, or his health was or is likely to be permanently injured.

An indictment alleged in the first count that the prisoner unlawfully and wilfully neglected and refused to provide sufficient food for her infant child five years old, she being able and having the means to do so. The second count charged that the prisoner unlawfully and wilfully neglected and refused to provide her infant child with necessary food, but there was no allegation that she had the ability or means to do so. The jury returned a verdict of guilty, on the ground that if the prisoner had applied to the guardians for relief she would have had it. *Held*, that neither count was proved, as it was not enough that the prisoner could have obtained the food on application to the guardians, and that it is doubtful whether the second count is good in law: R. v. Rugg, 12 Cox, 16.

It is to be remarked that the indictment in that case was under the common law, as, in England, the statute 24 & 25 V. c. 100 applies only to masters and servants. The bill as introduced in the House of Lords extended its provisions to husband and parents, but the Commons restricted it to masters: Greaves, Cons. Acts, 56. By the common law an indictment lies for all misdemeanours of a public nature. Thus it lies for a breach of duty which is not a mere private injury but an outrage upon the moral duties of society; as for the neglect to provide sufficient food or other necessaries for an infant of tender years unable to provide for and take care of itself, for whom the defendant is obliged by duty to provide, so as thereby to injure its health.

But the parent must have a present means or ability to support the child; the possibility of obtaining such relief is not sufficient; and, by the neglect of such duty, the child must have suffered a serious injury. An opportunity of applying to a relieving officer of the union from which the mother would have received adequate relief on application is not a sufficient proof in England of her having present means: R. v. Chandler, Dears. 453; R. v. Hogan, 2 Den. 277; R. v. Phillpot, Dears. 179. But these and similar cases are no authorities under our present statute in Canada.

In an indictment under s. 19, c. 162, R. S. C., it was not necessary to allege that the defendant had the means and was able to provide the food or clothing nor that his neglect to do so endangers the life or affects the health of his wife: R. v. Smith, 2 L. N. 223; R. v. Scott, 28 L. C. J. 264; but now, in an indictment under section 210, it is necessary to allege that the refusal, omission and neglect was without lawful excuse and that by such refusal, omission, and neglect to provide the food, etc., necessary to his wife, her life has been and is endangered, or her health permanently injured, or likely to be permanently injured: *see* R. v. Maher, 7 L. N. 82; R. v. Nasmith, 42 U. C. Q. B. 242.

Held, Armour, J., dissenting, that the evidence of a wife is inadmissible on the prosecution of her husband for refusal to support her, under 32-33 V. c. 20, s. 25; R. v. Bissell, 1 O. R. 514.

As to sections 213 & 214, which are common law rules, *see* annotation under section 220, *post*, and R. v. Salmon, Warb. Lead. Cas. 113, and cases there cited.

ABANDONING INFANTS, ETC., ETC.

216. Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully abandons or exposes any child under the age of two years, whereby its life is endangered, or its health is permanently injured.

2. *The words "abandon" and "expose" include a wilful omission to take charge of the child on the part of a person legally bound to do so, and any mode of*

dealing with it calculated to leave it exposed to risk without protection. R. S. C. c. 162, s. 20. 24-25 V. c. 100, s. 27 (Imp.).

Fine, section 958.

The repealed section had the words "or is likely to be permanently injured," and did not have sub-section 2.

Greaves' Note.—This clause is new. It is intended to provide for cases where children are abandoned or exposed under such circumstances that their lives or health may be, or are likely to be, endangered: *see* R. v. Hogan, 2 Den. 277; R. v. Cooper, 1 Den. 459, 2 C. & K. 876; R. v. Phillpot, Dears. 179; R. v. Gray, Dears. & B. 303, which show the necessity for this enactment.

Indictment.— . . . . unlawfully did abandon and expose a certain child called J. N., then being under the age of two years, whereby the life of the said child was endangered (*or whereby the health of such child was and is permanently injured*).

In order to sustain this indictment it is only necessary to prove that the defendant wilfully abandoned or exposed the child mentioned in the indictment, that the child was then under two years of age, and that its life was thereby endangered, or its health has been and is permanently injured

A. and B. were indicted for that they "did abandon and expose a child then being under the age of two years, whereby the life of the child was endangered." A., the mother of a child five weeks old, and B. put the child into a hamper, wrapped up in a shawl, and packed with shavings and cotton wool, and A., with the connivance of B., took the hamper to M., about four or five miles off, to the booking office of the railway station there. She there paid for the carriage of the hamper, and told the clerk to be very careful of it, and to send it to G. by the next train, which would leave M. in ten minutes from that time. She said nothing as to the contents of the hamper, which was addressed, "Mr. Carr's, Northoutgate, Gisbro, with care, to be deliv-

ered immediately," at which address the father of the child (a bastard) was then living. The hamper was carried by the ordinary passenger train, and delivered at its address the same evening. The child died three weeks afterwards, from causes not attributable to the conduct of the prisoners. On proof of these facts, it was objected for the prisoners that there was no evidence that the life of the child was endangered, and that there was no abandonment and no exposure of the child within the meaning of the statute. The objections were overruled and the prisoners found guilty. *Held*, that the conviction should be affirmed: R. v. Falkingham, 11 Cox, 475, Warb. Lead. Cas. 93.

A mother of a child under two years of age brought it and left it outside the father's house (she not living with her husband, the father of it). He was inside the house, and she called out, "Bill, here's your child; I can't keep it. I am gone." The father some time afterwards came out, stepped over the child and went away. About an hour and a half afterwards, his attention was again called to the child still lying in the road. His answer was, "It must bide there for what he knew, and then the mother ought to be taken up for the murder of it." Later on, the child was found by the police in the road, cold and stiff; but, by care, it was restored to animation. *Held*, on a case reserved, that, though the father had not had the custody of the child, yet, as he was by law bound to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him, whereby its life was endangered, within the statute: R. v. White, 12 Cox, 83.

ASSAULT BY MASTERS ON SERVANTS, ETC., ETC.

217. Every one is guilty of an indictable offence and liable to three years' imprisonment who, being legally liable as master or mistress to provide for any apprentice or servant, unlawfully does, or causes to be done, any bodily harm to any such apprentice or servant so that the life of such apprentice or servant is endangered or the health of such apprentice or servant has been, or is likely to be, permanently injured. R. S. C. c. 62, s. 19.

Chapter 62, R. S. C. cited under this section is "An Act respecting Copyright."

Fine, section 958. Verdict of common assault may be given; R. v. Bissonette, Ramsay's App. Cas. 190. *See* annotation under sections 211, 215.

Indictment.—. . . . that A. B. on . . . . then being the master of one J. N., his apprentice, and then being legally liable to provide for the said J. N. as his apprentice as aforesaid, unlawfully in and upon the said J. N. did make an assault, and him the said J. N. did then beat, wound and ill-treat, and thereby then did do, cause and occasion bodily harm to the said J. N. his apprentice as aforesaid, whereby the life of the said J. N. was endangered and his health has been and is permanently injured (*or is likely to be permanently injured.*)

HOMICIDE.

Imperial Commissioners' Report.

"The common law definition of murder is "unlawfully killing with malice aforethought." Manslaughter may in effect be defined as "unlawfully killing without malice aforethought." The objection to these definitions is that the expression "malice aforethought," is misleading. This expression, taken in a popular sense, would be understood to mean, that in order that homicide may be murder, the act must be premeditated to a greater or less extent, the jury having in each case to determine whether such a degree of premeditation existed as deserved the name."

"This definition, if so understood, would be obviously too narrow, as without what would commonly be called premeditation, homicide might be committed which would involve public danger and moral guilt in the highest possible degree."

"Of course, it can be pointed out that every intentional act may be said to be done aforethought, for the intention must precede the action. But even with this explanation, the expression is calculated to mislead any one but a trained lawyer. The inaccuracy of the definition is still more apparent when we find it laid down that a person may be guilty of murder who had no intention to kill or injure the deceased, or any other person, but only to commit some other felony, and the injury to the individual was a pure accident."

"This conclusion was arrived at by means of the doctrine of constructive or implied malice. In this case, as in the case of other legal fictions, it is difficult to say how far the doctrine extended."

"We do not propose on the present occasion to enter upon a discussion of this subject. It was carefully considered before a committee of the House of Commons, sitting on a bill for the definition of homicide, introduced by the late Mr. Russell Gurney, in 1874. It was also considered by the commission on capital punishment, which reported in 1866."

"Each of these bodies reported that the present condition of the law was unsatisfactory, though neither arrived at a definition which was considered satisfactory."

"The present law may, we think, be stated with sufficient exactness for our present purpose, somewhat as follows:—Murder is culpable homicide by any act done with malice aforethought. Malice aforethought is a common name for all the following states of mind:—(*a*) An intent preceding the act to kill or to do serious bodily injury to the person killed or to any other person; (*b*) knowledge that the act done is likely to produce such consequences, whether coupled with an intention to produce them or not; (*c*) an intent to commit any felony; (*d*) an intent to resist an officer of justice in the execution of his duty. Whether (*c*) is too broadly stated or not is a question open to doubt, but Sir Michael Foster, perhaps the highest authority on the subject, says (p. 258) 'A. shooteth at the poultry of B., and by accident killeth a man. If his intention was to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent; but if it was done wantonly and without that intention, it will be barely manslaughter.'"

"It seems to us that the law upon this subject ought to be freed from the element of fiction introduced into it by the expression of 'malice aforethought,' although the principle that murder may under certain circumstances be committed in the absence of an actual intention to cause death, ought to be maintained. If a person intends to kill, and does kill another, or if, without absolutely intending to kill, he voluntarily inflicts any bodily injury known to be likely to cause death, being reckless whether death ensues or not, he ought, in our opinion, to be considered a murderer if death ensues."

"For practical purposes we can make no distinction between a man who shoots another through the head, expressly meaning to kill him, a man who strikes another a violent blow with a sword, careless whether he dies of it or not, and a man who, intending for some object of his own to stop the passage of a railway train, contrives an explosion of dynamite or gunpowder under the engine, hoping indeed that death may not be caused,

but determined to effect his purpose whether it is so caused or not."

"This is the general object kept in view, both in the Draft Code and in the Bill, but there is some difference in the extent to which they go. There is no difference as to the cases in which the death of the person killed or of some other person is intended. The Bill included in the definition of murder, all cases in which the offender intended to cause, or knew that he probably would cause 'grievous bodily harm' to any person. The Draft Code would include all such cases, substituting the expression 'bodily injury known to the offender to be likely to cause death' for 'grievous bodily harm,' which, to some extent, narrows the definition given in the Bill. On the other hand, the Draft Code (section 175) includes all cases in which death is caused by the infliction of a 'grievous bodily injury,' for the purpose of facilitating the commission of certain heinous offences. All these cases would fall within the definition of murder given in the Bill, according to which it is murder to kill by the intentional infliction of grievous bodily harm, irrespectively of the purpose for which it is used. Lastly, section 175 in sub-sections (*b*) & (*c*) provides that killing by the administration of stupefying things, or by wilfully stopping the breath, for the purpose in either case of committing any of the specified offences, shall be murder, whether the offender knows or not that death is likely to ensue. According to the provisions of the Bill these cases would amount to murder only if the offender knew their danger. The difference between the Draft Code and the Bill upon the whole comes to this: A., in order to facilitate robbery, pushes something into B.'s mouth to stop his breath and thus to prevent him from crying out; the death of B., results. This is murder according to the Draft Code. According to the Bill, it is murder if A. knew that such an act would probably cause death; manslaughter if he did not. A few years ago a case occurred in the Western Circuit, which illustrates the principle on which this portion of the Draft Code is framed better than any hypothetical case. An innocent girl, on her way to church, had to pass over a stile into a narrow, wooded lane, and then go out of it by a stile on the other side. A ruffian who knew this lay in wait for her, muffled her head in a shawl

to stifle her cries, and proceeded to drag her down the lane towards a wood. She died before she reached it. He was executed for the murder. It is plain he did not mean to kill her, indeed his object was frustrated in consequence of her not reaching the wood alive, and he probably was not aware that stifling her breath for so short a time was dangerous to life; but as the law at the time was, and now is, the death having been occasioned by violence used to facilitate the commission of a rape, the offence was murder. And we believe there are few who would not think the law defective if such an offence was not murder."

"Again, A. stabs B. in the leg, not intending to kill him; B. dies. According to the Bill, this would be murder if the jury thought the act showed an intent to do grievous bodily harm, or if, without such intent, it was done with knowledge that it would probably cause death or grievous bodily harm. According to the Draft Code it would be murder if the jury thought the act was meant to cause B. an injury known to A. to be likely to cause death, he being reckless whether it caused death or not. It will thus be seen that the Bill and the Draft Code approach each other very closely."

"There is no substantial difference between the provisions of the Draft Code and the Bill dealing with provocation, though the language and arrangement differ. Each introduces an alteration of considerable importance into the common law. By the existing law, the infliction of a blow, or the sight by the husband of adultery committed with his wife, may amount to provocation which would reduce murder to manslaughter. It is possible that some other insufferable outrages might be held to have the same effect. There is no definite authoritative rule on the subject, but the authorities for saying that words can never amount to a provocation are weighty. We are of opinion that cases may be imagined where language would give a provocation greater than any ordinary blow. The question whether any particular act falls or not within this line appears to us to be pre-eminently a matter of degree for the consideration of the jury."

The law takes no cognizance of homicide unless death result from bodily injury, occasioned by some act or

unlawful omission, as contra-distinguished from death occasioned by any influence on the mind, or by any disease arising from such influence: *see* s. 223 *post*. The terms "*unlawful omission*" comprehend every case where any one, being under any legal obligation to supply food, clothing or other aid or support, or to do any other act, or make any other provision for the sustentation of life, or prevention of injury to life, is guilty of any breach of duty: s. 209, *ante*. It is essential to homicide of which the law takes cognizance that the party die of the injury done within one year and a day thereafter: s. 222, *post*. In the computation of the year and the day from the time of the injury, the whole of the day on which the act was done, or of any day on which the cause of injury was continuing, is to be reckoned the first. A child in the womb is not a subject of homicide in respect of any injury inflicted in the womb, unless it afterwards be born alive; it is otherwise if a child die within a year and a day after birth of any bodily injury inflicted upon such child whilst it was yet in the womb: 4 Cr. L. Com. Rep. p. XXXII., 8th of March, 1839. S. 219, *post*.

If a man have a disease which in all likelihood would terminate his life in a short time, and another give him a wound or hurt which hastens his death, it is murder or other species of homicide as the case may be: s. 224, *post*. And it has been ruled that though the stroke given is not in itself so mortal but that with good care it might be cured, yet if the party die of this wound within a year and a day, it is murder or other species of homicide as the case may be. And when a wound, not in itself mortal, for want of proper applications or from neglect turns to a gangrene or a fever, and that gangrene or fever is the immediate cause of the death of the party wounded, the party by whom the wound is given is guilty of murder or manslaughter, according to the circumstances; s. 225, *post*. For though the fever or gangrene, and not the

wound, be the immediate cause of death, yet the wound being the cause of the gangrene or fever is the immediate cause of the death, *causa causati*. So if one gives wounds to another, who neglects the cure of them or is disorderly, and doth not keep that rule which a person wounded should do, yet if he die it is murder or manslaughter, according to the circumstances; because if the wounds had not been the man had not died; and therefore neglect or disorder in the person who received the wounds shall not excuse the person who gave them: 1 Russ. 700.

So if a man be wounded, and the wound become fatal from the refusal of the party to submit to a surgical operation: R. v. Holland, 2 M. & Rob. 351; R. v. Pym, 1 Cox, 339; R. v. McIntyre, 2 Cox, 379; R. v. Martin, 5 C. & P. 128; R. v. Webb, 1 M. & Rob. 405. But it is otherwise if death results not from the injury done, but from unskilful treatment, or other cause subsequent to the injury: 4th Rep. Cr. L. Com., p. XXXII., 8th of March, 1839. S. 226, *post*.

Murder is the killing any person under the king's peace, with malice prepense or aforethought, either express or implied by law. Of this description the malice prepense, *malitia precogitata*, is the chief characteristic, the grand criterion by which murder is to be distinguished from any other species of homicide, and it will therefore be necessary to inquire concerning the cases in which such malice has been held to exist. It should, however, be observed that when the law makes use of the term *malice aforethought*, as descriptive of the crime of murder, it is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the act has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent upon mischief. And in general any formed design of doing mischief may be called malice. And, therefore, not such killing

only as proceeds from premeditated hatred or revenge against the person killed, but also, in many other cases, such killing as is accompanied with circumstances that show the heart to be perversely wicked is adjudged to be of *malice prepense*, and consequently murder: 1 Russ. 667.

Malice may be either *express* or *implied by law*. Express malice is, when one person kills another with a sedate, deliberate mind and formed design; such formed design being evidenced by external circumstances discovering the inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. And malice is implied by law from any deliberate cruel act committed by one person against another, however sudden; thus, where a man kills another suddenly without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. So if a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity be proved. And where one is killed in consequence of such a wilful act as shows the person by whom it is committed to be an enemy to all mankind, the law will infer a general malice from such depraved inclination to mischief. And it should be observed as a general rule, that all homicide is presumed to be malicious, and of course amounting to murder, until the contrary appears from circumstances of alleviation, excuse or justification; and that it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the court and jury, unless they arise out of the evidence produced against him. It should also be remarked that, where the defence rests upon some violent provocation, it will not avail, however grievous such provocation may have been, if it appears that there was an interval of reflection, or a reasonable time for the blood to have cooled before the deadly purpose

was effected. And provocation will be no answer to proof of *express* malice; so that, if, upon a provocation received, one party deliberately and advisedly denounce vengeance against the other, as by declaring that *he will have his blood*, or the like, and afterwards carry his design into execution, he will be guilty of murder; although the death happened so recently after the provocation as that the law might, apart from such evidence of express malice, have imputed the act to unadvised passion. But where fresh provocation intervenes between preconceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice; for if there be an old quarrel between A. and B. and they are reconciled again, and then upon a new and sudden falling out A. kills B., this is not murder. It is not to be presumed that the parties fought upon the old grudge unless it appear from the whole circumstances of the fact; but if upon the circumstances it should appear that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, then such killing will be murder: 1 Russ. 667.

If a man, after receiving a blow, feigns a reconciliation, and, after the lapse of a few minutes, invites a renewal of the aggression, with intent to use a deadly weapon, and on such renewal uses such weapon with deadly effect, there is evidence of implied malice to sustain the charge of murder. But if, after such reconciliation, the aggressor renews the contest, or attempts to do so, and the other having a deadly weapon about him, on such sudden renewal of the provocation, uses it without previous intent to do so, there is evidence which may reduce the crime to manslaughter: R. v. Selten, 11 Cox, 674. Mr Justice Hannen in his charge to the jury in that case said: "Now, murder is killing with malice aforethought; but though the malice may be harboured for a long time for the gratification of a cherished revenge, it may, on the other hand, be generated in a man's mind according to the character of

that mind, in a short space of time, and therefore it becomes the duty of the jury in each case to distinguish whether such motive had arisen in the mind of the prisoner, and whether it was for the gratification of such malice he committed the fatal act. But the law, having regard to the infirmity of man's nature, admits evidence of such provocation as is calculated to throw a man's mind off its balance, so as to show that he committed the act while under the influence of temporary excitement, and thus to negative the malice which is of the essence of the crime of murder. It must not be a light provocation, it must be a grave provocation; and undoubtedly a blow is regarded by the law as such a grave provocation; and supposing a deadly stroke inflicted promptly upon such provocation, a jury would be justified in regarding the crime as reduced to manslaughter. But if such a period of time has elapsed as would be sufficient to enable the mind to recover its balance, and it appears that the fatal blow has been struck in the pursuit of revenge, then the crime will be murder." Verdict of manslaughter: *see* s. 229, *post*.

In a case of death by stabbing, if the jury is of opinion that the wound was inflicted by the prisoner while smarting under a provocation so recent and so strong that he may be considered as not being at the moment the master of his own understanding, the offence will be manslaughter; but if there has been, after provocation, sufficient time for the blood to cool, for reason to resume its seat, before the mortal wound was given, the offence will amount to murder; and if the prisoner displays thought, contrivance and design in the mode of possessing himself of the weapon, and in again replacing it immediately after the blow was struck, such exercise of contrivance and design denotes rather the presence of judgment and reason than of violent and ungovernable passion: R. v. Hayward, 6 C. & P. 157.

Where a man finds another in the act of adultery with his wife, and kills him or her in the first transport of

passion, he is only guilty of manslaughter and that in the lowest degree; for the provocation is grievous, such as the law reasonably concludes cannot be borne in the first transport of passion; and the court in such cases will not inflict a severe punishment: 1 Russ. 786; *see* s. 229, *post.*

But in the case of the most grievous provocation to which a man can be exposed, that of finding another in the act of adultery with his wife, though it would be but manslaughter if he should kill the adulterer in the first transport of passion, yet if he kill him deliberately, and upon revenge, after the fact, and sufficient cooling time, it would undoubtedly be murder. For let it be observed that in all possible cases deliberate homicide upon a principle of revenge is murder. No man under the protection of the law is to be the avenger of his own wrongs. If they are of a nature for which the laws of society will give him an adequate remedy, thither he ought to resort; but be they of what nature soever, he ought to bear his lot with patience, and remember that vengeance belongeth only to the Most High: Fost. 296.

So, in the case of a father seeing a person in the act of committing an unnatural offence with his son and killing him instantly, this would be manslaughter, but if he only hears of it, and goes in search of the person, and meeting him strikes him with a stick, and afterwards stabs him with a knife, and kills him, in point of law it will be murder: R. v. Fisher, 8 C. & P. 182, Warb. Lead. Cas. 112.

If a blow without provocation is *wilfully* inflicted, the law infers that it was done with malice aforethought, and if death ensues the offender is guilty of murder, although the blow may have been given in a moment of passion: R. v. Noon, 6 Cox, 137.

Even blows previously received will not extenuate homicide upon deliberate malice and revenge, especially where it is to be collected from the circumstances that the

provocation was sought for the purpose of colouring the revenge: R. v. Mason, 1 East, P. C. 239.

In R. v. Welsh, 11 Cox, 336, Keating, J., in summing up the case to the jury, said: "The prisoner is indicted for that he killed the deceased feloniously and with malice aforethought, that is to say, intentionally, without such provocation as would have excused, or such cause as might have justified, the act. Malice aforethought means intention to kill. Whenever one person kills another intentionally he does it with malice aforethought; in point of law the intention signifies the malice. It is for him to show that it was not so by showing sufficient provocation, which only reduces the crime to manslaughter, because it tends to negative the malice. But when that provocation does not appear the malice aforethought implied in the intention remains. By the law of England, therefore, all intentional homicide is *prima facie* murder. It rests with the party charged with and proved to have committed it to show, either by evidence adduced for the purpose, or upon the facts as they appear, that the homicide took place under such circumstances as to reduce the crime from murder to manslaughter. Homicide which would be *prima facie* murder may be committed under such circumstances of provocation as to make it manslaughter, and show that it was not committed with malice aforethought. The question therefore is, first, whether there is evidence of any such provocation as could reduce the crime from murder to manslaughter; and if there be any such evidence, then it is for the jury, whether it was such that they can attribute the act to the violence of passion naturally arising therefrom and likely to be aroused thereby in the breast of a reasonable man. The law, therefore, is not, as was represented by the prisoner's counsel, that if a man commits the crime under the influence of passion it is mere manslaughter. The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind

of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion. When the law says that it allows for the infirmity of human nature, it does not say that if a man without sufficient provocation gives way to angry passion, and does not use his reason to control it,—the law does not say that an act of homicide intentionally committed under the influence of that passion is excused, or reduced to manslaughter. The law contemplates the case of a reasonable man, and requires that the provocation shall be such as that such a man might naturally be induced, in the anger of the moment, to commit the act. Now, I am bound to say that I am unable to discover in the evidence in this case any provocation which would suffice, or approach to such as would suffice, to reduce the crime to manslaughter. It has been laid down that mere words or gestures will not be sufficient to reduce the offence, and at all events the law is clear that the provocation must be serious. I have already said that I can discover no proof of such provocation in the evidence. If you can discover it you can give effect to it, but you are bound not to do so unless satisfied that it was serious. What I am bound to tell you is that, in law, it is necessary that there should have been serious provocation in order to reduce the crime to manslaughter, as for instance a blow, and a severe blow, something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act." Verdict: Guilty of murder.

So also if a man be greatly provoked, as by pulling his nose or other great indignity, and immediately kills the aggressor, though he is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself, yet neither is it murder for there is no previous malice; but it is manslaughter. But in this and every other case of homicide upon provocation, if there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kill the other, this is delib-

erate revenge and not heat of blood, and accordingly amounts to murder: 4 Blacks. 191. S. 229, *post.*

A packer found a boy stealing wood in his master's ground; he bound him to his horse's tail and beat him; the horse took fright and ran away, and dragged the boy on the ground so that he died. This was holden to be murder, for it was a deliberate act and savoured of cruelty: Fost 292.

At page 632 of Archbold is cited R. v. Rowley; a boy after fighting with another ran home bleeding to his father; the father immediately took a staff, ran three-quarters of a mile, and beat the other boy who died of this blow. And this was holden to be manslaughter only. But Mr. Justice Foster, 294, says that he always thought Rowley's case a very extraordinary one.

Though the general rule of law is that provocation by words will not reduce the crime of murder to that of manslaughter, special circumstances attending such a provocation might be held to take the case out of the general rule; s. 229, *post*, has "any insult." In R. v. Rothwell, 12 Cox, 147, Blackburn, J., in summing up, said: "A person who inflicts a dangerous wound, that is to say a wound of such a nature as he must know to be dangerous, and death ensues, is guilty of murder, but there may be such heat of blood and provocation as to reduce the crime to manslaughter. A blow is such a provocation as will reduce the crime of murder to that of manslaughter. Where, however, there are no blows, there must be a provocation equal to blows; it must be at least as great as blows. For instance a man who discovers his wife in adultery, and thereupon kills the adulterer, is only guilty of manslaughter. As a general rule of law no provocation of words will reduce the crime of murder to that of manslaughter; but under special circumstances there may be such provocation of words as will have that effect; for instance, if a husband, suddenly hearing from his wife that she had committed adultery, and he having no idea of

such a thing before, were thereupon to kill his wife it might be manslaughter. Now, in this case, words spoken by the deceased just previous to the blows inflicted by the prisoner were these: 'Aye; but I'll take no more for thee, for I will have no more children of thee; I have done it once, and I'll do it again,' meaning adultery. Now, what you will have to consider is, would these words, which were spoken just previous to the blows, amount to such a provocation as would in an ordinary man, not in a man of violent or passionate disposition, provoke him in such a way as to justify him in striking her as the prisoner did." Verdict of manslaughter.

In Sherwood's Case, 1 C. & K. 556, Pollock, C. B., in summing up said; "It is true that no provocation by words only will reduce the crime of murder to that of manslaughter; but it is equally true that every provocation by blows will not have this effect, particularly when, as in this case, the prisoner appears to have resented the blow by using a weapon calculated to cause death. Still, however, if there be a provocation by blows, which would not of itself render the killing manslaughter, but it be accompanied by such provocation by means of words and gestures as would be calculated to produce a degree of exasperation equal to that which would be produced by a violent blow, I am not prepared to say that the law will not regard these circumstances as reducing the crime to that of manslaughter only."

When A. finding a trespasser upon his land, in the first transport of his passion beat him and unluckily killed him, and it was holden to be manslaughter, it must be understood that he beat the trespasser, not with a mischievous intention, but *merely to chastise* him, and to deter him from a future commission of such a trespass. For if A. had knocked his brains out with a bill or hedge stake, or had killed him by an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, it would have been murder; these circumstances being some

of the genuine symptoms of the *mala mens*, the heart bent upon mischief, which enter into the true notion of malice in the legal sense of the word. Moir having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length discharged a pistol at a person who was trespassing, and wounded him in the thigh, which led to erysipelas, and the man died. Moir was convicted of murder and executed: 1 Russ. 718; s. 227, *post*. *See* Imp. Comm. note on that case under s. 53, *ante*.

Malice in its legal sense denotes a wrongful act done intentionally, without just cause or excuse. *Per* Littledale, J., in McPherson v. Daniels, 10 B. & C. 272; and Cresswell, J., in R. v. Noon, 6 Cox, 137:—

"We must settle what is meant by the term *malice*. The legal import of this term differs from its acceptation in common conversation. It is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind.

"Thus, in the crime of murder which is always stated in the indictment to be committed with malice aforethought, it is neither necessary in support of such indictment to show that the prisoner had any enmity to the deceased, nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional and done without any justifiable cause." *Per* Best, J., in R. v. Harvey, 2 B. & C. 268.

The nature of implied malice is illustrated by the maxim "*Culpa lata dolo æquiparatur*."

Malice aforethought, which makes a felonious killing murder, may be practically defined to be not *actual malice or actual aforethought*, or any other particular actual state of the mind, but any such combination of wrongful deed and mental culpability as judicial usage has determined to be sufficient to render that murder which else would be only manslaughter. One proposition is plain: that an

actual intent to take life is not a necessary ingredient in murder, any more than it is in manslaughter. Where the prisoner fired a loaded pistol at a person on horseback, and the ball took effect on another, whose death it caused, the offence was held to be murder; though the motive for firing it was not to kill the man, but only to frighten his horse, and cause the horse to throw him: 2 Bishop, Cr. L. 675, 676, 682; s. 227, *post*.

In Grey's case the defendant, a blacksmith, had broken, with a rod of iron, the skull of his servant, *whom he did not mean to kill*, and this was held to be murder; for, says the report, if a father, master, or school-master will correct his child, servant or scholar, he must do it with such things as are fit for correction, and not with such instruments as may probably kill them: Kel. 99.

A person driving a cart or other carriage happeneth to kill. If he saw or had timely notice of the mischief likely to ensue, and yet drove on, it will be murder; for it was wilfully and deliberately done. If he might have seen the danger, but did not look before him, it will be manslaughter for want of due circumspection. But if the accident happened in such a manner that no want of due care could be imputed to the driver it will be accidental death, and the driver will be excused: Fost. 263.

Further, if there be an evil intent, though that intent extendeth not to death, it is murder. Thus if a man, knowing that many people are in the street, throw a stone over a wall, intending only to frighten them or to give them a little hurt, and thereupon one is killed, this is murder: for he had an ill intent, though that intent extendeth not to death, and though he knew not the party slain: 3 Inst. 57; s. 227, *post*.

Although the malice in murder is what is called "*malice aforethought*," yet there is no particular period of time during which it is necessary it should have existed, or the prisoner should have contemplated the homicide. If, for

example, the intent to kill or to do other great bodily harm is executed the instant it springs into the mind, the offence is as truly murder as if it had dwelt there for a longer period: 2 Bishop, Cr. L. 677.

Where a person fires at another a fire-arm, knowing it to be loaded, and thereupon intending either to kill or to do grievous bodily harm, if death ensues the crime is murder; and, if in such case, the person who fires the weapon, though he does not know that it is loaded, has taken no care to ascertain, it is manslaughter: R. v. Campbell, 11 Cox, 323.

If an action, unlawful in itself, be done deliberately, and with intention of mischief or great bodily harm to particular individuals, or of mischief indiscriminately fall it where it may, and death ensue against or beside the original intention of the party, it will be murder: 1 Russ. 739. If a man deliberately shoot at A. and miss him, but kill B., this is murder: 1 Hale, 438. So where A. gave a poisoned apple to his wife, intending to poison her, and the wife, ignorant of the matter, gave it to a child who took it and died, this was held murder in A., though he, being present at the time, endeavoured to dissuade his wife from giving the apple to the child: Hale, *loc. cit.*; s. 227, *post.*

So if a person give medicine to a woman to procure an abortion, by which the woman is killed, the act was held clearly to be murder, for, though the death of the woman was not intended, the act is of a nature deliberate and malicious, and necessarily attended with great danger to the person on whom it was practised: 1 East, P. C. 230, 254; s. 227*d*, *post.*

Whenever one does an act with the design of committing *any felony, though not a felony dangerous to human life*, yet, if the life of another is accidentally taken, his offence is murder. So if a man set fire to a house, whereby a person in it is burned to death, he is guilty of murder, even if he had no idea that any one was or was likely to

be there: 1 Russ. 741, and *Greaves' note to it. That is not law now; see* ss. 227, 228, *post.*

In R. v. Lee, 4 F. & F. 63, Pollock, C.B., told the jury "that if two or more persons go out to commit a felony with intent that personal violence shall be used in its committal, and such violence is used and causes death, then they are all guilty of murder, even although death was not intended." *That is now limited to the offences mentioned in* s-s. 2, s. 228, *post.*

Where two persons go out with the common object of robbing a third person, and one of them, in pursuit of that common object, does an act which causes the death of that third person, under such circumstances as to be murder in him who does the act, it is murder in the other also: R. v. Jackson, 7 Cox, 357.

If a man intends to maim and causes death, and it can be made out most distinctly that he did not mean to kill, yet if he does acts and uses means for the purpose of accomplishing that limited object, and they are calculated to produce death, and death ensues, by the law of England that is murder, although the man did not mean to kill. It is not necessary to prove an intention to kill; it is only necessary to prove an intention to inflict an injury that might be dangerous to life, and that it resulted in death. A party may be convicted upon an indictment for murder by evidence that would have no tendency to prove that there was any intent to kill, nay, by evidence that might clearly show that he meant to stop short of death, and even take some means to prevent death; but if that illegal act of his produces death that is murder: R. v. Salvi, 10 Cox, *note b.*, 481; s. 227, *post.*

"A common and plain rule on this subject," says Bishop 2 Cr. L. 694, "is that, whenever one does an act with the design of committing any felony, though not a felony dangerous to human life, yet, if the life of another is accidentally taken, his offence is murder." Or in the language of

Baron Bramwell, in R. v. Horsey, 3 F. & F. 287 ; "the law laid down was that where a prisoner, in the course of committing a felony, caused the death of a human being, that was murder, *even though he did not intend it ;*" *see Greaves' note,* 1 Russ. 742, & s. 228, s-s. 2, *post.*

And if the act committed or attempted is only a misdemeanour, yet the "*accidental*" causing of death, in consequence of this act, is murder, if the misdemeanour is one endangering human life : Bishop, 2 Cr. L. 691.

If a large stone be thrown at one with a deliberate intention to hurt, though not to kill him, and, by accident, it kill him, or any other, this is murder : 1 Hale, 440, 1 Russ. 742. Also, where the intent is to do some great bodily harm to another, and death ensues, it will be murder : as if A. intend only to *beat* B. in anger, or from preconceived malice, and happen to kill him, it will be no excuse that he did not intend all the mischief that followed : for what he did was *malum in se*, and he must be answerable for all its consequences : he beat B. with an intention of doing him some bodily harm, and is therefore answerable for all the harm he did. In Foster, 261, it is said : "If an action unlawful in itself be done deliberately and with intention of mischief or great bodily harm to particulars, or of mischief indiscriminately fall it where it may, and death ensue *against or beside the original intention of the party*, it will be murder. But if such mischievous intention doth not appear, which is matter of fact and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death, because the act upon which death ensued was unlawful."

Extreme necessity of hunger does not justify homicide : R. v. Dudley, 15 Cox, 624, 14 Q. B. D. 273.

If two persons enter into an agreement to commit suicide together, and the means employed kill one of them

only, the survivor is guilty of murder: R. v. Jessop, 16 Cox, 204; s. 237, *post*.

The circumstance of a person having acted under an irresistible influence to the commission of homicide is no defence, if at the time he committed the act he knew he was doing what was wrong: R. v. Haynes, 1 F. & F. 666; *see* s. 11 *ante*.

On an indictment for murder, it being proved that the prisoner, a soldier, shot his officer through the head, the only evidence for the defence being that the act was sudden, without apparent motive, and that he had been addicted to drink, and had been suffering under depression; *Held*, that this was not enough to raise the defence of insanity; that the sole question was whether the prisoner fired the gun intending to kill; and that his expressions soon after the act were evidence of this, and that alleged inadequacy of motive was immaterial, the question being, not motive, but intent: R. v. Dixon, 11 Cox, 341.

Killing a man who was out at night dressed in white as a ghost, for the purpose of frightening the neighbourhood, is murder; it is no excuse that he could not otherwise be taken: 1 Russ. 749.

Forcing a person to do an act which is likely to produce and does produce death is murder; so, if the deceased threw himself out of a window, or in a river, to avoid the violence of the prisoner: 1 Russ. 676; R. v. Pitts, Car. & M. 284; R. v. Halliday, 6 Times L. R. 109; s. 220, *post*.

If two persons fight, and one overpowers the other and knocks him down, and puts a rope round his neck, and strangles him, this will be murder: R. v. Shaw, 6 C. & P. 372.

If a person being in possession of a deadly weapon enters into a contest with another, intending at the time to avail himself of it, and in the course of the contest actually uses it, and kills the other, it will be murder; but if he did

not intend to use it when he began the contest, but used it in the heat of passion, in consequence of an attack made upon him, it will be manslaughter. If he uses it to protect his own life or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger, having no other means of defence, and no means of escape, and retreating as far as he can, it will be justifiable homicide: R. v. Smith, 8 C. & P. 160.

A person cannot be indicted for murder in procuring another to be executed, by falsely charging him with a crime of which he was innocent: R. v. Macdaniel, 1 Leach, 44; *see* now s. 221.

Child murder.—To justify a conviction on an indictment charging a woman with the wilful murder of a child of which she was delivered, and which was born alive, the jury must be satisfied affirmatively that the whole body was brought alive into the world; and it is not sufficient that the child has breathed in the progress of the birth: R. v. Poulton, 5 C. & P. 329; R. v. Enoch, 5 C. & P. 539. If a child has been wholly produced from the body of its mother, and she wilfully and of malice aforethought strangles it while it is alive, and has an independent circulation, this is murder, although the child is still attached to its mother by the umbilical cord: R. v. Trilloe, 2 Moo. 260. A prisoner was charged with the murder of her new-born child by cutting off its head: *Held*, that, in order to justify a conviction for murder, the jury must be satisfied that the entire child was actually born into the world in a living state; and that the fact of its having breathed is not a decisive proof that it was born alive, as it may have breathed and yet died before birth: R. v. Sellis, 7 C. & P. 850; R. v. Handley, 13 Cox, 79; s. 219, *post.*

An infant in its mother's womb is not considered as a person who can be killed within the description of murder or manslaughter. The rule is thus: it must be born, every

part of it must have come from the mother, before the killing of it will constitute a felonious homicide: R. v. Wright, 9 C. & P. 754; R. v. Brain, 6 C. & P. 349; 1 Russ. 670; 2 Bishop, Cr. L. 632. Giving a child, whilst in the act of being born, a mortal wound in the head as soon as the head appears, and before the child has breathed, will, if the child is afterwards born alive and dies thereof, and there is malice, be murder; but if there is not malice, manslaughter: R. v. Senior, 1 Moo. 346; 1 Lewin, 183; s. 219, *post*.

Murder by poisoning.—Of all the forms of death by which human nature may be overcome, the most detestable is that of poison: because it can, of all others, be the least prevented either by manhood or forethought: 3 Inst. 48. He that wilfully gives poison to another, that hath provoked him or not, is guilty of wilful murder; the reason is because it is an act of deliberation odious in law, and presumes malice: 1 Hale, 455. A prisoner was indicted for the murder of her infant child by poison. She purchased a bottle of laudanum, and directed the person who had the care of the child to give it a teaspoonful every night. That person did not do so but put the bottle on the mantel-piece, where another little child found it and gave part of the contents to the prisoner's child who soon after died: held, that the administering of the laudanum by the child was as much, in point of law, an administering by the prisoner as if she herself had actually administered it with her own hand: R. v. Michael, 2 Moo. 120. On a trial for murder by poisoning statements made by the deceased in a conversation shortly before the time at which the poison is supposed to have been administered are evidence to prove the state of his health at that time: R. v. Johnston, 2 C. & K. 354. On an indictment for the murder of A., evidence is not admissible that three others in the same family died of similar poison, and that the prisoner was at all the deaths, and administered something

to two of his patients: R. v. Winslow, 8 Cox, 397. On an indictment against a woman for the murder of her husband by arsenic, in September, evidence was tendered, on behalf of the prosecution, of arsenic having been taken by her two sons, one of whom died in December and the other in March subsequently, and also by a third son, who took arsenic in April following but did not die. Proof was given of a similarity of symptoms in the four cases. Evidence was also tendered that she lived in the same house with her husband and sons, and that she prepared their tea, cooked their victuals, and distributed them to the four parties: *held*, that this evidence was admissible for the purpose of proving, first, that the deceased husband actually died of arsenic; secondly, that his death was not accidental; and that it was not inadmissible by reason of its tendency to prove or create a suspicion of a subsequent felony: R. v. Geering, 18 L. J. M. C. 215. Upon the trial of a husband and wife for the murder of the mother of the former by administering arsenic to her, for the purpose of rebutting the inference that the arsenic had been taken by accident evidence was admitted that the male prisoner's first wife had been poisoned nine months previously; that the woman who waited upon her, and occasionally tasted her food, shewed symptoms of having taken poison; that the food was always prepared by the female prisoner; and that the two prisoners, the only other persons in the house, were not affected with any symptoms of poison: R. v. Garner, 4 F. & F. 346. And Archibald, J., after consulting Pollock, C.B., in R. v. Cotton, 12 Cox, 400, *held*, that where a prisoner was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers and a lodger in her house had died previous to the present charge after having been attended by her was admissible: *see* R. v. Roden, 12 Cox, 630.

MURDER BY KILLING OFFICERS OF JUSTICE.

Ministers of justice, as bailiffs, constables, watchmen, etc. (either civil or criminal justice), while in the execution of their offices, are under the peculiar protection of the law; a protection founded in wisdom and equity, and in every principle of political justice, for without it the public tranquility cannot possibly be maintained, or private property secured. For these reasons the killing of officers so employed has been deemed murder of malice prepense as being an outrage wilfully committed in defiance of the justice of the kingdom. The law extends the same protection to any person acting in aid of an officer of justice, whether specially called thereunto or not. And a public officer is to be considered as acting strictly in discharge of his duty, not only while executing the process intrusted to him, but likewise while he is coming to perform, and returning from the performance of his duty: s. 228, *post.*

He is under the protection of the law *eundo, morando et redeundo.* And, therefore, if coming to perform his office he meets with great opposition and retires, and in the retreat is killed, this will be murder. Upon the same principles, if he meets with opposition by the way, and is killed before he comes to the place (such opposition being intended to prevent his performing his duty), this will also be murder: Roscoe, 697; 1 Russ. 732. But the defendant must be proved to have known that the deceased was a public officer, and in the legal discharge of his duty as such; for if he had no knowledge of the officer's authority or business the killing will be manslaughter only: s. 229, s-s. 4, *post.*

In order to render the killing of an officer of justice, whether he is authorized in right of his office or by warrant, amount to murder, upon his interference with an affray, it is necessary that he should have given some notification of his being an officer, and of the intent with which he interfered: R. v. Gordon, 1 East, P. C. 315, 352: s. 32, *ante.*

Where a constable interferes in an affray to keep the peace, and is killed, such of the persons concerned in killing him as knew him to be a constable are guilty of murder, and such as did not know it of manslaughter only: 1 Hale, 446. But it hath been adjudged that if a justice of the peace, constable or watchman, or even a private person, be killed in endeavouring to part those whom he sees fighting, the person by whom he is killed is guilty of murder; yet it hath been resolved, that if the third person slain in such a sudden affray do not give notice for what purpose he comes, by commanding the parties in the king's name to keep the peace, or otherwise manifestly shewing his intention to be not to take part in the quarrel but to appease it, he who kills him is guilty of manslaughter only, for he might suspect that he came to side with his adversary; but if the person interposing in such case be an officer within his proper district, and known, or generally acknowledged to bear the office he assumeth, the law will presume that the party killing had due notice of his intent, especially if it be in the day time: 1 Hawk. 101.

Killing an officer will amount to murder, though he had no warrant, and was not present when any felony was committed, and takes the party upon a charge only, and though such charge does not in terms specify all the particulars necessary to constitute the felony: R. v. Ford, R. & R. 329; *see* Rafferty v. The People, 12 Cox, 617; R. v. Carey, 14 Cox, 214.

Killing an officer who attempts to arrest a man will be murder, though the officer had no warrant, and though the man has done nothing for which he was liable to be arrested, if the officer has a charge against him for felony, and the man knows the individual to be an officer, though the officer does not notify to him that he has such a charge: R. v. Woolmer, 1 Moo. 334; s. 32, *ante*.

So, where a man seen attempting to commit a felony on fresh pursuit kills his pursuer, it is as much murder as if

the party were killed while attempting to take the defendant in the act, for any person, whether a peace officer or not, has power to arrest a person attempting to commit or actually committing a felony: R. v. Howarth, 1 Moo. 207.

If a person is playing music in a public thoroughfare, and thereby collects together a crowd of people, a policeman is justified in desiring him to go on, and in laying his hand on him and slightly pushing him, if it is only done to give effect to his remonstrance; and if the person, on so small a provocation, strikes the policeman with a dangerous weapon and kills him, it will be murder, but otherwise if the policeman gives him a blow and knocks him down: R. v. Hagan, 8 C. & P. 167.

MURDER.—KILLING BY OFFICERS OF JUSTICE.

Where an officer of justice, in endeavouring to execute his duty, kills a man, this is justifiable homicide, or manslaughter, or murder, according to circumstances. Where an officer of justice is resisted in the legal execution of his duty he may repel force by force; and if, in doing so, he kills the party resisting him, it is justifiable homicide; and this in civil as well as in criminal cases: 1 Hale, 494; 2 Hale, 118. And the same as to persons acting in aid of such officer. Thus if a peace officer have a legal warrant against B. for felony, or if B. stand indicted for felony, in these cases if B. resist, and in the struggle be killed by the officer, or any person acting in aid of him, the killing is justifiable: Fost. 318; s. 33, *et seq.*, *ante*. So, if a private person attempt to arrest one who commits a felony in his presence or interferes to suppress an affray, and he resists, and kill the person resisting, this is also justifiable homicide: 1 Hale, 481, 484. Still there must be an apparent necessity for the killing; for if the officer were to kill after the resisting had ceased, or if there were no reasonable necessity for the violence used upon the part of the officer, the killing would be manslaughter at the least. Also, in order to justify an officer

or private person in these cases, it is necessary that they should, at the time, be in the act of *legally* executing a duty imposed upon them by law, and under such circumstances that, if the officer or private person were killed, it would have been murder; for if the circumstances of the case were such that it would have been manslaughter only to kill the officer or private person, it will be manslaughter at least, in the officer or private person to kill the party resisting: Fost. 318; 1 Hale, 490. If the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he, in his defence, kill any of them, it is justifiable, for the sake of preventing an escape: 1 Hale, 496: ss. 35, 36, *ante*.

Where an officer or private person, having legal authority to apprehend a man, attempts to do so, and the man, instead of resisting, flies, or resists and then flies, and is killed by the officer or private person in the pursuit, if the offence with which the man was charged were a treason or a felony, or a dangerous wound given, and he could not otherwise be apprehended, the homicide is justifiable; but if charged with a breach of the peace or other misdemeanour merely, or if the arrest were intended in a civil suit, or if a press-gang kill a seaman or other person flying from them, the killing in these cases would be murder, unless, indeed, the homicide were occasioned by means not likely or intended to kill, such as tripping up his heels, giving him a blow of an ordinary cudgel, or other weapon not likely to kill, or the like; in which case the homicide, at most, would be manslaughter only. In case of a riot or rebellious assembly, the officers endeavouring to disperse the mob are justifiable in killing any of them, both at common law and by the Riot Act, if the riot cannot otherwise be suppressed: Archbold, 646; ss. 36, 40, 83, *ante*.

DUELLING.

Where words of reproach or other sudden provocations have led to blows and mutual combat, and death has ensued, the important inquiry will be, whether the occasion

was altogether sudden and not the result of preconceived anger or malice; for in no case will the killing, though in mutual combat, admit of alleviation if the fighting were upon malice. Thus a party killing another in a deliberate duel is guilty of murder: 1 Russ. 727.

Where, upon a previous agreement, and after there has been time for the blood to cool, two persons meet with deadly weapons, and one of them is killed, the party who occasions the death is guilty of murder, and the seconds also are equally guilty; and with respect to others shewn to be present the question is: Did they give their aid and assistance by their countenance and encouragement of the principals in the contest? mere presence will not be sufficient; but if they sustain the principals either by advice or assistance, or go to the ground for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do anything, yet, if they are present assisting and encouraging by their presence at the moment when the fatal shot is fired, they are, in law, guilty of the crime of murder: R. v. Young, 8 C. & P. 644.

Where two persons go out to fight a deliberate duel and death ensues, all persons who are present, encouraging and promoting that death, will be guilty of murder. And the person who acted as the second of the deceased person in such a duel may be convicted of murder, on an indictment charging him with being present, aiding and abetting the person by whose act the death of his principal was occasioned: R. v. Cuddy, 1 C. & K. 210; s. 61, *ante*.