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LIST OF ABBREVIATIONS.

A. & E.	Adolphus and Ellis, Reports
B. & Ad.	Barnewall and Adolphus' "
B. & Ald.	Barnewall and Alderson's "
B. & C.	Barnewall and Cresswell's "
B. & P.	Bosanquet and Puller's "
B. & S.	Best and Smith's "
Bing.	Bingham's K. B "
Brod. & B.	Broderip and Bingham's "
Burr.	Burrows' "
C. B.	Common Bench "
C. B. N. S.	Common Bench New Series "
Cl. & F.	Clark & Finelly's "
C. & D.	Crawford and Dixon's "
C. & K.	Carrington and Kirwan's N. P. Reports
Car. & M.	Carrington and Marshman " "
C. & P.	Carrington and Payne's " "
Cald.	Caldecott's Reports
Camp.	Campbell's Reports
Carr. Supp.	Carrington's Criminal Law
Chit.	Chitty's " "
Chit. Rep.	Chitty's Reports
C. L. J.	Canada Law Journal, Ont
C. L. T.	Canadian Law Times, Ont.
C. M. & R.	Crompton, Meeson & Roscoe's Reports
Co.	Coke's Reports
C. P. D.	Law Reports, Common Pleas Division
C. S. C.	Consolidated Statutes of Canada
C. S. L. C.	Consolidated Statutes of Lower Canada
C. S. U. C.	Consolidated Statutes of Upper Canada
D. & L.	Dowling and Lowndes' Reports
D. & M.	Davison and Merivale's "
D. & R.	Dowling and Ryland's "
Dears.	Dearsley's " "
Dears. & B.	Dearsley and Bell's Crown Cases
Den.	Denison's Crown Cases
Dor. Q. B. R.	Dorion's Queen's Bench Reports, Montreal
Doug.	Douglas Reports
E. & B.	Ellis and Blackburn's Reports
E. B. & E.	Ellis, Blackburn and Ellis' "

E. & E.	Ellis and Ellis' "
Ex. D.	Law Reports, Exchequer Division
F. & F.	Foster and Finlason's "
Fost.	Foster's Crown Cases
G. & D.	Gale and Davison's Reports
G. & O.	Geldert and Oxley's Nova Scotia Reports
H. & C.	Hurlstone and Coltman's
H. & N.	Hurlstone and Norman's "
Han.	Hannay's New Brunswick "
Ill.	Illinois State "
Ind.	Indiana Reports
Inst.	Coke's Institutes
Ir. R. C. L.	Irish Common Law Reports
Ir. L. R.	Irish Law Reports
J. P.	Justice of the Peace
Jur.	Jurist
Kel.	Kelyng's Crown Cases
L. & C.	Leigh and Cave's Crown Cases
L. C. J.	Lower Canada Jurist
L. C. L. J.	Lower Canada Law Journal
L. C. R.	Lower Canada Reports
Ld. Raym.	Lord Raymond's "
L. J.	Law Journal (England)
L. N.	Legal News, P. Q.
L. R. C. C. R.	Law Reports, Crown Cases Reserved
L. R. C. P.	Law Reports, Common Pleas
L. R. H. L.	Law Reports, English and Irish Appeals
L. R. P. C.	Law Reports, Privy Council
L. R. Q. B.	Law Reports, Queen's Bench
L. T.	Law Times Reports
M. & G.	Manning and Granger's Reports
M. & M.	Moody and Malkin's "
M. & Rob.	Moody and Robinson's "
M. & S.	Maule and Selwyn's "
M. & W.	Meeson and Welsby's "
Man. L. R.	Manitoba Law Reports
Marsh.	Marshall's Reports
M. L. R. Q. B.	Montreal Law Reports, Queen's Bench
Me.	Maine State Reports
Mod.	Modern Reports
Moo.	Moody's Crown Cases

N. B. Rep.	New Brunswick Reports
N. S. Rep.	Nova Scotia Reports
O. R.	Ontario Reports
Ont. A. R.	Ontario Appeal Reports
P. & B.	Pugsley and Burbidge, New Brunswick Reports
Plow.	Plowden's K. B. Report
P. R. (Ont.)	Practice Reports, Ontario
Pugs.	Pugsley's New Brunswick Reports
P. Wms.	Peere Williams, K. B. Reports
Q. B.	Queen's Bench
Q. B. D.	Law Reports, Queen's Bench Division
Q. L. R.	Quebec Law Reports
R. & C.	Russell & Chesley's Nova Scotia Reports
R. & M.	Ryan and Moody's Reports
R. & R.	Russell and Ryan's Reports
Rep.	Coke's Reports.
R. L.	Revue Legale, P. Q.
R. S. B. C.	Revised Statutes of British Columbia
R. S. N. B.	Revised Statutes of New Brunswick
R. S. N. S.	Revised Statutes of Nova Scotia
Russ.	Russell on Crimes, 4th ed.
R. & G.	Russell and Geldert's Nova Scotia Reports
Salk.	Salkeld's Reports
S. C. R.	Supreme Court of Canada Reports
St. Tr.	State Trials
Str.	Strange's Reports
Taun.	Taunton's "
T. R.	Term. "
T. Raym.	T. Raymond's "
Tyr.	Tyrwhitt's "
U. C. C. P.	Upper Canada Common Pleas
U. C. Q. B.	Upper Canada Queen's Bench
Warb. Lead. Cas.	Warburton's Leading Cases on Criminal Law
W. R.	Weekly Reporter
Wheat.	Wheaton's Reports
Wil.	Wilson's K. B. Reports.

55-56 VICTORIA.

CHAP. 29.

An Act respecting the Criminal Law.

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

TITLE I.

INTRODUCTORY PROVISIONS.

PART I.

PRELIMINARY.

1. This Act may be cited for all purposes as *The Criminal Code*, 1892.

COMMENCEMENT OF ACT.

2 This Act shall come into force on the first day of July, 1893.

INTERPRETATION CLAUSE.

3. In this Act the following expressions have the meanings assigned to them in this section unless the context requires otherwise :

(*a*) The expression "any Act," or "any other Act," includes any Act passed or to be passed by the Parliament of Canada, or any Act passed by the legislature of the late province of Canada, or passed or to be passed by the legislature of any province of Canada, or passed by the legislature of any province included in Canada before it was included therein; R. S. C. c. 174, s. 2 (*a*).

(*b*) The expression "Attorney-General" means the Attorney-General *or Solicitor-General* of any province in Canada in which any proceedings are taken under this Act, and, with respect to the North-west Territories and the district of Keewatin, the Attorney-General of Canada; R. S. C. c. 150, s. 2 (*a*).

(c) The expression "banker" includes any director of any incorporate bank or banking company; R. S. C. c. 164, s. 2 (g).

(d) The expression "cattle," includes any horse, mule, ass, swine, sheep, or goat, as well as any neat cattle or animal of the bovine species, and by whatever technical or familiar name known, and shall apply to one animal as well as to many; R. S. C. c. 172. s. 1, (*amended*); 24-25 V. c. 96, s. 10, (Imp.).

(e) The expression "Court of Appeal" includes the following courts: R. S. C. c. 174, s 2 (h).

(i) In the province of Ontario, any division of the High Court of Justice;

(ii) In the province of Quebec, the Court of Queen's Bench, appeal side;

(iii) In the provinces of Nova Scotia, New Brunswick and British Columbia, and in the North-west Territories, the Supreme Court *in banc;*

(iv) In the province of Prince Edward Island, the Supreme Court of Judicature;

(v) In the province of Manitoba, the Court of Queen's Bench;

(f) The expression "district, county or place" includes any division of any province of Canada for purposes relative to the administration of justice in criminal cases; R. S. C. c. 174, s. 2 (f).

(g) The expression "document of title to goods" includes any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to: R. S. C. c. 164, s. 2 (a); 24-25 V. c. 96, s. 1, (Imp.).

(h) The expression "document of title to lands" includes any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real property, or to any interest in any real property, or any notarial or registrar's copy thereof, or any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada respecting registration of titles, and relating to such title; R. S. C. c. 164, s. 2 (b); 24-25 V. c. 96, s. 1, (Imp.).

(i) The expression "explosive substance" includes any materials for making an explosive substance; also any apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; and also any part of any such apparatus, machine or implement; R. S. C. c. 150, s. 2 (b); 46 V. c. 3, s. 9, (Imp.).

(j) Finding the indictment includes also exhibiting an information and making a presentment; R. S. C. c. 174, s. 2 (d), (*amended*).

(k) Having in one's possession, includes not only having in one's own personal possession, but also knowingly—

(i) having in the actual possession or custody of any other person; and

(ii) having in any place (whether belonging to or occupied by one's self or not) for the use or benefit of one's self or of any other person; R. S. C. c. 164, s. 2, (*l*); c. 165, s. 2; c. 167, s. 2; c. 171, s. 3; 50-51 V. c. 45, s. 2 (*e*).

If there are two or more persons, any one or more of whom, with the knowledge and consent of the rest, have any thing in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;

(*l*) The expressions "indictment" and "count" respectively include information and presentment as well as indictment, and also any plea, replication or other pleading, and any record; R. S. C. c. 174, s. 2 (*c*), (*amended*);

(*m*) The expression "intoxicating liquor" means and includes any alcoholic, spirituous, vinous, fermented or other intoxicating liquor, or any mixed liquor a part of which is spirituous or vinous, fermented or otherwise intoxicating; R. S. C. c. 151, s. 1 (*d*).

(*n*) The expression "justice" means a justice of the peace, and includes two or more justices, if two or more justices act or have jurisdiction, and also any person having the power or authority of two or more justices of the peace; R. S. C. c. 174, s. 2 (*b*).

(*o*) The expression "loaded arms" includes any gun, pistol or other arm loaded with gunpowder, or other explosive substance, and ball, shot, slug or other destructive material, or charged with compressed air and ball, shot, slug, or other destructive material, R. S. C. c. 162, s. 1 (*amended*); *R.* v. *Harris*, 5 C. & P. 159; *R.* v. *Jackson*, 17 Cox, 104; 24-25 V. c. 100, s. 19, (Imp.).

(*o*-1) The expression "military law" includes *The Militia Act* and any orders, rules and regulations made thereunder, the Queen's Regulations and Orders for the Army; any Act of the United Kingdom or other law applying to Her Majesty's troops in Canada, and all other orders, rules and regulations of whatever nature or kind soever to which Her Majesty's troops in Canada are subject;

(*p*) The expression "municipality" includes the corporation of any city, town, village, county, township, parish or other territorial or local division of any province of Canada, the inhabitants whereof are incorporated or have the right of holding property for any purpose; R. S. C. c. 164, s. 2 (*j*).

(*p*-1) In the sections of this Act relating to defamatory libel the word "newspaper" shall mean any paper, magazine or periodical containing public news, intelligence or occurrences, or any remarks or observations thereon, printed for sale and published periodically, or in parts or numbers, at intervals not exceeding *thirty-one* days between the publication of any two such papers, parts or numbers, and also any paper, magazine or periodical printed in order to be dispersed and made public, weekly or oftener, or at intervals not exceeding *thirty-one* days, and containing only or principally advertisements; 51 V. c. 44, s. 1 (*amended*).

(*q*) The expression "night" or "night time" means the interval between nine o'clock in the afternoon and six o'clock in the forenoon of the following day, and the expression "day" or "day time" includes the interval between six o'clock in the forenoon and nine o'clock in the afternoon of the same day; R. S. C. c. 164, s. 2; 24-25 V. c. 96, s. 1, (Imp.).

(*r*) The expression "offensive weapon" includes any gun or other firearm, or air-gun, or any part thereof, or any sword, sword-blade, bayonet, pike, pike-head, spear, spear-head, dirk, dagger, knife, or other instrument intended for cutting or stabbing, or any metal knuckles, or other deadly or dangerous weapon, and any instrument or thing intended to be used as a weapon, and all ammunition which may be used with or for any weapon; R. S. C. c. 151, s. 1 (*c*).

(*s*) The expression "peace officer" includes a mayor, warden, reeve, sheriff, deputy-sheriff, sheriff's officer, and justice of the peace, and also the warden, keeper or guard of a penitentiary and the gaoler or keeper of any prison, and any police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace, or for the service or execution of civil process; (*new*).

(*t*) The expressions "person," "owner," and other expressions of the same kind include Her Majesty and all public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts in relation to such acts and things as they are capable of doing and owning respectively; (*new*). *See* R. S. C. c. 1, s. 4.

(*u*) The expression "prison" includes any penitentiary, common gaol, public or reformatory prison, lock-up, guard room or other place in which persons charged with the commission of offences are usually kept or detained in custody; (*new*).

(*v*) The expression "property" includes:

(i) Every kind of real and personal property, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods;

(ii) Not only such property as was originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange, whether immediately or otherwise;

(iii) Any postal card, postage stamp or other stamp issued or prepared for issue by the authority of the Parliament of Canada, or of the legislature of any province of Canada, for the payment to the Crown or any corporate body of any fee, rate or duty, and whether still in the possession of the Crown or of any person or corporation; and such postal card or stamp shall be held to be a chattel, and to be equal in value to the amount of the postage, rate or duty expressed on its face in words or figures or both; R. S. C. c. 164, s. 2; 24-25 V. c. 96, s. 1, (Imp.).

(*w*) The expression "public officer" includes any inland revenue or customs officer, officer of the army, navy, marine, militia, North-west mounted police, or other officer engaged in enforcing the laws relating to the revenue, customs, trade or navigation of Canada; (*New*).

(*x*) The expression "shipwrecked person" includes any person belonging to, on board of, *or having quitted* any vessel wrecked, stranded, or in distress at any place in Canada; R. S. C. c. 81, s. 2 (*h*), (*Amended*).

(*y*) The expression "Superior Court of Criminal Jurisdiction" means and includes the following courts:

(i) In the province of Ontario, the three divisions of the High Court of Justice

(ii) In the province of Quebec, the Court of Queen's Bench;

(iii) In the provinces of Nova Scotia, New Brunswick and British Columbia, and in the North-west Territories, the Supreme Court;

(iv) In the province of Prince Edward Island, the Supreme Court of Judicature;

(v) In the province of Manitoba, the Court of Queen's Bench (Crown side); (*New*).

(*z*) The expression "territorial division" includes any county, union of counties, township, city, town, parish or other judicial division or place to which the context applies; R. S. C. c. 174, s. 2 (*g*).

(*aa*) The expression "testamentary instrument" includes any will, codicil, or other testamentary writing or appointment, as well during the life of the testator whose testamentary disposition it purports to be as after his death, whether the same relates to real or personal property, or both; R. S. C. c. 164, s. 2 (*i*).

(*bb*) The expression "trustee" means a trustee on some express trust created by some deed, will or instrument in writing, or by parol, or otherwise, and includes the heir or personal representative of any such trustee, and every other person upon or to whom the duty of such trust has devolved or come, whether by appointment of a court or otherwise, and also an executor and administrator, and an official manager, assignee, liquidator or other like officer acting under any Act relating to joint stock companies, bankruptcy or insolvency, and any person who is, by the law of the province of Quebec, an "*administrateur*" *or* "*fidéicommissaire*"; and the expression "trust" includes whatever is by that law an "*administration*" *or* "*fidéicommission*"; R. S. C. c. 164, s. 2 (*c*), (*Amended*); 24-25 V. c. 96, s. 1, (Imp.).

(*cc*) The expression "valuable security" includes any order, exchequer acquittance or other security entitling or evidencing the title of any person to any share or interest in any public stock or fund, whether of Canada or of any province thereof, or of the United Kingdom, or of Great Britain or Ireland, or any British colony or possession, or of any foreign state, or in any fund of any body corporate, company or society, whether within Canada or the United Kingdom, or any British colony or possession, or in any foreign state or country, or to any deposit in any savings bank or other bank, and also includes any debenture, deed, bond, bill, note, warrant, order or other security for money or for payment of money, whether of Canada or of any province thereof, or of the United Kingdom or of any British colony or possession, or of any foreign state, and any document of title to lands or goods as hereinbefore defined wheresoever such lands or goods are situate, and any stamp or writing which secures or evidences title to, or interest in any chattel personal, or any release, receipt, discharge or other instrument, evidencing payment of money, or the delivery of any chattel personal; and every such valuable security shall, where value is material, be deemed to be of value equal to that of such unsatisfied money, chattel personal, share, interest or deposit, for the securing or payment of which, or delivery or transfer or sale of which, or for the entitling or evidencing title to which, such valuable security is applicable, or to that of such money or chattel personal, the payment or delivery of which is evidenced by such valuable security; 53 V. c. 37, s. 20; 24-25 V. c. 96, s. 1, (Imp.).

(*dd*) The expression "wreck" includes the cargo, stores and tackle of any vessel and all parts of a vessel separated therefrom, and also the property of shipwrecked persons; R. S. C. c. 81, s. 2.

(*ee*) The expression "writing" includes any mode in which, and any material on which, words or figures whether at length or abridged are written, printed or otherwise expressed, or any map or plan is inscribed; R. S. C. c. 164, s. 2; *see* R. S. C. c. 1, s. 4.

INTERPRETATION OF OTHER WORDS.

4. The expressions "mail," "mailable matter," "post letter," "post letter bag," and "post office" when used in this Act have the meanings assigned to them in *The Post Office Act*, and *in every case in which the offence dealt with in this Act relates to the subject treated of in any other Act, the words and expressions used herein in respect to such offence shall have the meaning assigned to them in such other Act.*

The Post Office Act is c. 35 of the Revised Statutes.

CARNAL KNOWLEDGE DEFINED.

SEC. 4a.—Carnal knowledge is complete upon penetration to any, even to the slightest degree, and even without the emission of seed: (*amendment of 1893*).

OFFENCES AGAINST IMPERIAL STATUTES.

5. No person shall be proceeded against for any offence against any Act of the Parliament of England, of Great Britain, or of the United Kingdom of Great Britain and Ireland, unless such Act is, by the express terms thereof, or of some other Act of such Parliament, made applicable to Canada or some portion thereof as part of Her Majesty's dominions or possessions.

By 28-29 V. c. 63 (Imp.), any colonial law repugnant to any Act of the Imperial Parliament is, to the extent of that repugnancy, void.

PUNISHMENTS.

6. Every one who commits an offence *against this Act* is liable as herein provided to one or more of the following punishments:—

(*a*) Death, ss. 65, 68, 127, 129, 231, 267, 935 to 949; ss. 6, 7, c. 146 R. S. C.

(*b*) Imprisonment, ss. 950 to 956;

(*c*) Whipping, s. 957;

(*d*) Fine, s. 958;

(*e*) Finding sureties for future good behaviour, s. 958;

(*f*) If holding office under the Crown, to be removed therefrom, s. 961;

(*g*) To forfeit any pension or superannuation allowance, s. 961;

(*h*) To be disqualified from holding office, from sitting in Parliament and from exercising any franchise, s. 961.

(*i*) To pay costs, s. 832;

(*j*) To indemnify any person suffering loss of property by commission of his offence, s. 836.

Why is this enactment limited to offences against "this Act"?

PART II.

MATTERS OF JUSTIFICATION OR EXCUSE.

Common Law Rules.

7. All rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge *under this Act* except in so far as they are hereby altered or are inconsistent herewith.

8. The matters provided for in this part are hereby declared and enacted to be justifications or excuses in the case of all charges to which they apply.

"We regard this as one of the most difficult as well as most important portions of the draft Code. . . . We do not think it desirable that, if a particular combination of circumstances arises of so unusual a character that the law has never been decided with reference to it, there should be any risks of a code being so framed as to deprive an accused person of a defence to which the common law entitles him, and that it might become the duty of the Judge to direct the jury that they must find him guilty, although the facts proved that he had a defence on the merits, and would have an undoubted claim to be pardoned by the Crown. While, therefore, digesting and declaring the law as applicable to the ordinary cases, we think that the common law, so far as it affords a defence, should be preserved in all cases not expressly provided for. This we have endeavoured to do by section 19 of the draft Code."—(*Sec. 7 ante*), Imp. Comm. Rep.

Children Under Seven.

9. No person shall be convicted of an offence by reason of any act or omission of such person when under the age of seven years.

That is the common law: 4 Blacks. 23. No proof of the capacity of an infant under seven to commit a crime can be admitted: *see* R. v. Owen, Warb. Lead. Cas. 19.

Children Between Seven and Fourteen.

10. No person shall be convicted of an offence by reason of an act or omission of such person when of the age of seven, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct, and to appreciate that it was wrong.

Such an infant is presumed to be incapable to commit any crime until the contrary is proved, and such a proof must be clear and beyond all doubt: 4 Blacks. 23.

A boy under fourteen cannot, in law, commit a rape; section 266; nor the offence of carnally knowing a girl under fourteen, under section 269, R. v. Waite, [1892], 2 Q. B. 600, nor, any of the offences where carnal connection with a woman is a necessary ingredient of the offence, or any attempt to commit rape or any of the above mentioned offences: compare R. v. Eldershaw, 3 C. & P. 396; R. v. Groombridge, 7 C. & P. 582; R. v. Philips, 8 C. & P. 736; R. v. Jordan, 9 C. & P. 118; R. v. Brimilow, 2 Moo. 122, 1 Russ. 8; R. v. Allen, 1 Den. 364.

A person of the age of fourteen and upwards is presumed to have capacity to commit any crime until the contrary is proved: *see* R. v. Owen, Warb. Lead. Cas. 19; R. v. Vamplew, 3 F. & F. 520.

INSANITY.

11. No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such act or omission was wrong.

2. A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.

3. Every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

See 3 Burn's Just. 180; 1 Russ. 11; R. v. Oxford, Warb. Lead. Cas. 21, and cases there cited; R. v. Davis, 14 Cox, 563; R. v. Dubois, 17 Q. L. R. 203; R. v. Dove, 3 Stephen's Hist. 426.

"Section 22 (*sec. 11, ante*), which relates to insanity, expresses the existing law. The obscurity which hangs over the subject cannot altogether be dispelled until our existing ignorance as to nature of the will and the mind, the nature of the organs by which they operate, the manner and degree in which those

operations are interfered with by disease, and the nature of the diseases which interfere with them, are greatly diminished.

"The framing of the definition has caused us much labour and anxiety; and though we cannot deem the definition to be altogether satisfactory, we consider it as satisfactory as the nature of the subject admits of. Much latitude must, in any case, be left to the tribunal which has to apply the law to the facts in each particular case.

. . . . . .

It must be borne in mind, that although insanity is a defence which is applicable to any criminal charge, it is most frequently put forward in trials for murder, and for this offence the law—and we think wisely—awards upon conviction a fixed punishment which the Judge has no power to mitigate.

"In the case of any other offence if it should appear that the offender was afflicted with some unsoundness of mind, but not to such a degree as to render him irresponsible—in other words where the criminal element predominates though mixed in a greater or less degree with the insane element, the Judge can apportion the punishment to the degree of criminality, making allowances for the weakened or disordered intellect.

"But in a case of murder this can only be done by an appeal to the executive; and we are of opinion that this difficulty cannot be successfully avoided by any definition of insanity which would be both safe and practicable, and that many cases must occur which cannot be satisfactorily dealt with otherwise than by such an appeal."—Imp. Comm. Rep.

Compulsion by Threats.

12. Except as hereinafter provided, compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence shall be an excuse for the commission, by a person subject to such threats, and who believes such threats will be executed, and who is not a party to any association or conspiracy, the being a party to which rendered him subject to compulsion, of any offence other than treason as defined in paragraphs *a*, *b*, *c*, *d* and *e* of sub-section one of section sixty-five, murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm, and arson; *See R.* v. *Tyler*, 8 *C. & P.* 616, *Warb. Lead Cas.* 31.

"There can be no doubt that a man is entitled to preserve his own life and limb; and, on this ground, he may justify much which otherwise would be punishable. The cases of a person setting up as a defence that he was compelled to commit a crime is of everyday occurrence. There is no doubt on the authorities that compulsion is a defence where the crime is not of a heinous character. But killing an innocent person, according to Lord Hale, can never be justified. He lays down the stern rule: 'If a man be desperately assaulted and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury, he will kill an innocent person there present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself than kill an innocent.' On the trials for high treason in 1746, the defence of the prisoners was in many cases that they were compelled to serve in the rebel army. The law was laid down somewhat more favourably for the prisoners than it had been before, as the defence of compulsion was stated to apply not merely to furnishing provisions to the rebel army, but even to joining and serving in that army. It was laid down (*See* Foster 14) that, 'The only force that doth excuse is force upon the person and present fear of death; and this force and fear of death must continue all the time the party remains with the rebels. It is incumbent on every man who makes force his defence, to show an actual force, and that he quitted the service as soon as he could.' It is noticeable that though most of those who set up this defence must have fought in actual battle and must have killed, or at least assisted in killing the loyalists, and so brought themselves within the stern rule laid down by Hale, it was never suggested that this made a difference. We have framed section 23 (*sec. 12, ante*) of our Draft Code, to express what we think is the existing law, and what at all events we suggest ought to be the law."—Imp. Comm. Rep.

As to homicide by necessity, *see* R. v. Dudley, 14 Q. B. D. 273, Warb. Lead. Cas. 102; United States v. Holmes, 1 Wall., jr., 1.

COMPULSION OF WIFE. (*New*).

13. No presumption shall be made that a married woman committing an offence does so under compulsion because she commits it in the presence of her husband.

This alters the law. All offences committed by a married woman in presence of her husband, except high treason and murder, were presumed to have been committed under coercion: R. v. Torpey, 12 Cox, 45, Warb. Lead. Cas. 26, and cases there cited: R. v. Buncombe, 1 Cox, 183; 1 Russ. 33, and Greaves' note (*n*).

IGNORANCE OF THE LAW.

14. The fact that an offender is ignorant of the law is not an excuse for any offence committed by him.

See R. v. Mailloux, 3 Pugs. (N. B.) 493; R. v. Reed, Car. & M. 308; R. v. Hall, 3 C. & P. 409; R. v. Hearn, cited in Warb. Lead. Cas. 204.

Where the criminal quality of an act depends upon its having been wilfully done the actual motive of the offender is immaterial: 7th Rep. Crim. L. Comm 1843, Art. 10. For criminal purposes, the intention to do the act exists where it is wilfully done. Intention and motive are not the same thing: 4th Rep. xv. and 7th Rep. 29.

In R. v. Crawshaw, Bell. 303, the jury found the defendant guilty, but that he did not know perhaps that he was acting contrary to law. But, said the court, the defendant's ignorance of the statute is no excuse for him. As to ignorance of fact, and the rule that "*actus non facit reum nisi mens sit rea*," *see* R. v. Prince, 13 Cox 138; R. v. Tolson, 16 Cox, 629, 23 Q. B. D. 168, Warb. Lead. Cas. 72, and cases there cited: R. v. Twose, Warb. Lead. Cas. 1; R. v. Hicklin, L. R. 3 Q. B. 360; Dyke v. Gower, 17 Cox, 421, and cases cited under section 283, *post*.

Though drunkenness is never an excuse for a crime, yet, where the intention of the guilty party is an element of the offence itself, the fact that the accused was intoxicated at the time may be taken into consideration by the jury in

considering whether he had the intention necessary to constitute the offence charged: R. v. Cruse, Warb. Lead. Cas. 24, and cases there cited: R. v. Doherty, 16 Cox, 306; R. v. Carroll, 7 C. & P. 145; 1 Russ. 12, and Greaves' note.

Ignorance of the law, an excuse in a specified case under section 21, *post*.

As to liability, in criminal law, of masters for the acts of their servants: *see* R. v. Stephens, Warb. Lead. Cas. 37; Bond v. Evans, 16 Cox, 461, 21 Q. B. D. 249; R. v. Bennett, Bell, 1; R. v. Allen, 7 C. & P. 153; Chisholm v. Doulton, 16 Cox, 675, 22 Q. B. D. 736, and cases there cited; Kearley v. Tylor, 17 Cox, 328; Elliott v. Osborn, 17 Cox, 346; Brown v. Foot, 17 Cox, 509.

EXECUTION OF SENTENCE.

15. Every ministerial officer of any court authorized to execute a lawful sentence, and every gaoler, and every person lawfully assisting such ministerial officer or gaoler, is *justified* in executing such sentence.

That is common law. What the law requires, it justifies. *Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud (5 Rep. 115 b.)* *See post*, sections 18 & 19, as to erroneous sentences, and note under section 16 as to the word *justified*.

EXECUTION OF PROCESS.

16. Every ministerial officer of any court duly authorized to execute any lawful process of such court, whether of a civil or a criminal nature, and every person lawfully assisting him, is *justified* in executing the same; and every gaoler who is required under such process to receive and detain any person is justified in receiving and detaining him.

See note under preceding section, and R. v. King, 18 O. R. 566.

"There is a difference in the language used in the sections in this part which probably requires explanation. Sometimes it is said that the person doing an act is "justified" in so doing under particular circumstances. The effect of an enactment using that word would be not only to relieve him from punishment, but also to afford him a statutable defence against a civil action for what he had done. Sometimes it is said that a

person doing an act is 'protected from criminal responsibility' under particular circumstances. The effect of an enactment using this language is to relieve him from punishment, but to leave his liability to an action for damages to be determined on other grounds, the enactment neither giving a defence to such an action where it does not exist, nor taking it away where it does. This difference is rendered necessary by the proposed abolition of the distinction between felony and misdemeanour.

"We think that in all cases where it is the duty of a peace officer to arrest, (as it is in cases of felony) it is proper that he should be protected as he now is, from civil as well as from criminal responsibility. And as it is proposed to abolish the distinction between felony and misdemeanour, on which most of the existing law as to arresting without a warrant depends, we think it is necessary to give a new protection from all liability (both civil and criminal) for arrest, in those cases which by the schemes of the Draft Code are (so far as the power of arrest is concerned) substituted for felonies. In those cases therefore which are provided for in sections 32, 33, 34, 37, 38, (*22, 23, 24, 27, 28, of this Code*) the word 'justified' is used. A private person is, by the existing law, protected from civil responsibility for arresting without warrant a person who is on reasonable grounds believed to have committed a felony, provided a felony has actually been committed, but not otherwise. In section 35, (*25 of this Code*) providing an equivalent for this law, the word used is 'justified.'

"On the other hand, where we suggest an enactment which extends the existing law for the purpose of protecting the person from criminal proceedings, we have not thought it right that it should deprive the person injured of his right to damages.

"And in cases in which it is doubtful whether the enactment extends the existing law or not, we have thought it better not to prejudice the decision of the civil courts by the language used. In cases therefore such as those dealt with by sections 29, 30, 31, 36, 39, 46, 47, (*19, 20, 21, 26, 29, 36, 37, of this Code*) we have used the words 'protected from criminal responsibility.'"—Imp. Comm. Rep.

Parliament clearly assumed that they have the same right to deal with this subject that the Imperial Parliament has:—*Quære?*

EXECUTION OF WARRANTS.

17. Every one duly authorized to execute a lawful warrant issued by any court or justice of the peace or other person having jurisdiction to issue such warrant, and every person lawfully assisting him, is *justified* in executing such warrant; and every gaoler who is required under such warrant to receive and detain any person is justified in receiving and retaining him.

See note under section 15: R. v. Davies, 8 Cox, 486, and note under section 16 as to the word *justified*.

A warrant can only be executed by the person to whom it is directed, and if executed by any other this other commits a trespass: Symonds v. Kurtz, 16 Cox, 726.

EXECUTION OF ERRONEOUS SENTENCE OR PROCESS.

18. If a sentence is passed or process issued by a court having jurisdiction under any circumstances to pass such a sentence or issue such process, or if a warrant is issued by a court or person having jurisdiction under any circumstances to issue such a warrant, the sentence passed or process or warrant issued shall be sufficient to *justify* the officer or person authorized to execute the same, and every gaoler and person lawfully assisting in executing or carrying out such sentence, process or warrant, although the court passing the sentence or issuing the process had not in the particular case authority to pass the sentence or to issue the process, *or although the court, justice or other person in the particular case had no jurisdiction to issue, or exceeded its or his jurisdiction in issuing the warrant, or was, at the time when such sentence was passed or process or warrant issued, out of the district in or for which such court, Justice or person was entitled to act.*

See West v. Smallwood, 3 M. & W. 418.

"The latter part of this section (in italics) perhaps extends the law."—Imp. Comm. Rep.

See note under section 16 as to the word *justified*.

"The result of the authorities justifies us in saying that wherever a ministerial officer, who is bound to obey the orders of a court or magistrate (as, for instance, in executing a sentence or effecting an arrest under warrant), and is punishable by indictment for disobedience, merely obeys the order which he has received, he is justified, if that order was within the jurisdiction of the person giving it.

"And we think that the authorities show that a ministerial officer obeying an order of the court, or the warrant of a magistrate, is justified, if the warrant or order was one which the court or magistrate could, under any circumstances, lawfully

issue, though the order or warrant was in fact obtained improperly; or, though there was a defect of jurisdiction in the particular case, which might make the magistrate issuing the warrant civilly responsible: on the plain principle that a ministerial officer is not bound to enquire, what were the grounds on which the order or warrant was issued, and is not to blame for acting on the supposition, that the court or magistrate had jurisdiction."—Imp. Comm. Rep.

SENTENCE OR PROCESS WITHOUT JURISDICTION.

19. Every officer, gaoler or person executing any sentence, process or warrant, and every person lawfully assisting such officer, gaoler or person, shall be protected from *criminal* responsibility if he acts in good faith under the belief that the sentence or process was that of a court having jurisdiction or that the warrant was that of a court, justice of the peace or other person having authority to issue warrants, and if it be proved that the person passing the sentence or issuing the process acted as such a court under colour of having some appointment or commission lawfully authorizing him to act as such a court, or that the person issuing the warrant acted as a justice of the peace or other person having such authority, although in fact such appointment or commission did not exist or had expired, or although in fact the court or the person passing the sentence or issuing the process was not the court or the person authorized by the commission to act, or the person issuing the warrant was not duly authorized so to act.

See note under section 16 as to the words, "criminal responsibility."

"Though cases of this sort have rarely arisen in practice, we think we are justified by the opinion of Lord Hale (1 Hale, 498) in saying that the order of a court, having a colour of jurisdiction, though acting erroneously, is enough to justify the ministerial officer."—Imp. Comm. Rep.

ARRESTING THE WRONG PERSON. (*New*).

20. Every one duly authorized to execute a warrant to arrest who thereupon arrests a person, believing in good faith and on reasonable and probable grounds that he is the person named in the warrant, shall be protected from *criminal responsibility* to the same extent and subject to the same provision as if the person arrested had been the person named in the warrant.

(2) Every one called on to assist the person making such arrest, and believing that the person in whose arrest he is called on to assist is the person for whose arrest the warrant is issued, and every gaoler who is required to receive and detain such person, shall be protected to the same extent and subject to the same provisions as if the arrested person had been the person named in the warrant.

See note under section 16 as to the words "criminal responsibility."

"This is new. As an officer arresting for felony without warrant is by the common law justified even if he by mistake arrests the wrong person, we think that the man who arrests any person with a warrant for any offence shall at least be protected from criminal responsibility. The right of action is not affected by it."—Imp. Comm. Rep.

IRREGULAR WARRANT OR PROCESS.

21. Every one acting under a warrant or process which is bad in law on account of some defect in substance or in form apparent on the face of it, if he in good faith and without culpable ignorance and negligence believes that the warrant or process is good in law, shall be protected from *criminal responsibility* to the same extent and subject to the same provisions as if the warrant or process were good in law, *and ignorance of the law shall in such case be an excuse: Provided, that it shall be a question of law whether the facts of which there is evidence may or may not constitute culpable ignorance or negligence in his so believing the warrant or process to be good in law.*

See note under section 16 as to the words "criminal responsibility."

"It is at least doubtful on the existing authorities whether a person honestly acting under a bad warrant, defective on the face of it, has any defence, though only doing what would have been his duty if the warrant was good. The section, as framed, protects him. The proviso is new, but seems to be reasonable. It does not touch the question of civil responsibility."—Imp. Comm. Rep.

See R. v. Monkman, under section 263 *post.*

ARREST BY PEACE OFFICER.

22. Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, whether it has been committed or not, and who, on reasonable and probable grounds, believes that any person has committed that offence, is *justified* in arresting such person without warrant, whether such person is guilty or not.

"Peace Officer" defined, section 3. *See* note under section 16, as to the word *justified.* Section 552 defines for what offence an arrest may be made without warrant. This section 22 is a re-enactment of the law as to felonies.

PERSONS ASSISTING PEACE OFFICER.

23. Every one called upon to assist a peace officer in the arrest of a person suspected of having committed such offence as last aforesaid, is *justified* in assisting, if he knows that the person calling on him for assistance is a peace officer, and does not know that there is no reasonable grounds for the suspicion.

This is the common law. *See* note under section 16 as to the word *justified.*

ARREST WITHOUT WARRANT.

24. Every one is *justified* in arresting without warrant any person whom he finds committing any offence for which the offender may be arrested without warrant, or may be arrested when found committing.

See note under section 16 as to the word *justified.*

See section 552, *post*, as to arrests. It is not clear that it was necessary to enact in these sections that a person who, being by law duly authorized to do so, arrests any one without warrant is justified in so doing.

The words "finds committing" in this and similar enactments are to be construed strictly: R. v. Phelps, Car. & M. 180. *See* remarks under section 552, *post.*

ARREST AFTER COMMISSION OF AN OFFENCE.

25. If any offence for which the offender may be arrested without warrant has been committed, any one who, on reasonable and probable grounds, believes that any person is guilty of that offence is *justified* in arresting him without warrant, whether such person is guilty or not.

See sub-section 4, section 552. *See* note under section 16 as to the word *justified.*

ARREST FOR MAJOR OFFENCES COMMITTED BY NIGHT.

26. Every one is protected from *criminal responsibility* for arresting without warrant any person whom he, on reasonable and probable grounds, *believes he finds* committing by night any offence for which the offender may be arrested without warrant.

"Night" defined, section 3. By sub-section 3, section 552, any person may arrest without warrant any one whom he finds by night committing any offence *against this Act. See* note under section 16 as to the words "criminal responsibility."

ARREST BY PEACE OFFICER.

27. Every peace officer is *justified* in arresting without warrant any person whom he finds committing any offence.

See note under section 16 as to the word *justified*. "Peace officer" defined, section 3. As to arrest without warrant *see* section 552, sub-section 3, which applies only to offences *against this Act*. An officer is *bound* to arrest in many cases, but the Code has no reference to it.

ARREST OF PERSON COMMITTING AN OFFENCE BY NIGHT.

28. Every one is *justified* in arresting without warrant any person whom he finds by night committing any offence.

2. Every peace officer is *justified* in arresting without warrant any person whom he finds lying or loitering in any highway, yard or other place by night, and whom he has good cause to suspect of having committed or being about to commit any offence *for which an offender may be arrested without warrant.*

The words in italics are a clear error, as reference to sub-section 7, section 552 will show. *See* sub-sections 4 and 7 of section 552. "Night" and "peace officer" defined, section 3. *See* note under section 16 as to the word *justified*.

ARREST DURING FLIGHT

29. Every one is protected from *criminal responsibility* for arresting without warrant any person whom he, on reasonable and probable grounds, believes to have committed an offence and to be escaping from and to be freshly pursued by those whom he, on reasonable and probable grounds, believes to have lawful authority to arrest that person for such offence.

See sub-section 4, section 552. *See* note under section 16 as to the words "criminal responsibility."

"This is believed to extend the common law, which applies only to the arrest of persons actually guilty. It does not affect the question of civil liability."—Imp. Comm. Rep.

This and all these akin sections were necessary in the Imperial Code because it contained no section as section 552 of this Code, under which the arrests it authorizes to be made relieves in law the parties making them from all liability whatever, without it being necessary to enact it expressly. What the law authorizes it justifies, and these enactments are superfluous besides being diffuse and, perhaps, in part at least, *ultra vires*.

STATUTORY POWER OF ARREST.

30. Nothing in this Act shall take away or diminish any authority given by any Act in force for the time being to arrest, detain or put any restraint on any person.

MODE OF ARRESTING.

31. Every one *justified* or protected from *criminal* responsibility in executing any sentence, warrant or process, or in making any arrest, and every one lawfully assisting him, is justified, or protected from *criminal* responsibility, as the case may be, in using such force as may be necessary to overcome any force used in resisting such execution or arrest, unless the sentence, process or warrant can be executed or the arrest effected by reasonable means in a less violent manner.

See note under sections 33 & 45, *post*, and note under section 16 as to the words "justified" and "criminal responsibility."

See Dillon v. O'Brien, 16 Cox, 245.

DUTY OF PERSONS ARRESTING.

32. It is the duty of every one executing any process or warrant to have it with him, and to produce it if required.

2. It is the duty of every one arresting another, whether with or without warrant, to give notice, where practicable, of the process or warrant under which he acts, or of the cause of the arrest.

3. *A failure to fulfil either of the two duties last mentioned shall not of itself deprive the person executing the process or warrant, or his assistants, or the person arresting, of protection from criminal responsibility, but shall be relevant to the inquiry whether the process or warrant might not have been executed, or the arrest effected, by reasonable means in a less violent manner.*

"This (*sub-section 3*) is believed to alter the common law."—Imp. Comm. Rep.

See Codd v. Cabe, 1 Ex. D. 352; R. v. Carey, 14 Cox, 214; R. v. Cumpton, Warb. Lead. Cas. 215, and cases there cited.

PEACE OFFICER PREVENTING ESCAPE FROM ARREST FOR MAJOR OFFENCES.

33. Every peace officer proceeding lawfully to arrest, with or without warrant, any person for any offence for which the offender may be arrested without warrant, and every one lawfully assisting in such arrest, is *justified*, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by such flight, unless such escape can be prevented by reasonable means in a less violent manner.

See note under section 16 as to the word *justified*.

"Peace officer" defined, section 3.

"It is also a principle of the common law that all powers, the exercise of which may do harm to others, must be exercised in a reasonable manner, and that if there is excess, the person guilty of such excess is liable for it according to the nature and quality of his act."—Imp. Comm. Rep.

See section 57, *post*.

PRIVATE PERSON PREVENTING SUCH ESCAPE.

34. *Every private person* proceeding lawfully to arrest without warrant any person for any offence for which the offender may be arrested without warrant is *justified*, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by flight, unless such escape can be prevented by reasonable means in a less violent manner: *Provided, that such force is neither intended nor likely to cause death or grievous bodily harm.*

See note under section 16 as to the word *justified*.

"There is some obscurity as to the existing law on this point."—(*The words in italics*)—Imp. Comm. Rep.

OTHER PREVENTING ESCAPE FROM ARREST.

35. *Every one* proceeding lawfully to arrest any person for any cause other than such offence as in the last section mentioned is *justified*, if the person to be arrested takes to flight to avoid arrest, in using such force as may be necessary to prevent his escape by flight, unless such escape can be prevented by reasonable means in a less violent manner: *Provided such force is neither intended nor likely to cause death or grievous bodily harm.*

See note under preceding section.

PREVENTING ESCAPE OR RESCUE IN MAJOR OFFENCES.

36. *Every one* who has lawfully arrested any person for any offence for which the offender may be arrested without warrant is protected from *criminal responsibility* in using such force in order to prevent the rescue or escape of the person arrested as he believes, on reasonable grounds, to be necessary for that purpose.

"This seems to extend the law so far as regards private persons; 2 Hale, 88."—Imp. Comm. Rep.

See note under section 16 as to the words "criminal responsibility."

PREVENTING ESCAPE OR RESCUE IN MINOR OFFENCES.

37. *Every one* who has lawfully arrested any person for any cause other than an offence for which the offender may be arrested without warrant is protected from *criminal responsibility* in using such force in order to prevent his escape or rescue as he believes, on reasonable grounds, to be necessary for that purpose: Provided that such force is neither intended nor likely to cause death or grievous bodily harm.

See note under preceding section.

PREVENTING BREACH OF THE PEACE.

38. Every one who witnesses a breach of the peace is *justified* in interfering to prevent its continuance or renewal and may detain any person committing or about to join in or renew such breach of the peace, in order to give him into the custody of a peace officer: provided that the person inter-

fering uses no more force than is reasonably necessary for preventing the continuance or renewal of such breach of the peace, or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of such breach of the peace.

See section 142, *post.*

39. Every peace officer who witnesses a breach of the peace, and every person lawfully assisting him, is *justified* (*bound?*) in arresting any one whom he finds committing such breach of the peace, or whom he, on reasonable and probable grounds, believes to be about to join in or renew such breach of the peace.

2. Every peace officer is *justified* in receiving into custody any person given into his charge as having been a party to a breach of the peace by one who has, or whom such peace officer, upon reasonable and probable grounds, believes to have, witnessed such breach of the peace.

"Peace officer" defined, section 3.

See Timothy v. Simpson, 1 C. M. & R. 757; Baynes v. Brewster, 2 Q. B. 375; Price v. Seeley, 10 Cl. & F. 28; Webster v. Watts, 11 Q. B. 311. *See* note under section 16 as to the word *justified.*

SUPPRESSION OF RIOT BY MAGISTRATES.

40. Every sheriff, deputy sheriff, mayor or other head officer or acting head officer of any county, city, town or district, and every magistrate and justice of the peace, is *justified* in using and ordering to be used, and every peace officer is *justified* in using such force as he, in good faith, and on reasonable and probable grounds, believes to be necessary to suppress a riot, and as is not disproportioned to the danger which he, on reasonable and probable grounds, believes to be apprehended from the continuance of the riot.

"Peace officer" defined, section 3. "Riot" defined, and punishment, section 80 *et seq.* *See* note under section 16 as to the word *justified.* *See* Stevenson v. Wilson, 2 L. C. J. 254. A sheriff or other officer is *bound* to endeavour to suppress a riot: s. 140 *post.*

OTHER SUPPRESSION OF RIOT.

41. Every one, whether subject to military law or not, acting in good faith in obedience to orders given by any sheriff, deputy-sheriff, mayor or other head officer or acting head officer of any county, city, town or district, or by any magistrate or justice of the peace, for the suppression of a riot, is *justified* in obeying the orders so given unless such orders are *manifestly* unlawful, and is protected from *criminal* responsibility in using such force as he, on reasonable and probable grounds, believes to be necessary for carrying into effect such orders.

2. It shall be a question of law whether any particular order is *manifestly* unlawful or not.

See note under section 16 as to the word *justified.*

"Military law" defined, section 3. "Riot" defined, section 80.

"The protection given by this and the following sections to persons obeying the orders of magistrates and military officers is, perhaps, carried to an extent not yet expressly decided; but see the language of Tindal, C.J., in R. v. Pinney, 5 C. & P. 254, and Willes, J., in Keighly v. Bell, 4 F. & F. 763."—Imp. Comm. Rep.

SUPPRESSION OF RIOT, OTHER CASES.

42. Every one, whether subject to military law or not, who in good faith and on reasonable and probable grounds believes that serious mischief will arise from a riot before there is time to procure the intervention of any of the authorities aforesaid, is *justified* in using such force as he, in good faith and on reasonable and probable grounds, believes to be necessary for the suppression of such riot, and as is not disproportioned to the danger which he, on reasonable grounds, believes to be apprehended from the continuance of the riot.

See note under preceding section.

PROTECTION OF PERSONS SUBJECT TO MILITARY LAW.

43. Every one who is bound by military law to obey the lawful command of his superior officer is *justified* in obeying any command given him by his superior officer for the suppression of a riot, unless such order is *manifestly* unlawful.

2. It shall be a question of law whether any particular order is *manifestly* unlawful or not.

See note under section 41.

PREVENTION OF MAJOR OFFENCES.

44. Every one is *justified* in using such force as may be reasonably necessary in order to prevent the commission of any offence for which, if committed, the offender might be arrested without warrant, *and* the commission of which would be likely to cause immediate and serious injury to the person or property of any one; or, in order to prevent any act being done which he, on reasonable grounds, believes would, if committed, amount to any of such offences.

See section 552 as to offences for which arrest without warrant is authorized, and remarks thereunder. *See* note under section 16, as to the word *justified.* *See* Handcock v. Baker, 2 B. & P. 260, and R. v. Rose, 15 Cox, 540.

SELF-DEFENCE—UNPROVOKED ASSAULT.

45. Every one unlawfully assaulted, *not having provoked such assault,* is *justified* in repelling force by force, if the force he uses is not meant to cause

death or grievous bodily harm, and is no more than is necessary for the purpose of self-defence; and every one so assaulted is *justified*, though he causes death or grievous bodily harm, if he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purpose, and if he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

See note under section 16 as to the word *justified*. *See* remarks under section 265, *post*: R. v. Knock, 14 Cox, 1, and cases in Archbold, 755; 3 Blacks. 4; Horrigan, Cases on Self-Defence, 720; *see* section 229, *post*.

"We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty and property against illegal violence and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from, the force used is not disproportioned to the injury or mischief which it is intended to prevent. This last principle will explain and qualify many of our suggestions. It does not seem to have been universally admitted, and we have therefore thought it advisable to give our reasons for thinking that it not only ought to be recognized as the law in future, but that it is the law at present."—Imp. Comm. Rep.

SELF DEFENCE—PROVOKED ASSAULT.

46. Every one who has without justification assaulted another, or has provoked an assault from that other, may nevertheless justify force subsequent to such assault, if he uses such force under reasonable apprehension of death or grievous bodily harm from the violence of the person first assaulted or provoked, and in the belief, on reasonable grounds, that it is necessary for his own preservation from death or grievous bodily harm: Provided, that he did not commence the assault with intent to kill or do grievous bodily harm, and did not endeavour at any time before the necessity for preserving himself arose, to kill or do grievous bodily harm: Provided also, that before such necessity arose he declined further conflict, and quitted or retreated from it as far as was practicable.

2. Provocation, within the meaning of this and the last preceding section, may be given by blows, words or gestures.

See note under preceding section, and section 229, *post*.

PREVENTION OF INSULT.

47. Every one is *justified* in using force in defence of his own person, or that of any one under his protection, from an assault accompanied with insult: Provided, that he uses no more force than is necessary to prevent such assault, or the repetition of it: Provided also, that this section shall not justify the wilful infliction of any hurt or mischief disproportionate to the insult which the force used was intended to prevent.

See note under section 16 as to the word *justified*.

"This perhaps extends the law, but it appears reasonable."—Imp. Comm. Rep.

DEFENCE OF MOVEABLE PROPERTY.

48. Every one who is in peaceable possession of any moveable property or thing, and every one lawfully assisting him, is *justified* in resisting the taking of such thing by any trespasser, or in retaking it from such trespasser, if in either case he does not strike or do bodily harm to such trespasser; and if, after any one being in peaceable possession as aforesaid has laid hands upon any such thing, such trespasser persists in attempting to keep it or to take it from the possessor, or from any one lawfully assisting him, the trespasser shall be deemed to commit an assault without justification or provocation.

See note under section 16 as to the word *justified*.

"This puts the possessor in the position of a person acting in self defence contemplated by section 45."—Imp. Comm. Rep.

See note under section 53, *post*.

DEFENCE OF MOVEABLE PROPERTY, OTHER CASE.

49. Every one who is in peaceable possession of any moveable property or thing under a claim of right, and every one acting under his authority, is protected from *criminal responsibility* for defending such possession, even against a person entitled by law to the possession of such property or thing, if he uses no more force than is necessary.

This and the preceding and the next eleven sections are given as the existing law. *See* note under section 16 as to the words "Criminal responsibility."

ILLEGAL DEFENCE OF MOVEABLE PROPERTY.

50. Every one who is in peaceable possession of any moveable property or thing but neither claims right thereto nor acts under the authority of a person claiming right thereto, is *neither justified* nor protected from *criminal* responsibility for defending his possession against a person entitled by law to the possession of such property or thing.

See note under preceding section.

DEFENCE OF DWELLING HOUSE.

51. Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting by his authority, is *justified* in using such

force as is necessary to prevent the forcible breaking and entering of such dwelling-house, either by *night* or day, by any person with the intent to commit any indictable offence therein.

See cases under section 265, *post*, and Imp. Comm. Rep. under section 16 and section 45, *ante*, and 53 *post*; also Horrigan, Cases on Self Defence, 749 *et seq*.

52. Every one who is in peaceable possession of a dwelling-house, and every one lawfully assisting him or acting by his authority, is *justified* in using such force as is necessary to prevent the forcible breaking and entering of such dwelling-house by night by any person, if he believes, on reasonable and probable grounds, that such breaking and entering is attempted with the intent to commit any indictable offence therein.

See under preceding section.

DEFENCE OF REAL PROPERTY.

53. Every one who is in peaceable possession of any house or land, or other real property, and every one lawfully assisting him or acting by his authority, is *justified* in using force to prevent any person from trespassing on such property, or to remove him therefrom, if he uses no more force than is necessary; and if such trespasser resists such attempt to prevent his entry or to remove him, such trespasser shall be deemed to commit an assault without justification or provocation.

See Imp. Comm. Rep. under sections 16 and 45 *ante*, and cases under section 265, *post*; 1 Russ. 1028; 1 Burn, 313; Lows v. Telford, 13 Cox, 226, Warb. Lead. Cas. 51: Cook v. Beal, 1 Ld. Raym. 176; Handcock v. Baker, 2 B. & P. 260; R. v. Hewlett, 1 F. & F. 91; R. v. Hood, 1 Moo. 281; Spires v. Barrick, 14 U. C. Q. B. 424; Glass v. O'Grady, 17 U. C. C. P. 233; Davis v. Lennon, 8 U. C. Q. B. 599.

"A full report of the evidence in the case of R. v. Moir, and an imperfect report of Lord Tenterden's summing up are to be found in the annual register for 1830, vol. 72, p. 344. Moir having ordered some fishermen not to trespass on his land by taking a short cut, found the deceased and others persisting in going across. He rode up to them and ordered them back. They refused to go and there was evidence of angry words, and some slight evidence that the deceased threatened to strike Moir with a pole. Moir shot him in the arm, and the wound ultimately proved fatal. Before the man died, or indeed was supposed to be in danger, Moir avowed and justified his act, and said that in similar circumstances he would do the same again. This land,

he said, was his castle, and as he could not without the use of firearms prevent the fishermen from persisting in their trespass, he did use them, and would use them again. Lord Tenterden took a different view of the law. He told the jury that the prevention of such a trespass could not justify such an act, and he seems to have left to them as the only justification which on these facts could arise, the question whether the prisoner was in reasonable apprehension of danger to his life from the threats of the deceased. Moir was found guilty of murder and executed. (*See* this case as since stated in R. v. Price, 7 C. & P. 178, and Roscoe, Cr. Evid. 714.) . . . The law discourages persons from taking the law into their own hands. Still the law does permit men to defend themselves. *Vim vi repellere licet modo fiat moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam:* Co. Lit. 162a. And when violence is used for the purpose of repelling a wrong, the degree of violence must not be disproportioned to the wrong to be prevented, or it is not justified. There is no case that we are aware of in which it has been held that homicide to prevent mere trespass is justifiable. The question raised has always been whether it was murder, or reduced by the provocation to manslaughter. . . . But the defence of possession either of goods or land against a mere trespass, not a crime, does not, strictly speaking, justify even a breach of the peace. The party in lawful possession may justify gently laying his hands on the trespasser and requesting him to depart. If the trespasser resists, and in doing so assaults the party in possession, that party may repel the assault and for that purpose may use any force which he would be justified in using in defence of his person. (*See section 45, ante.*) As is accurately said in 1 Rolle's Abt. Trespass, G. 8, "a justification of a battery in defence of possession, though it arose in the defence of the possession, yet in the end it is the defence of the person."—Imp. Comm. Rep.

ASSERTION OF RIGHT TO HOUSE OR LAND.

54 Every one is *justified* in peaceably entering in the day-time to take possession of any house or land to the possession of which he, or some person under whose authority he acts, is lawfully entitled.

2. If any person, *not having or acting under the authority of one having peaceable possession of any such house or land with a claim of right,* assaults any

one peaceably entering as aforesaid, for the purpose of making him desist from such entry, such assault shall be deemed to be without justification or provocation.

3. If any person having peaceable possession of such house or land with a claim of right, or any person acting by his authority, assaults any one entering as aforesaid, for the purpose of making him desist from such entry, such assault shall be deemed to be provoked by the person entering.

See note under preceding section.

DISCIPLINE OF MINORS AND ON SHIP.

55. It is lawful for every parent, or person in the place of a parent, schoolmaster or master, to use force by way of correction towards any child, pupil or apprentice under his care, provided that such force is reasonable under the circumstances.

56. It is lawful for the master or officer in command of a ship on a voyage to use force for the purpose of maintaining good order and discipline on board of his ship, provided that he believes on reasonable grounds, that such force is necessary, and provided also that the force used is reasonable in degree.

A parent may in a reasonable manner chastise his child, or a master his servant, or a schoolmaster his scholar, or a gaoler his prisoner, and a captain of a ship any of the crew who have mutinously or violently misconducted themselves: 1 Burn. 314; Mitchell v. Defries, 2 U. C. Q. B. 430; Brisson v. Lafontaine, 8 L. C. J. 173.

As to homicide by correction: *see* R. v. Hopley, Warb. Lead. Cas. 110; R. v. Griffin, 11 Cox, 402.

SURGICAL OPERATIONS.

57. Every one is protected from *criminal* responsibility for performing with reasonable care and skill any surgical operation upon any person for his benefit, provided that performing the operation was reasonable, having regard to the patient's state at the time, and to all the circumstances of the case.

EXCESS.

58. Every one authorized by law to use force is *criminally responsible* for any excess, according to the nature and quality of the act which constitutes the excess.

See note under section 16, and section 45, *ante*, and Hamilton v. Massie, 18 O. R. 585.

CONSENT TO DEATH NOT LAWFUL.

59. No one has a right to consent to the infliction of death upon himself; and if such consent is given, it shall have no effect upon the *criminal responsibility* of any person by whom such death may be caused.

See note under section 16, as to the words "criminal responsibility."

OBEDIENCE TO *De Facto* LAW.

60. Every one is protected from *criminal* responsibility for any act done in obedience to the laws for the time being made and enforced by those in possession (*de facto*) of the sovereign power in and over the place where the act is done.

"*See* 11 Hen. VII., c. 1, Sir H. Vane's case, Kelyng 15, and Foster's 4th discourse, p. 402."—Imp. Comm. Rep.

PART III.

PARTIES TO THE COMMISSION OF OFFENCES.

61. Every one is a party to and guilty of an offence who—

(*a*) Actually commits it; or

(*b*) Does or omits an act for the purpose of aiding any person to commit the offence; or

(*c*) Abets any person in commission of the offence; or

(*d*) Counsels or procures any person to commit the offence.

2. If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been known to be a probable consequence of the prosecution of such common purpose.

See in R. v. Jordan, Warb. Lead. Cas. 2, and R. v. Manning, *Id.* 7, a collection of cases on the subject of principals and accessories.

See section 237, as to aiding and abetting suicide.

This section is so framed, says the Imperial Commissioners' Report, as to put an end to the nice distinctions between accessories before the fact and principals in the second degree, already practically superseded by chapter 145 Revised Statutes. All are now principals in any offence, and punishable as the actual perpetrator of the offence, as it always has been in treason and misdemeanour. The prosecutor may, at his option, prefer an indictment against the accessories before the fact, and aiders and abettors as principal offenders, whether the party who actually committed

the offence is indicted with them or not; R. v. Tracey, 6 Mod. 30. For instance: A. abetted in the commission of a theft by B. The indictment may charge A. and B. jointly or A. or B. alone as guilty of the offence, in the ordinary form, as if they had actually stolen by one and the same act. Or the indictment, after charging the principal of the offence, may charge the accessory or aider as follows: "*And the jurors aforesaid do further present, that C. D., before the said offence was committed as aforesaid, to wit, on . . . . did incite, move, procure, aid, counsel, hire and command the said A. B. the said offence in manner and form aforesaid to do and commit;*" or, "*that C. D., on the day and year aforesaid, was present, aiding, abetting and assisting the said* A. B. to commit the said offence in manner and form aforesaid." And if the actual offender is not indicted, as follows: "*The jurors, etc., etc., present, that A. B., or that some person or persons to the jurors aforesaid unknown, on . . . . did steal, etc., etc. And the jurors aforesaid do further present that C. D.,*" . . . (*continue as in preceding form*).

In every case where there may be a doubt whether a person be a principal or accessory before the fact, it may be advisable to prefer the indictment against him as a principal, as such an indictment will be sufficient whether it turn out on the evidence that such person was a principal or accessory before the fact, as well as where it is clear that he was either the one or the other but it is uncertain which he was.

It is no objection to an accessory before the fact being convicted that his principal has been acquitted: R. v. Hughes, Bell. 242; R. v. Burton, 13 Cox, 71. And such accessories, aiders and abettors may be arraigned and tried before the actual perpetrator of the offence: 2 Hale, 223; R. v. James, 17 Cox, 24, 24 Q. B. D. 439. In some cases, as in suicide, for instance, the aiders and abettors or accessories only can be indicted. Where the actual perpetrator and the acces-

sories are jointly indicted all may be found guilty of attempting to commit the offence charged: section 711. And, if an attempt only to commit an offence is charged, all may be found guilty, though the full offence is proved; section 712. If the offence charged is not proved, but another offence included in it is proved, they may all be found guilty of the offence so proved: section 713.

The soliciting and inciting a person to commit an offence, where no offence is in fact committed by the person so solicited, is an indictable offence: R. v. Gregory, 10 Cox, 459.

A principal in the first degree is one who is the actor or actual perpetrator of the act. But it is not necessary that he should be actually present when the offence is consummated; for if one lay poison purposely for another who takes it and is killed, he who laid the poison, though absent when it was taken, is a principal in the first degree: Fost. 349; R. v. Harley, 4 C. & P. 369. So, it is not necessary that the act should be perpetrated with his own hands; for if an offence be committed through the medium of an innocent agent the employer, though absent when the act is done, is answerable as a principal in the first degree: *see* R. v. Giles, 1 Moo. 166; R. v. Michael, 2 Moo. 120; R. v. Clifford, 2 C. & K. 202. Thus, if a child, under the age of discretion, or any other instrument excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, be incited to the commission of murder or any other crime, the inciter, though absent when the fact was committed, is, *ex necessitate*, liable for the act of his agent, and a principal in the first degree: Fost. 349; R. v. Palmer, 2 Leach, 978; R. v. Butcher, Bell, 6. But if the instrument be aware of the consequences of his act he is a principal in the first degree, and the employer, if he be absent when the fact is committed, is an accessory before the fact, and may now be indicted either as such, or as the actual offender: R. v. Stewart, R. & R. 363; R. v. Williams, 1 Den. 39; unless the instrument concur in the

act merely for the purpose of detecting and punishing the employer, in which case he is considered as an innocent agent: R. v. Bannen, 2 Moo. 309.

Principals in the second degree.—Such were called those who were present, aiding and abetting, at the commission of the fact.

Presence, in this sense, is either actual or constructive. It is not necessary that the party should be actually present, an ear or eye-witness of the transaction; he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should the occasion arise. Thus, if he be outside the house, watching to prevent surprise, or the like, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make him a principal in the second degree: Fost. 347, 350; *see* 1 Russ. 61; 1 Hale, 555; R. v. Gogerly, R. & R. 343; R. v. Owen, 1 Moo. 96. But he must be sufficiently near to give assistance. R. v. Stewart, R. & R. 363; and the mere circumstance of a party going towards a place where a felony is to be committed, in order to assist to carry off the property, and assisting in carrying it off, will not make him a principal in the second degree, unless, at the time of the felonious taking, he were within such a distance as to be *able* to assist in it: R. v. Kelly, R. & R. 421; 1 Russ. 27. So, where two persons broke open a warehouse, and stole thereout a quantity of butter, which they carried along the street thirty yards, and then fetched the prisoner who, being apprised of the robbery, assisted in carrying away the property, it was holden that he was not a principal, but only an accessory after the fact: R. v. King, R. & R. 332; R. v. Dyer, 2 East, P. C. 767. And although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not principals, but accessories before the fact: R. v. Soares,

R. & R. 25; R. v. Davis, *Id.* 113; R. v Else, *Id.* 142; R. v. Badcock, *Id.* 249; R. v. Manners, 7 C. & P. 801; R. v. Howell, 9 C. & P. 437; R. v. Tuckwell, Car. & M. 215. So, if one of them has been apprehended before the commission of the offence by the other, he can be considered only as an accessory before the fact: R. v. Johnson, Car. & M. 218. But presence during the whole of the transaction is not necessary; for instance, if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals: R. v. Bingley, R. & R. 446; *see* 2 East, P. C. 768. As, if A. counsel B. to make the paper, C. to engrave the plate, and D. to fill up the names of a forged note, and they do so, each without knowing that the others are employed for that purpose, B., C. and D. may be indicted for the forgery, and A. as an accessory: R. v. Dade, 1 Moo. 307; for, if several make distinct parts of a forged instrument, each is a principal, though he do not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others: R. v. Kirkwood, 1 Moo. 304; R. v. Charles, 17 Cox, 499; *see* R. v. Kelly, 2 C. & K. 379.

There must also be a participation in the act; for although a man be present whilst a felony is committed, if he take no part in it and do not act in concert with those who committed it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony, or apprehend the felon: 1 Hale, 439; Fost. 350. It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law he was present aiding and abetting. So, a participation, the result of a

concerted design to commit a specific offence, is sufficient to constitute a principal in the second degree. Thus, if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and then another of the party entices the owner away that he who has the goods may carry them off, all are guilty as principals: R. v. Standley, R. & R. 305; 1 Russ. 29; R. v. Passey, 7 C. & P. 282; R. v. Lockett, *Id.* 300. So, it has been holden, that to aid and assist a person to the jurors unknown to obtain money by ring-dropping, is felony, if the jury find that the prisoner was confederate with the person unknown to obtain the money by means of the practice: R. v. Moore, 1 Leach, 314. So, if two persons driving carriages incite each other to drive furiously, and one of them run over and kill a man, it is manslaughter in both: R. v. Swindall, 2 C. &. K. 230. If one encourage another to commit suicide, and be present abetting him while he does so, such person is guilty of murder as a principal; and if two persons encourage each other to self-murder, and one kills himself, but the other fails in the attempt, the latter is a principal in the murder of the other: R. v. Dyson, R. & R. 523; R. v. Russell, 1 Moo. 356; R. v. Alison, 8 C. & P. 418; R. v. Jessop, 16 Cox, 204; but *see* section 237, *post.* So, likewise, if several persons combine for an unlawful purpose to be carried into effect by unlawful means: Fost. 351, 352; particularly, if it be to be carried into effect notwithstanding any opposition that may be offered against it: Fost. 353, 354; and if one of them, in the prosecution of it, kill a man, it is murder in all who are present, whether they actually aid or abet or not: *see* the Sessinghurst-house case, 1 Hale, 461; provided the death were caused by the act of some one of the party in the course of his endeavours to effect the common object of the assembly: 1 Hawk. c. 31, s. 52; Fost. 352.; R. v. Hodgson, 1 Leach, 6; R. v. Plummer, Kel. 109. But it is not sufficient that the common purpose is merely unlawful;

it must either be felonious, or, if it be to commit a misdemeanour, then there must be evidence to show that the parties engaged intended to carry it out at all hazards: R. v. Skeet, 4 F. & F. 931; *see* also R. v. Luck, 3 F. & F. 483; R. v. Craw, 8 Cox, 335. And the act must be the result of the confederacy; for, if several are out for the purpose of committing a felony, and, upon alarm and pursuit, run different ways, and one of them kill a pursuer to avoid being taken, the others are not to be considered as principals in that offence: R. v. White, R. & R. 99. Thus, where a gang of poachers, consisting of the prisoners and Williams attacked a game keeper, beat him, and left him senseless upon the ground, but Williams returned, and whilst the gamekeeper was insensible upon the ground took from him his gun, pocket-book and money, Park, J., held that this was robbery in Williams only: R. v. Hawkins, 3 C. & P. 392. The purpose must also be unlawful; for, if the original object be lawful, and be prosecuted by lawful means, should one of the party in the prosecution of it kill a man, although the party killing, and all those who actually aid and abet him in the act, may, according to circumstances, be guilty of murder or manslaughter, yet the other persons who are present, and who do not actually aid and abet, are not guilty as principals in the second degree: Fost. 354, 355; section 62, *post*.

A mere participation in the act, without a felonious participation in the design, will not be sufficient: 1 East, P. C. 258; R. v. Plummer, Kel. 109. Thus, if a master assault another with malice prepense, and the servant, ignorant of his master's felonious design, take part with him, and kill the other, it is manslaughter in the servant, and murder in the master: 1 Hale, 446. So, on an indictment under the statute, 1 V. c. 85, s. 2, charging A. with the capital offence of inflicting a bodily injury dangerous to life with intent to commit murder, and B. with aiding and abetting him, it was held to be essential, to make out the charge as against

B., that he should have been aware of A's. intention to commit murder: R. v. Cruse, 8 C. & P. 541.

In the case of murder by duelling, in strictness both of the seconds are principals in the second degree; yet Lord Hale considers that, as far as relates to the second of the party killed, the rule of law in this respect has been too far strained; and he seems to doubt whether such second should be deemed a principal in the second degree: 1 Hale, 422, 452. However, it was holden by Patteson, J., that all persons present at a prize-fight, having gone thither with the purpose of seeing the prize-fighters strike each other, were principals in the breach of the peace: R. v. Perkins, 4 C. & P. 537; *see* R. v. Murphy, 6 C. & P. 103, and R. v. Coney, 15 Cox, 46; and upon the same principle, the seconds in a duel, being participators in an unlawful act, would both be guilty of murder, if death were to ensue; and so the law was laid down in R. v. Young, 8 C. &. P. 644; and in R. v. Cuddy, 1 C. & K. 210.

Aiders and abettors were formerly defined to be accessories at the fact, and could not have been tried until the principal had been convicted or outlawed: Fost. 347. But this doctrine is exploded; and it is now settled, that all those who are present aiding and abetting when a felony is committed are principals in the second degree, and may be arraigned and tried before the principal in the first degree has been found guilty: 2 Hale, 223; and may be convicted, though the party charged as principal in the first degree is acquitted: R. v. Taylor, 1 Leach, 360; R. v. Towle, R. & R. 314; R. v. Hughes, Bell, 242.

In treason, and in offences below felony, and in all felonies in which the punishment of principals in the first degree and of principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree: 2 Hawk. c. 25, s. 64; provided the offence permit of participation: Fost. 345; R. v. Hughes, Bell, 242; or specially as aiders and

abettors: R. v. Crisham, Car. & M. 187. But where by particular statutes the punishment was different, then principals in the second degree must have been indicted specially as aiders and abettors: 1 East, P. C. 348, 350; R. v. Sterne, 1 Leach, 473. If indicted as aiders and abettors, an indictment charging that A. gave the mortal blow, and that B., C. and D. were present aiding and abetting, would be sustained by evidence that B. gave the blow, and that A., C. and D. were present aiding and abetting; and even if it appeared that the act was committed by a person not named in the indictment, the aiders and abettors might nevertheless be convicted: R. v. Borthwick. 1 East, P. C. 350; *see* R. v. Swindall, 2 C. & K. 230. And the same though the jury say that they are not satisfied which gave the blow, if they are satisfied that one of them did, and that the others were present aiding and abetting: R. v. Downing, 1 Den. 52. When a prisoner was convicted upon an indictment which charged him with rape as a principal in the first count, and as an aider and abettor in the second, it was holden that the conviction upon the first count was good. R. v. Folkes, 1 Moo. 354; R. v. Gray, 7 C. & P. 164; *see* R. v. Crisham, Car. & M. 187.

Accessories before the fact.—An accessory before the fact is he who, being absent at the time of the felony committed, doth yet procure, counsel, command or abet another to commit a felony: 1 Hale, 615.

If the party be actually or constructively present when the felony is committed he is an aider and abettor, and not an accessory before the fact; for it is essential, to constitute the offence of accessory, that the party should be absent at the time the offence is committed: 1 Hale, 615; R. v. Gordon, 1 Leach, 515; 1 East, P. C. 352; R. v. Brown, 14 Cox, 144.

The procurement may be personal, or through the intervention of a third person: Fost. 125; R. v. Earl of Somerset, 19 St. Tr. 804; R. v. Cooper, 5 C. & P. 535; it may also be

direct, by hire, counsel, command, or conspiracy; or indirect, by evincing an express liking, approbation, or assent to another's felonious design of committing a felony: 2 Hawk. c. 29, s. 16; but the bare concealment of a felony to be committed will not make the party concealing it an accessory before the fact: 2 Hawk. c. 29, s. 23; nor will tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute this offence: 1 Hale, 616. The procurement must be continuing; for if the procurer of a felony repent, and before the felony is committed actually countermand his order, and the principal notwithstanding commit the felony, the original contriver will not be an accessory: 1 Hale, 618. So, if the accessory order or advise one crime, and the principal intentionally commit another; as, for instance, to burn a house, and instead of that he commit a larceny; or to commit a crime against A., and instead of so doing he commit the same crime against B.; the accessory will not be answerable: 1 Hale, 617; but, if the principal commit the same offence against B. by mistake instead of A., it seems it would be otherwise: Fost. 370, *et seq.*; but *see* 1 Hale, 617; 3 Inst. 51. But it is clear that the accessory is liable for all that ensues upon the execution of the unlawful act commanded; as, for instance, if A. command B. to beat C., and he beat him so that he dies, A. is accessory to the murder: *see* section 62, *post*; 1 Hale, 617. Or if A. command B. to burn the house of C., and in doing so the house of D. is also burnt, A. is accessory to the burning of D.'s house: R. v. Saunders, Plowd. 475. So, if the offence commanded be effected, although by different means from those commanded, as, for instance, if J. W. hire J. S. to poison A., and, instead of poisoning him, he shoots him, J. W. is, nevertheless, liable as accessory: Fost. 369, 370; section 62, *post*. Where the procurement is through an intermediate agent it is not necessary that the accessory should name the person to be procured to do the act: R. v. Cooper, 5 C. & P. 535.

Several persons may be convicted on a joint charge against them as accessories before the fact to a particular felony, though the only evidence against them is of separate acts done by each at separate times and places: R. v. Barber, 1 C. & K. 442.

It may be necessary to observe, that it is only in felonies that there can be accessories; in high treason, every instance of incitement, etc., which in felony would make a man an accessory before the fact, will make him a principal traitor: Fost. 341; and he must be indicted as such: 1 Hale, 235. Also, all those who in felony would be accessories before the fact, in offences under felony are principals, and indictable as such: R. v. Clayton, 1 C. & K. 128; R. v. Moland, 2 Moo. 276; R. v. Greenwood, 2 Den. 453; *under section 61, ante, that now applies to all offences.* In manslaughter it has been said there can be no accessories before the fact, for the offence is sudden and unpremeditated; and therefore, if A. be indicted for murder, and B. as accessory, if the jury find A. guilty of manslaughter they must acquit B: 1 Hale, 437, 466, 615; 1 Hawk. c. 30, s. 2. Where, however, the prisoner procured and gave a woman poison in order that she might take it and so procure abortion, and she did take it in his absence, and died of its effects, it was held that he might be convicted as an accessory before the fact to the crime of manslaughter: R. v Gaylor, Dears. & B. 288. In the course of the argument in that case, Bramwell, B., said: "Suppose a man for mischief gives another a strong dose of medicine, not intending any further injury than to cause him to be sick and uncomfortable, and death ensues, would not that be manslaughter? Suppose, then, that another had counselled him to do it, would not he who counselled be an accessory before the fact?

In R. v. Chadwick, Stafford Sum. Ass. 1850, the prisoner was indicted as a principal for murder by arsenic, and the jury found that he procured the arsenic, and caused it to be administered by another person, but was absent when it

was administered; and thereupon it was objected that the 11 & 12 V., c. 46, s. 1, which was similar to chapter 145 Rev. Stat. s. 1, did not apply to murder, but Williams, J., overruled the objection, and refused to reserve the point. Where the principal and accessory are tried together, one being charged as principal and the other as accessory, if the principal plead otherwise than the general issue, the accessory shall not be bound to answer until the principal's plea be first determined: 1 Hale, 624. Where the principal was indicted for larceny in a dwelling-house, and the accessory was charged in the same indictment as accessory before the fact to the said "*felony and burglary*," and the jury acquitted the principal of the burglary, but found him guilty of the larceny, it seems the judges were of opinion that the accessory should have been acquitted; for the indictment charged him as accessory to the burglary only, and the principal being acquitted of that, the accessory should have been acquitted also: R. v. Dannelly and Vaughan, R. & R. 310. Where three persons were charged with a larceny, and two others as accessories, in one count, and the latter were also charged separately in other counts with substantive felonies, it was held that, although the principals were acquitted, the accessories might be convicted on the latter counts: R. v. Pulham, 9 C. & P. 280.

If a man be indicted as accessory in the same felony to several persons, and be found accessory to one, it is a good verdict, and judgment may be passed upon him: R. v. Lord Sanchar, 9 Co. 189; Fost. 361; 1 Hale, 624.

OFFENCES COMMITTED DIFFERENTLY.

62. Every one who counsels or procures another to be a party to an offence of which that other is afterwards guilty is a party to that offence, although it may be committed in a way different from that which was counselled or suggested.

2. Every one who counsels or procures another to be a party to an offence is a party to every offence which that other commits in consequence of such counselling or procuring, and which the person counselling or procuring knew, or ought to have known, to be likely to be committed in consequence of such counselling or procuring.

"This is believed to express the existing law: Fost., part 3, and cases under preceding section."—Imp. Comm. Rep.

The mere fact of being stakeholder for a prize fight where one of the combatants was killed does not make one accessory before the fact to the manslaughter: R. v. Taylor, 13 Cox, 68.

ACCESSORY AFTER THE FACT.

63. An accessory after the fact to an offence is one who receives, comforts or assists any one who has been a party to such offence in order to enable him to escape, knowing him to have been a party thereto.

2. No married person whose husband *or wife* has been a party to an offence shall become an accessory after the fact thereto by receiving, comforting or assisting the other of them, and no married woman whose husband has been a party to an offence shall become an accessory after the fact thereto, *by receiving, comforting or assisting in his presence and by his authority any other person* who has been a party to such offence in order to enable her husband or such other person to escape.

The Imperial Commissioners report this section as declaratory of the existing law, but that is an error. A husband, at common law, cannot aid his wife to escape. Then, section 13, *ante*, seems to have been forgotten in drafting this section 63.

See as to punishment, sections 531, 532. Accessories after the fact to certain offences, not triable at Quarter Sessions, section 540. *See* section 627 as to indictment of accessories after the fact in certain cases: *see* R. v. Lee, Warb. Lead. Cas. 9, for a collection of cases on the subject.

An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon: 1 Hale, 618; 4 Bl. Com. 37. Any assistance given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to make a man an accessory after the fact; as, for instance, that he concealed him in the house: or shut the door against his pursuers, until he should have an opportunity of escaping: 1 Hale, 619; or took money from him to allow him to escape: or supplied him with money, a horse or other necessaries, in order to enable him to escape: 2 Hawk. c. 29, s. 26; or bribed

the gaoler to let him escape, or conveyed instruments to him to enable him to break prison and escape: 1 Hale, 621.

But merely suffering the principal to escape will not make the party an accessory after the fact, for it amounts at most but to a mere omission: 1 Hale, 619. So, if a person supply a felon in prison with victuals or other necessaries for his sustenance: 1 Hale, 620; or relieve and maintain him if he be bailed out of prison: *Id.*; or if a physician or surgeon professionally attend a felon sick or wounded, although he know him to be a felon. *See* R. v. Chapple, 9 C. & P. 355; R. v. Jarvis, 2 M. & Rob. 40.

A wife is not punishable as accessory for receiving, etc., her husband, although she knew him to have committed felony: 1 Hale, 48, 621; R. v. Manning, 2 C. & K. 903, *n.*; for she is presumed to act under his coercion; but *see* now section 13, *ante*. But no other relation of persons can excuse the wilful receipt or assistance of felons; a father cannot assist his child, a child his parent, a husband his wife, a brother his brother, a master his servant, or a servant his master: 1 Chit. 266. (Section 63 *ante* alters this as to a husband assisting his wife.) Even one may make himself an accessory after the fact to a larceny of his own goods, or to a robbery on himself, by harbouring the thief, or assisting in his escape: Fost. 123. If the wife alone, the husband being ignorant of it, receive any other person being a felon, the wife is accessory, and not the husband: 1 Hale, 621. And if the husband and wife both receive a felon knowingly, it shall be adjudged only the act of the husband, and the wife shall be acquitted: *Id.* (*See* now section 13 *ante.*)

To constitute this offence it is necessary that the accessory have notice, direct or implied, at the time he assists or comforts the felon, that he had committed a felony. It is also necessary that the felony be completed at the time the assistance is given; for, if one wounds another

mortally, and after the wound given, but before death ensues, a person assist or receive the delinquent, this does not make him accessory to the homicide; for until death ensues no murder or manslaughter is committed: 2 Hawk. c. 29, s. 35; 4 Bl. Com. 38.

On an indictment charging a man as a principal felon only, he cannot be convicted of the offence of being an accessory after the fact: R. v. Fallon. L. & C. 217.

The receipt of stolen goods did not at common law constitute the receiver an accessory, but was a distinct misdemeanour, punishable by fine and imprisonment: 1 Hale, 620; *see* now section 314, *post*.

Four prisoners were indicted for murder jointly with two others indicted as accessories after the fact. The prisoners indicted for murder were found guilty of manslaughter, and the other two guilty of having been accessories after the fact to manslaughter. *Held*, on motion in arrest of judgment, that the conviction against the accessories was right: R. v. Richards, 13 Cox, 611; *see* R. v. Brannon, 14 Cox, 394.

ATTEMPTS.

64. Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended *whether under the circumstances it was possible to commit such offence or not.*

2. The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.

The words in italics were given as new law in the Imperial Commissioners' Report of 1879 in view of R. v. Collins, L. & C. 471, but that case has since been overruled: R. v. Brown, 24 Q. B. D. 357, and R. v. Ring, 17 Cox, 491.

See sections 528, 529, as to punishment in cases not otherwise provided for, and sections 711, 713 as to verdict of attempt under certain circumstances.

Attempts to commit certain crimes are specially provided for in sections 71, 75, 100, 120, 127, 129, 131, 132, 136, 154,

175, 178, 185, 189, 232, 238, 241, 248*b*, 268, 270, 400, 424, 432, 485, 488, 492, 494, 496, 500.

A mere intention to commit a crime is not indictable. Some act is required, but acts only remotely leading towards the commission of an offence are not to be considered as attempts to commit it, whilst acts immediately connected with it are: R. v. Roebuck, Dears. & B. 24; 1 Russ. 83; R. v. Hensler, 11 Cox, 570; R. v. Eagleton, Dears. 515; R. v. Roberts, Dears. 539; R. v. Cheeseman, L. & C. 140.

An assault with intent to commit a crime is an attempt to commit that crime: R. v. Dungey, 4 F. & F. 99. *See* reporter's note in that case and R. v. John, 15 S. C. R. 384.

An attempt to commit a crime is an intent to commit such crime manifested by some overt act, and, in cases of rape, robbery, etc., etc., necessarily includes an assault: Stephen's Cr. L. 49; in such cases, an assault is an attempt and an attempt is an assault; R. v. Martin, 9 C. & P. 213, 215; *see* annotation to section 711, *post;* and R. v. Marsh, 1 Den. 505; R. v. Heath, R. & R. 184; R. v. Stewart, R. & R. 288; R. v. Fuller, R. & R. 308; R. v. Duckworth, 17 Cox, 495.

If A., mistaking a post in the dark for B., and intending to murder B., shoots at the post, he has not committed an attempt to murder, according to the existing law. Does the above section 64 change the law in this respect? Sir James Stephens thinks that article 74 of the Draft Code of 1879 would have had that effect in England: 2 Stephen's Hist., 225. That article reads as follows:—

"An attempt to commit an offence is an act done or omitted with intent to commit that offence, forming part of a series of acts or omissions which would have constituted the offence, if such series of acts or omissions had not been interrupted, either by the voluntary determination of the offender not to complete the offence, or by some other cause.

"Every one who, believing that a certain state of facts exists, does or omits an act, the doing or omitting of which would, if

that state of facts existed, be an attempt to commit an offence, attempts to commit that offence, although its commission in the manner proposed was, by reason of the non-existence of that state of facts at the time of the act or omission, impossible.

"The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law."

This article of the Imperial Draft Code, and of the Bill of 1879, re-appeared in the Bill of 1880, somewhat altered in shape and phraseology, but not in substance, as will be seen by comparing it with section 64 of this Code, which reproduces it verbatim as it was in that Bill of 1880. It thus seems clear that, in Sir James Stephen's opinion, the supposed case of attempting to murder by shooting at a post, would constitute now, under section 64 of this Code, an indictable attempt to commit murder—*Sed quære? See* Baron Bramwell's remarks in R. v. McPherson, Dears. & B. 197, in 1857, long before the decision in R. v. Collins, L. & C. 471. Sir James Stephens took the law as it was then settled by the case of R. v. Collins, which has since been over-ruled by R. v. Ring, 17 Cox, 491, and it was not necessary for him to distinguish between the case of the shooting at a post and the case of putting the hand in an empty pocket. In neither case, in his opinion, is there an indictable attempt to commit a crime. But though it is now unquestionable, under section 64, that the latter case constitutes an attempt to steal, though there was nothing to steal, it does not follow that the former case constitutes an attempt to murder, though there was no one to kill. Here the assault, a principal ingredient of the offence, is wanting. There was no assault on B., and A. clearly could not be indicted under section 232, *post*, because he did not shoot at any person: R. v. Lovel, 2 Moo. & R. 39. But, for an attempt to steal, the overt act, or commencement of execution of the theft is complete by itself when a man puts his hand into the

pocket of any one to steal whatever there may be in it. No ingredient of the attempt is wanted there. The offender may be arrested *instanter*, whilst no one could arrest a man who is preparing to shoot at a post, in the case first supposed.

That is, no doubt, almost the same question in another form, but yet it serves as a test. The shooting in that case is an attempt to attempt to commit murder, whilst in the case of stealing, the putting the hand in the pocket is the direct attempt to commit the stealing. The shooting is one degree more remote from the murder than the thrust of the hand in the pocket is from the stealing. There may have been no killing, even if B., the person intended to be murdered, had really been shot at, as the shot might either have missed him or only wounded him, and *then* A. would have been guilty of an attempt to murder. Whilst, in the other case, if there is in the pocket anything to steal, the stealing itself is the proximate, and only possible, offence which the man who thrusts his hand in the pocket can commit. Between the shooting at a person with intent to murder and the murder there is an intermediate possible offence, that is, the attempt to murder, if the person shot at is not killed. Between the thrust of the hand in the pocket with intent to steal, and the stealing, there is no such intermediate offence possible. In this last case, therefore, there is a direct attempt to steal, whilst in the first case there is no attempt to murder, not because a murder was not possible, but because, under the terms of subsection 2 of section 64, the act of shooting was too remote from the murder to constitute, in law, an attempt to murder, as there might have been no murder even if B. had actually been shot at.