# CHAPTER XLVIII.

## [1] MALICIOUS INJURIES TO PROPERTY.

### [2] ARTICLE 562.

ARSON—SETTING FIRE TO BUILDINGS, ETC.—OFFENCES PUNISHABLE BY IMPRISONMENT FOR LIFE.

EVERY one is guilty of felony, and liable to imprisonment for life, who unlawfully and maliciously sets fire[3] to:

[4] (*a.*) any church, chapel, meeting-house or other place of divine worship; or

[5] (*b.*) any dwelling house, any person being therein; or

[6] (*c*) any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, storehouse, granary, hovel, shed or fold, or any farm building, or any building or erection used in farming land, or in carrying on any trade or manufacture or any branch thereof, whether the same is then in the possession of the

[1] It is not material whether any offence against R. S. C. c. 163 is committed from malice conceived against the owner of the property in respect of which it is committed or otherwise (R. S. C. c. 163, s. 60; 24 & 25 Vict. c. 97, s. 58; *R.* v. *Bradshaw*, 38 U. C. Q. B. 564); nor whether the offender is or is not in possession of the property if the offence is committed with intent to injure or defraud any person (R. S. C. c. 168, s. 61; 24 & 25 Vict. c. 97, s. 59.)

[2] S. D. Art. 877 (*a.*)

[3] [As to what constitutes "setting fire," it is not necessary that flame should be seen; *R.* v. *Stallion*, 1 Moo. 398; but it is not sufficient that wood should be scorched black: *R.* v. *Russell*, Car. & M. 541. It is sufficient if the wood has been at a red heat; *R.* v. *Parker*, 9 C. & P. 45. I suppose the question is whether the thing burnt has or has not begun to be decomposed by the action of fire.] With respect to the case of a man setting fire to his own house, see *R.* v. *Greenwood*, 23 U. C. Q. B. 250; *R.* v. *Cronin*, 1 Ont. Dig. 904; *R.* v. *Bryans*, 12 U. C. C. P. 161.

[4] R. S. C. c. 168, s. 2; 24 and 25 Vict. c 97, *s.* 1.

[5] R. S. C. c. 168, s. 3; 24 and 25 Vict. c. 97, s. 2.

[6] R. S. C. c. 164, s. 4; 24 and 25 Vict. c. 97, *s.* 3. A building used by a carpenter, who is putting up a house near it, as a place of deposit for his tools and window frames that he had made, but in which no work is carried on by him, is not a building used in carrying on a trade; *R.* v. *Smith*, 14 U. C. Q. B. 546.

offender, or in the possession of any other person, with the intent thereby to injure or defraud any person; or

[1] (*d.*) any station, engine-house, warehouse or other building, belonging or appertaining to any railway, port, dock or harbor, or to any canal or other navigable water; or

[2] (*e.*) any building, other than such as are hereinbefore mentioned, belonging to Her Majesty or to any county, riding, division, city, town, village, parish or place, or belonging to any university or college, or hall of any university, or to any corporation, or to any unincorporated body or society of persons, associated together for any lawful purpose, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution; or

[3] (*f.*) any stack of corn, grain, pulse, tares, hay, straw, haulm or stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood or bark, or any stere or pile of wood or bark; or

[4] (*g.*) any mine of coal, cannel oil, anthracite or other mineral fuel, or any mine or well of oil or other combustible substance.

### [5] ARTICLE 563.

ARSON—SETTING FIRE TO BUILDINGS, ETC.—OFFENCES PUNISHABLE BY FOURTEEN YEARS' IMPRISONMENT.

Every one is guilty of felony, and liable to fourteen years' imprisonment, who unlawfully and maliciously sets fire to

[6] (*a.*) [7] any building other than such as are mentioned in

[1] R. S. C. c. 168, s. 5; 24 & 25 Vict. c. 97, s. 4.

[2] R. S. C. c. 168, s. 7; 24 & 25 Vict. c. 97, s. 5.

[3] R. S. C. c. 168, s. 19; 24 & 25 Vict. c. 97, s. 17.

[4] R. S. C. c. 168, s. 28; 24 & 25 Vict. c. 97, s. 26.

[5] S. D. Art. 378 (*a*), (*b*), (*c*).

[6] R. S. C. c. 168, s. 8; 24 and 25 Vict. c. 97, s. 6.

[7] [If it were not for the arbitrary and practically unimportant distinction between the punishment for this offence, and for the offences defined in Art. 562, clauses (*a*)-(*e*), the following enactment would include them all:—"Whoever sets fire to any building whatever shall be liable to penal servitude for life as a maximum punishment." This would reduce six cumbrous sections, filling a page of Chitty's Statutes, to two lines.]

the next preceding Article (whether finished or unfinished);[1] or

[2] (*b.*) any matter or thing, being in, against or under any building, under such circumstances that, if the building were thereby set fire to, the offence would amount to felony; or

[3] (*c.*) any forest, tree, manufactured lumber, square timber, logs or floats, boom, dam or slide on the crown domain, or on land leased or lawfully held for the purpose of cutting timber, or on private property, or on any creek, river, rollway, beach or wharf, so that the same is injured or destroyed; or

[4] (*d.*) any crop of hay, grass, corn, grain or pulse, or of any cultivated vegetable produce, whether standing or cut down, or any part of any wood, coppice or plantation of trees, or any heath, gorse, furze or fern.

### ARTICLE 564.

#### RECKLESSLY SETTING FIRE TO FORESTS, ETC.

[5] Every one is guilty of a misdemeanor, and liable to two years' imprisonment, who, by such negligence as shows him to be reckless or wantonly regardless of consequences, or in violation of a municipal law of the locality,

[1] [R. v. *Manning*, L. R. 1 C. C. R. 338. It is a question for a jury what constitutes a building.] Where on the trial it was assumed that a wooden building, so burned that only a few rafters remained, and the sides and floors so injured that it was untenantable, was a building, the court on a case reserved set aside the conviction; *R.* v. *Labadie*, 32 U.C.Q.B. 429.

[2] R.S.C. c. 168, s. 9. [24 & 25 Vict. c. 97, s. 7. In *R.* v. *Child*, L. R. 1 C. C. R. 307, it was said that the legislature probably meant to enact that, if any person sets fire to any thing in a house likely to set fire to the house itself, he should be guilty of felony, but that they had failed to say so. In that case A set fire to goods in a house to spite the owner, but with no intention to burn the house, and (as the jury were considered by the Court to have found) not thinking it probable that what he was doing would have that effect, and not being reckless on the subject. My impression is that the legislature said what it meant, but that the judge who reserved the case (Blackburn, J.) was not followed by the jury in the directions that he gave.]

[3] R. S. C. c. 168, s. 12.

[4] R. S. C. c. 168, s. 18; 24 & 25 Vict. c. 97, s. 16.

[5] R. S. C. c. 168, s. 11.

sets fire to any forest, tree, manufactured lumber, square timber, logs or floats, boom, dam or slide on the crown domain, or land leased or lawfully held for the purpose of cutting timber, or on private property, on any creek or river, or rollway, beach or wharf, so that the same is injured or destroyed.

The magistrate investigating any such charge may, in his discretion, if the consequences have not been serious, dispose of the matter summarily, without sending the offender for trial, by imposing a fine not exceeding fifty dollars, and in default of payment, by the committal of the offender to prison for any term not exceeding six months, with or without hard labor.

### [1] ARTICLE 565.

#### ATTEMPTING TO SET ON FIRE, ETC.

Every one is guilty of felony and liable to fourteen years' imprisonment in cases (*a.*) and (*b.*) and to seven years' imprisonment in cases (*c.*) and (*d.*) who [2] unlawfully and maliciously, by any overt act, attempts to set fire to any of the following things, under such circumstances that if the same were thereby set fire to the offender would be guilty of felony, that is to say :—

[3] (*a.*) any building or any matter or thing that is in, against or under any building ; or

[4] (*b.*) any mine or oil well ; or

[5] (*c.*) any crop of hay, grass, corn, grain or pulse, or of any cultivated vegetable produce, whether standing or cut down, or any part of any wood, coppice or plantation of trees, or any heath, gorse, furze or fern ; or

[1] S. D. Arts. 378 (*d*), 380 (*b*).

[2] B under the direction of A arranges a blanket saturated with oil so that if it is set on fire, the flame will be communicated to a building and then lights a match, holds it until it is burning well and then puts it down to within an inch or two of the blanket, when the match goes out. A attempts to set fire to the building ; *R.* v. *Goodman*, 22 U. C. C. P. 338.

[3] R. S. C. c. 168, s. 10 ; 24 & 25 Vict. c. 97, s. 8.

[4] R. S. C. c. 168, s. 29 ; 24 & 25 Vict. c. 97, s. 27.

[5] R. S. C. c. 168, s. 20 ; 24 & 25 Vict. c. 97, s. 18.

(*d.*) any stack of corn, grain, pulse, tares, hay, straw, haulm or stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood or bark, or any stere or pile of wood or bark.

[1] ARTICLE 566.

THREATS TO BURN, ETC.

[2] Every one is guilty of felony and liable to ten years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any house, barn or other building, or any rick or stack of grain, hay or straw or other agricultural produce or any grain, hay or straw or other agricultural produce, in or under any building, or any ship or vessel.

[3] ARTICLE 567.

SETTING FIRE TO AND OTHER INJURIES TO HER MAJESTY'S SHIPS, DOCK-YARDS, ETC.

[4] Every one is guilty of felony and liable to imprisonment for life, who unlawfully and maliciously sets on fire or burns, or otherwise destroys or causes to be set on fire or burnt, or otherwise destroyed,

(*a.*) any of Her Majesty's ships or vessels of war, whether afloat, or building or begun to be built in any of Her Majesty's dock-yards, or building or repairing by contract in any private yard, for the use of Her Majesty ; or

(*b.*) any of Her Majesty's arsenals, magazines, dock-

[1] S. D. Art. 379.

[2] R. S. C. c. 173, s. 8 ; 24 & 25 Vict. c. 97, s. 59.

[3] S. D. Art. 376.

[4] R. S. C. c. 168, s. 6 ; 12 Geo. 3, c. 24, s. 1. The latter statute applies to the realm and to all islands, countries, ports or places thereto belonging. By it the offender is liable to suffer death.

yards, rope-yards, victualling offices, or any of the buildings erected therein or belonging thereto, or any timber or material there placed for building, repairing or fitting out of ships or vessels, or any of Her Majesty's military naval or victualling stores or other ammunition of war; or

(*c.*) any place or places where any such military, naval or victualling stores, or other ammunition of war, are kept, placed or deposited.

### [1] ARTICLE 568.

#### SETTING FIRE TO SHIPS, AND OTHER INJURIES THERETO, AND TO LIGHTS, BUOYS, ETC.

Every one is guilty of felony and liable to imprisonment for life in cases (*a.*), (*e.*) and (*f.*), to fourteen years' imprisonment in cases (*b.*) and (*c.*) and to seven years' imprisonment in cases (*d.*) and (*g.*) who unlawfully and maliciously

[2] (*a.*) sets fire to, casts away or in anywise destroys

(i) any ship or vessel, whether the same is complete or in an unfinished state; or

[3] (ii) any ship or vessel, with intent thereby to prejudice any owner or part owner of such ship or vessel, or of any goods on board the same, or any person who has underwritten or who underwrites any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same;

[4] (*b.*) by any overt act, attempts to set fire to, cast away or destroy any ship or vessel, under such circumstances that, if the ship or vessel were thereby set fire to, cast away or destroyed, the offender would be guilty of felony; or

[1] S. D. Arts. 377 (*a.*), (*i.*), (*j.*), (*k.*), (*l.*), 378 (*d*), (*e*), 380 (*f*), (*h*).

[2] R. S. C. c. 168, s. 46; 24 & 25 Vict. c. 97, s. 42.

[3] R. S. C. c. 168, s. 47; 24 & 25 Vict. c. 97, s. 43. [This section and s. 42 are like dividing theft into two offences, theft, and theft with intent to injure the owner of the stolen goods, each offence being punished in the same way.]

[4] R. S. C. c. 168, s. 48; 24 & 25 Vict. c. 97, s. 44.

[1] (*c.*) places or throws in, into, upon, against or near any ship or vessel, any gunpowder or other explosive substance, with intent to destroy or damage any ship or vessel, or any machinery, working-tools, goods or chattels, whether or not any explosion takes place, and whether or not any injury is effected; or

[2] (*d.*) damages otherwise than by fire, gunpowder or other explosive substance, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same or render the same useless; or

[3] (*e.*) masks, alters, removes or extinguishes any light or signal, or exhibits any false light or signal, with intent to bring any ship, vessel or boat into danger; or

(*f.*) does anything tending to the immediate loss or destruction of any ship, vessel or boat, and for which no punishment is hereinbefore provided; or

[4] (*g.*) cuts away, casts adrift, removes, alters, defaces, sinks or destroys, or does any act with intent to cut away, cast adrift, remove, alter, deface, sink or destroy, or in any other manner injures or conceals any lighthouse, light-ship, floating or other light, lantern or signal, or any boat, buoy, buoy-rope, beacon, anchor, perch or mark used or intended for the guidance of seamen, or for the purpose of navigation.

[5] Every one who makes fast any vessel or boat to any such buoy, beacon or sea mark, is liable, on summary conviction, to a penalty not exceeding ten dollars, and in default of payment, to one month's imprisonment.

[1] R. S. C. c. 168, s. 49; 24 & 25 Vict. c. 97, s. 45.

[2] R. S. C. c. 168, s. 50; 24 & 25 Vict. c. 97, s. 46.

[3] R. S. C. c. 168, s. 51; 24 & 25 Vict. c. 97, s. 47. The word "maliciously" does not qualify the paragraph of section 51 represented by clause (*e*) "unlawfully masks, &c."

[4] R. S. C. c. 168, s. 52; 24 & 25 Vict. c. 97, s. 48.

[5] R. S. C. c. 168, s. 53.

### ARTICLE 569.

INJURIES TO HER MAJESTY'S VESSELS—GOODS LIABLE TO SEIZURE—CUSTOM HOUSES, ETC.

[1] Every one is guilty of felony, and liable to imprisonment for life, [2] who

(*a.*) wilfully or maliciously shoots at, or attempts to destroy or damage, any vessel belonging to Her Majesty, or in the service of Canada; or

(*b.*) before or after the actual seizure thereof, staves, breaks or in any way destroys any goods liable to seizure or forfeiture under any law relating to customs, trade or navigation; or

(*c.*) scuttles, sinks or cuts adrift any vessel, or wilfully and maliciously destroys or injures by fire or otherwise any custom house or other building, in which are deposited or kept any goods that have been seized, forfeited or bonded.

### [3] ARTICLE 570.

INJURIES BY EXPLOSIVE SUBSTANCES.

Every one is guilty of felony, and liable to imprisonment for life in case (*a*), and for fourteen years in case (*b*), who unlawfully and maliciously

[4] (*a.*) by the explosion of gunpowder or other explosive substance, destroys, throws down or damages the whole or any part of any dwelling-house, any person being

[1] R. S. C. c. 32, s. 213.

[2] Art 17.

[3] S. D. Art. 377 (*b*), 378 (*c*).

As to injuring ships by explosive substances, see Art. 568 (*c.*) See also

As to causing explosions likely to endanger life or property, Arts. 92, 93.

As to offences committed by means of explosive substances involving or with intent to do bodily injury, Arts. 299-300.

As to making explosive substances, or sending or carrying them by railway or on ship-board, note 4 to Art. 299.

[4] R. S. C. c. 168, s. 13; 24 & 25 Vict. c. 97, s. 9.

therein, or of any building, whereby the life of any person is endangered; or

(*b.*) [1] places or throws in, into, upon, under, against or near any building, any gunpowder or other explosive substance, with intent to destroy or damage any building, or any engine, machinery, working tools, fixtures, goods or chattels, whether or not any explosion takes place, and whether or not any damage is caused.

### [2] Article 571.

INJURIES TO MANUFACTURES, MACHINERY, ETC.

Every one is guilty of felony, and liable to imprisonment for life in cases (*a*) (i), (ii) and (iii), and (*b*), and to seven years' imprisonment in cases (*a*) (iv) and (v), who

[3] (*a.*) unlawfully and maliciously cuts, breaks or destroys, or damages, with intent to destroy, or to render useless,

(i.) any goods or article of silk, woollen, linen, cotton, hair, mohair or alpaca, or of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenters, or in any stage, process or progress of manufacture; or

(ii.) any warp or shute of silk, woollen, linen, cotton, hair, mohair or alpaca, or of any one or more of those materials mixed with each other, or mixed with any other material; or

(iii.) any loom, frame, machine, engine, rack, tackle, tool or implement, whether fixed or movable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing or otherwise manufacturing or preparing any such goods or articles; or

[1] R. S. C. c. 168, s. 14; 24 & 25 Vict. c. 97, s. 10.
[2] S. D. Arts. 377 (c), 380 (*a*).
[3] R. S. C. c. 168, s. 16; 24 & 25 Vict. c. 97, s. 14.

[1] (iv.) any machine or engine, whether fixed or movable, used or intended to be used for sowing, reaping, mowing, threshing, ploughing or draining, or for performing any other agricultural operation; or

(v.) any machine or engine, or any tool or implement whether fixed or movable, prepared for or employed in any manufacture whatsoever except the manufacture of silk, woollen, linen, cotton, hair, mohair or alpaca goods, or goods of any one or more of those materials mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose or lace; or

[2] (*b.*) by force enters into any house, shop, building or place, with intent to commit any of the offences mentioned in clauses (*a*) (i), (ii) and (iii).

### [3] Article 572.

#### INJURIES TO MINES AND OIL WELLS.

[4] Every one is guilty of felony and liable to seven years' imprisonment who unlawfully and maliciously

(*a.*) causes any water, earth, rubbish or other substance to be conveyed or to run or fall into any mine, or into any oil well, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine or well, or to hinder or delay the working thereof; or

(*b.*) with the like intent, pulls down, fills up or obstructs or damages with intent to destroy, obstruct or render useless, any airway, waterway, drain, pit, level or shaft of or belonging to any mine or well.

This provision does not extend to any damage committed underground by any owner of any adjoining mine

[1] R. S. C. c. 168, s. 17; 24 & 25 Vict. c. 97, s. 15. [Some cases on the application of this section to imperfect machines are collected in Fisher's Digest, pp. 2591-2593]. An apparatus for manufacturing potash, consisting of ovens, kettles, tubs, etc., is not a "machine or engine" within the meaning of 4 & 5 Vict. (P.C.) c. 26, s. 5; *R.* v. *Dougherty*, 2 L. C. R. 255.

[2] R. S. C. c. 168 s. 16; 24 & 25 Vict. c. 97 s. 14.

[3] S. D. Art. 380 (*c*).

[4] R. S. C. c. 168, s. 30; 24 & 25 Vict. c. 97, s. 23.

or well in working the same, or by any person duly employed in such working.

[1] ARTICLE 573.

INJURIES TO MACHINERY, ETC., USED FOR WORKING MINES—OIL WELLS.

[2] Every one is guilty of felony, and liable to seven years' imprisonment, who, unlawfully and maliciously,

(*a.*) pulls down or destroys or damages, with intent to destroy or render useless, any steam engine or other engine for sinking, draining, ventilating or working, or for in anywise assisting in sinking, draining, ventilating or working any mine or oil well, or any appliance or apparatus in connection with any such steam or other engine, or any staith, building or erection used in conducting the business of any mine or oil well, or any bridge, waggon-way or track for conveying minerals or oil from any mine or well, whether such engine, staith, building, erection, bridge, waggon-way or track is completed or in an unfinished state; or

(*b.*) stops, obstructs or hinders the working of any such steam or other engine, or of any such appliances or apparatus, with intent thereby to destroy or damage any mine or oil well, or to hinder, obstruct or delay the working thereof; or

(*c.*) wholly or partially cuts through, severs, breaks or unfastens, or damages, with intent to destroy or render useless, any rope, chain or tackle, of whatsoever material the same is made, used in any mine or oil well, or in or upon any inclined plane, railway or other way or other work whatsoever, in anywise belonging or appertaining to or connected with or employed in any mine or oil well, or the working or business thereof.

[1] S. D. Art. 380 (c), (d).

[2] R. S. C. c. 168, s. 31; 24 & 25 Vict. c. 97, s. 29.

### [1] Article 574.

INJURIES TO SEA AND RIVER BANKS, AND TO WORKS ON RIVERS, CANALS, ETC.

[2] Every one is guilty of felony, and liable to imprisonment for life, who, unlawfully and maliciously,

(*a.*) breaks down or cuts down, or otherwise damages or destroys, any sea bank, sea wall, dyke or aboiteau, or the bank, dam or wall of or belonging to any river, canal, drain, reservoir, pool or marsh, whereby any land or building is, or is in danger of being, overflowed or damaged; or

(*b.*) throws, breaks or cuts down, levels, undermines or otherwise destroys, any quay, wharf, jetty, lock, sluice, floodgate, weir, tunnel, towing-path, drain, water-course or other work belonging to any port, harbor, dock or reservoir, or on or belonging to any navigable water or canal, or any dam or structure erected to create or utilize any hydraulic power, or any embankment for the support thereof.

### [3] Article 575.

OTHER INJURIES TO WORKS ON RIVERS AND CANALS.

[4] Every one is guilty of felony, and liable to seven years' imprisonment, who, unlawfully and maliciously,

(*a.*) cuts off, draws up or removes any piles, stone or other materials fixed in the ground and used for securing any sea bank or sea wall, or the bank, dam or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbor, dock, quay, wharf, jetty or lock; or

(*b.*) opens or draws up any floodgate or sluice, or does

[1] S. D. Art. 377 (*d*), (*e*).

[2] R. S. C. c. 168, s. 32; 24 & Vict. c. 97, s. 30. As to malicious injuries to works belonging to the Commissioners of the Harbor of Quebec, see 22 Vict. (P.C.) c. 32, s. 22.

[3] S. D. Art. 380 (*e*), (*f*).

[4] R. S. C. c. 168, s. 33; 24 & 25 Vict. c. 97, s. 31.

any other injury or mischief to any navigable river or canal, with intent, and so as thereby, to obstruct or prevent the carrying on, completing or maintaining the navigation thereof.

[1] ARTICLE 576.

INJURIES TO BRIDGES, VIADUCTS AND TOLL-BARS.

[2] Every one is guilty of felony, and liable to imprisonment for life, who unlawfully and maliciously pulls or throws down, or in anywise destroys any bridge, whether over any stream of water or not, or any viaduct or aqueduct, over or under which bridge, viaduct or aqueduct any highway, railway or canal passes, or does any injury with intent and so as thereby to render such bridge, viaduct or aqueduct, or the highway, railway or canal passing over or under the same, or any part thereof, dangerous or impassable.

ARTICLE 577.

INJURIES TO RAFTS OF TIMBER AND WORKS USED FOR THE TRANSMISSION THEREOF.

[3] Every one is guilty of a misdemeanor, and liable to a fine or to two years' imprisonment or to both, who unlawfully and maliciously,

(*a.*) breaks, injures, cuts, loosens, removes or destroys, in whole or in part, any dam, pier, slide, boom or other such work, or any chain or other fastening attached thereto, or any raft, crib of timber or saw-logs ; or

(*b.*) impedes or blocks up any channel or passage intended for the transmission of timber.

[1] S. D. Art. 377 (*f*).

[2] R. S. C. c. 168, s. 35 ; 24 & 25 Vict. c. 97, s. 33.

[3] R. S. C. c. 168, s. 54. As to unlawfully setting timber adrift, see R. S. C. c. 103, s. 41. (*The Cullers' Act*).

### ARTICLE 578.

PREVENTING THE SAVING OF WRECKED VESSELS OR WRECK.

[1] Every one is guilty of felony, and liable to seven years' imprisonment, who prevents or impedes or endeavors to prevent or impede

(*a.*) the saving of any vessel that is wrecked, stranded, abandoned or in distress; or

(*b.*) any person in his endeavor to save such vessel.

Every one who prevents or impedes, or endeavors to prevent or impede, the saving of any wreck, is guilty of a misdemeanor and liable on conviction on indictment to two years' imprisonment, and on summary conviction before two justices of the peace to a fine of four hundred dollars or six months' imprisonment.

### [2] ARTICLE 579.

INJURIES TO FISH PONDS.

[3] Every one is guilty of a misdemeanor, and liable to seven years' imprisonment, who unlawfully and maliciously,

(*a.*) cuts through, breaks down, or otherwise destroys the dam, flood-gate or sluice of any fish-pond, or of any water which is private property, or in which there is any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish; or

(*b.*) puts any lime or other noxious material in any such pond or water, with intent thereby to destroy any of the fish that are then or that may thereafter be put therein; or

[1] R. S. C. 81, s. 36 (*b*), s. 37 (*c*).

[2] S. D. Art. 380 (*g*), (*h*), (*i*).

[3] R. S. C. c. 168, s. 34; 24 & 25 Vict. c. 97, s. 32. As to throwing lime, chemical substance or poisonous matter, &c., or mill rubbish into waters frequented by fish, see R. S. C. c. 95, s. 15; and as to injuries to places set apart for the propagation of fish, see Id. s. 21.

(*c.*) cuts through, breaks down or otherwise destroys the dam or floodgate of any mill-pond, reservoir or pool.

[1] ARTICLE 580.

INJURIES TO RAILWAYS AND RAILWAY PROPERTY WITH INTENT, ETC.

[2] Every one is guilty of a felony, and liable to imprisonment for life, who unlawfully and maliciously, and with intent to obstruct, endanger, upset, overthrow, injure or destroy any engine, tender, carriage, truck or vehicle, on any railway, or any property passing over or along any railway,

(*a.*) puts, places, casts or throws any wood, stone or other matter or thing upon or across any railway ; or

(*b.*) breaks, takes up, removes, displaces, injures or destroys any rail, railway switch, sleeper, bridge, fence or other matter or thing, or any portion thereof, belonging to any railway ; or

(*c.*) turns, moves or diverts any point or other machinery belonging to any railway ; or

(*d.*) makes or shows, hides or removes any signal or light upon or near any railway ; or

(*e.*) does or causes to be done, any other matter or thing.

ARTICLE 581.

INJURIES TO RAILWAYS AND RAILWAY PROPERTY.

[3] Every one is guilty of a misdemeanor, and liable to

[1] S. D. Art. 377 (*h*).

[2] R. S. C. c. 168, s. 37 ; 24 & 25 Vict. c. 97, s. 35.

Provisions similar to those contained in Arts. 580, 581, occur in *The Railway Act* of the Province of Canada (C. S. C. c. 66) and the amendments thereto. See ss. 84, 85, 152, 153, 154 and 23 Vict. (P. C.), c. 29, s. 6.

As to violation of railway regulations by officers and servants of the railway, see Art. 153 note.

[3] R. S. C. c. 168, s. 38.

five years' imprisonment, who unlawfully and maliciously

(*a.*) breaks, throws down, injures or destroys, or does any other hurt or mischief to ;

(*b.*) obstructs or interrupts the free use of ; or

(*c.*) obstructs, hinders or prevents the carrying on, completing, supporting or maintaining of

any railway or any part thereof, or any building, structure, station, depot, wharf, vessel, fixture, bridge, fence, engine, tender, carriage, truck, vehicle, machinery or other work, device, matter or thing of such railway, or appertaining thereto or connected therewith.

## [1] ARTICLE 582.

### OBSTRUCTING RAILWAYS.

[2] Every one is guilty of a misdemeanor, and liable to two years' imprisonment, who, by any means, or in any manner or way whatsoever, or by any wilful omission or neglect, obstructs or interrupts, or causes to be obstructed or interrupted, or aids or assists in obstructing or interrupting, the free use of any railway or any part thereof, or any building, structure, station, depot, wharf, vessel, fixture, bridge, fence, engine, tender, carriage, truck, vehicle, machinery or other work, device, matter or thing of such railway, or appertaining thereto, or connected therewith.

[1] S. D. Art. 383 (*b*).

[2] R. S. C. c. 168, s. 39 ; 24 & 25 Vict. c. 97, s. 36. [Changing a signal so as to cause a train to go slower than it otherwise would is an obstructing : *R.* v. *Hadfield*, L. R. 1 C. C. R. 253 ; so is stretching out the arms as a signal ; *R.* v. *Hardy*, L. R. 1 C. C. R. 278. A railway not opened for public traffic may be obstructed : *R.* v. *Bradford*, Bell, C. C. 269.] A, without the consent of the railway company, takes a trolley or hand-car, places it on the track and with it runs upon the railway for several miles, at a time when ordinarily no train is running thereon. A obstructs the free use of the railway ; *R.* v. *Brownell*, 26 N. B. R. 579.

### ARTICLE 583.

INJURIES TO PACKAGES IN THE CUSTODY OF RAILWAYS.

[1] Every one is guilty of a misdemeanor, and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the goods or liquors so taken or destroyed, or to imprisonment (with or without hard labor) [2] for a term not exceeding one month, or to both, who

(*a.*) bores, pierces, cuts, opens or otherwise injures any cask, box or package, which contains wine, spirits or other liquors, or any case, box, sack, wrapper, package or roll of goods, in, on or about any car, waggon, boat, vessel, warehouse, station house, wharf, quay or premises of, or which belong to, any Government railway, or any railway company, with intent feloniously to steal or otherwise unlawfully to obtain or to injure the contents, or any part thereof; or

(*b.*) unlawfully drinks or wilfully spills or allows to run to waste any such liquors, or any part thereof.

### [3] ARTICLE 584.

INJURIES TO ELECTRIC TELEGRAPHS, ETC.

[4] Every one is guilty of a misdemeanor, and liable to imprisonment for any term less than two years, who unlawfully and maliciously

(*a*) cuts, breaks, throws down, destroys, injures or removes any battery, machinery, wire, cable, post or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic

[1] R. S. C. c. 38, s. 62; 51 Vict. (D.) c. 29, s. 297.

[2] The words in brackets do not occur in R. S. C. c. 38, s. 62.

[3] S. D. Art. 383 (*g.*) (*h.*)

[4] R. S. C. c. 168, s. 40; 24 & 25 Vict. c. 97, s. 37. As to malicious injuries to submarine cables, see 51 Vict. (D.) c. 31, s. 4.

telegraph, electric light, telephone or fire alarm, or in the working thereof, or for the transmission of electricity for other lawful purposes ; or

(*b.*) prevents or obstructs, in any manner whatsoever, the sending, conveyance or delivery of any communication by any such telegraph, telephone or fire alarm, or the transmission of electricity for any such electric light or for any such purpose as aforesaid.

[1] Every one who unlawfully and maliciously, by any overt act, attempts to commit any such offence is liable, on summary conviction, to a penalty not exceeding fifty dollars, or to three months' imprisonment, with or without hard labor.

### ARTICLE 585.

INJURIES TO MAILABLE MATTER—POST LETTER BAGS—LETTER BOXES, ETC.—BOOKS OF ACCOUNT—OBSTRUCTING MAILS.

Every one is guilty of a misdemeanor, and liable to five years' imprisonment, [2] who

(*a.*) [3] wilfully and maliciously destroys, damages, detains or delays any parcel sent by parcel post, any packet or package of patterns or samples of merchandise or goods, or of seeds, cuttings, bulbs, roots, scions or grafts, or any printed vote or proceeding, newspaper, printed paper or book or other mailable matter, not being a post letter, sent by mail ; or

(*b.*) [4] cuts, tears, rips or wilfully damages or destroys any post letter bag ; or

(*c.*) [5] wilfully or maliciously injures or destroys any

[1] R. S. C. c. 163, s. 41 ; 24 & 25 Vict. c. 97, s. 38.

[2] Art. 17.

[3] R. S. C. c. 35, s. 91. See also s. 97 as to drunkenness and negligence on the part of mail carriers ; s. 98 as to toll-keeper refusing to allow mail to pass ; and s. 99 as to ferryman refusing to carry over a mail at his ferry. The offences are misdemeanors.

[4] Id. s. 96.

[5] Id. s. 107.

street letter box, pillar box or other receptacle established by authority of the Postmaster-General for the deposit of letters or other mailable matter; or

(*d.*) [1] being a postmaster, wilfully destroys, mutilates or obliterates any book containing or which ought to contain the record or account of the money orders issued or paid, or of the registered letters or other business of his office; or

(*e.*) [2] abandons, or obstructs or wilfully delays the passing or progress of any mail, or any car, train, locomotive engine, tender, carriage, vessel, horse or animal employed in conveying any mail on any railway, public highway, river, canal or water communication.

### [3] Article 586.

#### INJURIES TO CATTLE.

[4] Every one is guilty of felony, and liable to fourteen years' imprisonment, who unlawfully and maliciously kills, maims, wounds, poisons or injures any cattle.

### Article 587.

#### ATTEMPTING TO INJURE CATTLE.

[5] Every one is guilty of a misdemeanor, and liable to a fine or imprisonment, [6] or both, in the discretion of the court, who unlawfully and maliciously attempts to kill,

[1] R. S. C. c. 35 s. 101.

[2] Id. s. 95.

[3] S. D. Art. 378 (*g*).

[4] R. S. C. c. 168, s. 43; 24 & 25 Vict. c. 97, s. 40.

[An injury inflicted by the hand may be a wound: *R.* v. *Bullock*, L. R. 1. C. C. R. 115. On repealed statutes to the same effect, see *R.* v. *Owens*, 1 Moo. 205, and *R.* v. *Hughes*, 2 C. & P. 420, in which Parke, B. said setting a dog at an animal whereby it was bitten was not a maiming or wounding.] As to maliciously cutting off the hair of the manes and tails of horses see *R.* v. *Smith*, 1 G. & O. 29, decided under R. S. N. S., 3rd S. c. 169, s. 22, a provision similar to R. S. C. c. 168, s. 58 Art. 602.

[5] R. S. C. c. 168, s. 44.

[6] Five years; Art. 17.

maim, wound, poison or injure any cattle, or unlawfully and maliciously places poison in such a position as to be easily partaken of by any cattle.

### [1] ARTICLE 588.

#### INJURIES TO OTHER ANIMALS.

[2] Every one is guilty of a misdemeanor, and liable, on summary conviction, to a penalty not exceeding one hundred dollars, over and above the amount of injury done, or to three months' imprisonment with or without hard labor, who unlawfully and maliciously kills, maims, wounds, poisons or injures any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement, or kept for any domestic purpose, or purpose of lawful profit or advantage or science.

Every one who, having been convicted of any such offence, afterwards commits any such offence, is guilty of a misdemeanor, and liable to a fine or imprisonment, [3] or both, in the discretion of the court.

### [4] ARTICLE 589.

#### THREATS TO INJURE CATTLE.

[5] Every one is guilty of felony, and liable to ten years' imprisonment, who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill, maim, wound, poison, or injure any cattle.

[1] S. D. Art. 383 (*j*).
[2] R. S. C. c. 168, s. 45; 24 & 25 Vict. c. 97, s. 41.
[3] Five years; Art. 17.
[4] S. D. Art. 379.
[5] R. S. C. c. 173, s. 8; 24 & 25 Vict. c. 97, s. 50.

[1] ARTICLE 590.

INJURIES TO HOP-BINDS AND GRAPE VINES.

[2] Every one is guilty of felony, and liable to fourteen years' imprisonment, who, unlawfully and maliciously, cuts or otherwise destroys any hop-binds growing on poles in any plantation of hops, or any grape vines growing in any vineyard.

[3] ARTICLE 591.

INJURIES TO TREES, ETC., GROWING IN CERTAIN PLACES.

Every one is guilty of felony, and liable to three years' imprisonment, who, unlawfully and maliciously, cuts, breaks, barks, roots up or otherwise destroys or damages the whole or any part of any tree, sapling or shrub, or any underwood growing

(*a.*) [4] in any park, pleasure ground, garden, orchard or avenue, or in any ground adjoining or belonging to any dwelling-house, if the amount of the injury done exceeds the sum of five dollars; or

(*b.*) [5] in any public street or place or elsewhere than in any park, pleasure ground, garden, orchard or avenue, or in any ground adjoining or belonging to any dwelling-house, if the amount of injury done exceeds the sum of twenty dollars.

[1] S. D. Art. 378 (*k*).

[2] R. S. C. c. 168, s. 21; 24 & 25 Vict. c. 97, s. 19.

[3] S. D. Art. 381 (*a*).

[4] R. S. C. c. 168, s. 22; 24 & 25 Vict. c. 97, s. 20. As to wilful injuries to trees growing in reserves or forest parks in the Rocky Mountains, see R. S. C. c. 54, s. 78.

[5] R. S. C. c. 168, s. 23; 24 & 25 Vict. c. 97, s. 21.

[These sums are exclusive of consequential damage. A did injury to the amount of £1 to a hedge which it would cost £4 14s. 6d. to replace. This is injury to the amount of £1, not to the amount of £5 14s. 6d.; *R.* v. *Whiteman*, Dear. 353 (upon 7 & 8 Geo. 4, c. 30, s. 19).]

[1] ARTICLE 592.

INJURIES TO TREES, ETC., WHERESOEVER GROWING.

[2] Every one is guilty of a misdemeanor, and liable, on summary conviction, to a penalty not exceeding five dollars over and above the amount of the injury done, or to one month's imprisonment, with or without hard labor, who unlawfully and maliciously cuts, breaks, barks, roots up or otherwise destroys or damages the whole or any part of any tree, sapling or shrub, or any underwood, wheresoever the same is growing, the injury done being to the amount of twenty-five cents, at the least:

Every one who, having been convicted of any such offence,[3] afterwards commits any such offence, is liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the amount of the injury done, or to three months' imprisonment with hard labor:

Every one who, having been twice convicted of any such offence, afterwards commits any such offence, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.

[1] ARTICLE 593.

INJURIES TO VEGETABLE PRODUCTIONS GROWING IN GARDENS, ETC.

[5] Every one is guilty of a misdemeanor and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the amount of the injury done, or to three months' imprisonment, with or without hard labor, who unlawfully and maliciously destroys, or damages with intent to destroy, any plant, root, fruit or

[1] S. D. Art. 383 (b).
[2] R. S. C. c. 168, s. 24; 24 & 25 Vict. c. 97, s. 22.
[3] "either against this or any other act or law."
[4] S. D. Art. 383 (c).
[5] R. S. C. c. 168, s. 25; 24 & 25 Vict. c. 97, s. 23.

vegetable production, growing in any garden, orchard, nursery ground, house, hot-house, green-house or conservatory:

Every one who, having been convicted of any such offence,[1] afterwards commits any such offence, is guilty of felony, and liable to two years' imprisonment.

[2] ARTICLE 594.

INJURIES TO CULTIVATED ROOTS AND PLANTS GROWING ELSEWHERE.

[3] Every one is guilty of a misdemeanor and liable, on summary conviction, to a penalty not exceeding five dollars over and above the amount of the injury done, or to one month's imprisonment, with or without hard labor, and in default of payment of such penalty and costs, if any, to imprisonment for any term not exceeding one month, who unlawfully and maliciously destroys, or damages with intent to destroy, any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard or nursery ground:

Every one who, having been convicted of any such offence,[1] afterwards commits any such offence, is liable on summary conviction, to three months' imprisonment with hard labor.

ARTICLE 595.

INJURIES TO LAND MARKS INDICATING MUNICIPAL DIVISIONS.

[4] Every one is guilty of felony, and liable to seven years'

[1] "either against this or any other Act or law."

[2] S. D. Art. 383 (*d*).

[3] R. S. C. c. 168, s. 26; 24 & 25 Vict. c. 97, s. 24. A, with the permission of his brother, a squatter on the lot, cuts firewood thereon. A, there being no malice, is not within the statute; *Dumais* v. *Hall*, 13 Q. L. R. 236.

[4] R. S. C. c. 168, s. 56. See also R. S. C. c. 54, s. 188, as to injuries to land marks placed thereunder, or under the authority of the Governor-in-Council, or indicating township sections or other legal sub-divisions in Manitoba or the Territories.

imprisonment, who knowingly and wilfully pulls down, defaces, alters or removes any mound, land mark, post or monument lawfully erected, planted or placed to mark or determine the boundaries of any Province, county, city, town, township, parish or other municipal division.

### ARTICLE 596.

#### INJURIES TO OTHER LAND MARKS.

[1] Every one who knowingly and wilfully defaces, alters or removes any mound, land mark, post or monument lawfully placed by any land surveyor to mark any limit, boundary or angle of any concession, range, lot or parcel of land, is guilty of a misdemeanor, and liable to a fine not exceeding one hundred dollars, or to three months' imprisonment, or to both. It is not an offence for any land surveyor in his operations to take up such posts or other boundary marks when necessary, if he carefully replaces them as they were before.

### [2] ARTICLE 597.

#### INJURIES TO FENCES, ETC.

[3] Every one is guilty of a misdemeanor, and liable, on summary conviction, to a penalty not exceeding five dollars over and above the amount of the injury done, who unlawfully and maliciously cuts, breaks, throws down, or in anywise destroys any fence of any description whatsoever, or any wall, stile or gate, or any part thereof, respectively:

Every one who, having been convicted of any such offence, [4] afterwards commits any such offence, is liable,

[1] R. S. C. c. 168, s. 57. The land marks must have been lawfully placed; *R.* v. *Austin*, 11 Q. L. R. 76.

[2] S. D. Art. 383 (*e*).

[3] R. S. C. c. 168, s. 27; 24 & 25 Vict. c. 97 s. 25.

[4] "either against this or any other Act or law."

on summary conviction, to three months' imprisonment with hard labor.

[1] ARTICLE 598.

INJURIES TO TURNPIKE GATES, TOLL-BARS, ETC.

[2] Every one is guilty of a misdemeanor, and liable to fine or imprisonment, or both, in the discretion of the court, who unlawfully and maliciously throws down, levels or otherwise destroys, in whole or in part,

(*a.*) any turnpike gate or toll-bar, or any wall, chain, rail, post, bar or other fence belonging to any turnpike gate or toll-bar, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any Act or law relating thereto; or

(*b.*) any house, building or weighing engine erected for the better collection, ascertainment or security of any such toll.

[3] ARTICLE 599.

INJURIES TO WORKS OF ART.

[4] Every one is guilty of a misdemeanor, and liable to one year's imprisonment who unlawfully and maliciously destroys or damages

(*a.*) any book, manuscript, picture, print, statue, bust or vase, or any other article or thing kept for the purposes of art, science or literature, or as an object of curiosity, in any museum, gallery, cabinet, library or other depository, which museum, gallery, cabinet, library or other depository is, either at all times or from time to time, open for the admission of the public or of any considerable number of persons to view the same, either by the per-

[1] S. D. Art. 583 (*f*).
[2] R. S. C. c. 168, s. 36; 24 & 25 Vict. c. 97, s. 34.
[3] S. D. Art. 383 (*i*).
[4] R. S. C. c. 168, s. 42; 24 & 25 Vict. c. 97, s. 39.

mission of the proprietor thereof, or by the payment of money before entering the same; or

(*b.*) any picture, statue, monument or other memorial of the dead, painted glass or other monument or work of art in any church, chapel, meeting-house or other place of divine worship, or in any building belonging to Her Majesty, or to any county, riding, city, town, village, parish or place, or to any university, or college or hall of any university, or in any street, square, churchyard, burial ground, public garden or ground; or

(*c.*) any statue or monument exposed to public view, or any ornament, railing or fence, surrounding such statue or monument, or any fountain, lamp, post or other thing of metal, glass, wood or other material, in any street, square or other public place.

### ARTICLE 600.

#### INJURIES TO POLL BOOKS, ETC.

[1] Every one is guilty of felony, and liable to a fine in the discretion of the court, or to seven years' imprisonment, or to both, who unlawfully and maliciously

(*a.*) destroys, injures or obliterates, or causes to be wilfully or maliciously destroyed, injured or obliterated; or

(*b.*) makes or causes to be made any erasure, addition of names or interlineation of names in or upon; or

(*c.*) aids, consents or assists in so destroying, injuring or obliterating, or in making any erasure, addition of names or interlineation of names in or upon

any writ of election, or any return to a writ of election or any indenture, poll-book, voters' list, certificate, affidavit or report, or any document or paper made, prepared or drawn out according to any law in regard to dominion,[2] provincial, municipal or civic elections.

[1] R. S. C. c. 168, s. 55.

[2] R. S. C. c. 8, s. 102. The language of this section is not verbatim the same as that of R. S. C. c. 168, s. 55, but they are substantially the same.

[1] ARTICLE 601.

INJURIES TO BUILDINGS BY TENANTS.

[2] Every one is guilty of a misdemeanor[3] who, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, unlawfully and maliciously

(*a.*) pulls down or demolishes, or begins to pull down or demolish the same or any part thereof; or

(*b.*) pulls down or severs from the freehold any fixture fixed in or to such dwelling-house or building, or part of such dwelling-house or building.

[4] ARTICLE 602.

INJURIES NOT BEFORE PROVIDED FOR.

[5] Every one is guilty of a misdemeanor, and liable to five years' imprisonment, who unlawfully and maliciously commits any damage, injury or spoil to or upon any real or personal property whatsoever, either of a public or a private nature, for which no punishment is [6] otherwise provided, the damage, injury or spoil being to an amount exceeding twenty dollars.

[7] ARTICLE 603.

OTHER INJURIES NOT OTHERWISE PROVIDED FOR.

[8] Every one who unlawfully and maliciously commits

[1] S. D. Art. 383 (*a*).
[2] R. S. C. c. 168, s. 15; 24 & 25 Vict. c. 97, s. 13.
[3] And liable to five years' imprisonment; Art. 17.
[4] S. D. Art. 383 (*l*).
[5] R. S. C. c. 168, s. 58; 24 & 25 Vict. c. 97, s. 51.
[6] "hereinbefore provided."
[7] S. D. Art. 383 (*m*).
[8] R. S. C. c. 168, s. 59; 24 & 25 Vict. c. 97, s. 52.

any damage, injury or spoil to or upon any [1] real or personal property whatsoever (including trees, saplings, shrubs and underwood) either of a public or private nature, for which no punishment is [2] otherwise provided, is liable, on summary conviction, to a penalty not exceeding twenty dollars, and such further sum, not exceeding twenty dollars, as appears to the justice to be a reasonable compensation for the damage, injury or spoil so committed,—which last mentioned sum of money shall, in the case of private property, be paid to the person aggrieved; and if such sums of money, together with the costs, if ordered, are not paid, either immediately after the conviction, or within such period as the justice shall, at the time of the conviction, appoint, the justice may cause the offender to be imprisoned for any term not exceeding two months, with or without hard labor.

Nothing herein extends to

(*a.*) any case where the person acted under a fair and reasonable supposition that he had a right to do the act complained of; or

(*b.*) any trespass, not being wilful and malicious, committed in hunting or fishing, or in the pursuit of game.[3]

[1] [These words do not include an incorporeal right, such as the right to depasture cows on a moor; *Laws* v. *Eltringham*, L. R. 8. Q. B. D. 283.] A person who gathers mushrooms growing in their natural state in a field, doing no other damage or injury does not thereby "wilfully or maliciously" commit damage, injury or spoil to or upon real or personal property within the meaning of 24 & 25 Vict. c. 97, s. 52; *Gardner* v. *Mansbridge*, L. R. 19 Q. B. D. 217. The case would be even clearer under R. S. C. c. 168, s. 59, where the qualifying words are "unlawfully and maliciously." One who cuts off a portion of his neighbors's trees to protect his own property from the nuisance caused by boys throwing stones at the blossoms on such trees, and to secure the entrance of air and light to his own dwelling, cannot be said to be acting under a fair and reasonable supposition that he has a right to do the acts complained of; *Hamilton* v. *Bone*, 16 Cox, C. C. 437. See R. S. C. c. 43, ss. 23, 26, 27 (as enacted in 50 & 51 Vict. (D.) c. 33, ss. 3, 4) and 32; 27 & 28 Vict. (P.C.) c. 69 as to trespasses committed upon Indian lands. Also R. S. C. c. 54, s. 79, as to trespasses upon Dominion lands.

[2] "hereinbefore provided."

[3] But every such trespass shall be punishable as if R. S. C. c. 168 had not been passed.

# CHAPTER XLIX.

## *CRUELTY TO ANIMALS.*

### ARTICLE 604.

#### CRUELTY TO ANIMALS.

[1] EVERY one is guilty of a misdemeanor, and liable, on conviction before two justices of the peace, to a penalty not exceeding fifty dollars, or to imprisonment for any term not exceeding three months, with or without hard labor, or to both, who,

(*a.*) wantonly, cruelly or unnecessarily beats, binds, ill-treats, abuses, overdrives or tortures any cattle, poultry, dog, domestic animal or bird; or

(*b.*) while driving any cattle or other animal is, by negligence or ill-usage in the driving thereof, the means whereby any mischief, damage or injury is done by any such cattle or other animal; or

(*c.*) in any manner, encourages, aids or assists at the fighting or baiting of any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature.

### ARTICLE 605.

#### KEEPING COCK-PIT.

[2] Every one is guilty of a misdemeanor, and liable, on

[1] R. S. C. c. 172, s. 2; 12 & 13 Vict. c. 92, ss. 2, 3. The words "wantonly" and "unnecessarily" do not occur in the latter statute; the word "wantonly" was, however, used in the earlier English Statute 5 & 6 Wm. 4, c. 59, s. 2. The cutting of the combs of cocks to fit them for fighting or winning prizes at exhibitions is within the statute; *Murphy* v. *Manning* L. R. 2 Ex. D. 307. So, also, is the dishorning of cattle; *Ford* v. *Wiley*, L. R. 23 Q. B. D. 203; but the spaying of sows is not; *Lewis* v. *Fermor*, L. R. 18 Q. B. D. 532. See, however, the remarks of Hawkins, J., in *Ford* v. *Wiley*. The good to be attained must be reasonably proportionate to the suffering caused.

No prosecution for any offence defined in Articles 604 and 605 shall be commenced except within three months next after the commission of the offence: R. S. C. c. 172, s. 6.

[2] R. S. C. c. 172, s. 3.

summary conviction before two justices of the peace, to a penalty not exceeding fifty dollars, or to imprisonment for any term not exceeding three months, with or without hard labor, or to both, who builds, makes, maintains or keeps a cock-pit on premises belonging to or occupied by him, or allows a cock-pit to be built, made, maintained or kept on premises belonging to or occupied by him.

All cocks found in any such cock-pit, or on the premises wherein such cock-pit is, shall be confiscated and sold for the benefit of the municipality in which such cock-pit is situated.

## ARTICLE 606.

### THE CONVEYANCE OF CATTLE.

[1] No railway company within Canada, whose railway forms any part of a line of road over which cattle are conveyed from one Province to another Province, or from the United States to or through any Province, or from any part of a province to another part of the same, or owner or master of any vessel carrying or transporting cattle, from one Province to another Province, or within any Province, or from the United States through or to any Province, shall confine the same in any car, or vessel of any description, for a longer period than twenty-eight consecutive hours, without unlading [2] the same for rest, water and feeding for a period of at least five consecutive

[1] R. S. C. c. 172, ss. 8, 11.

[2] Cattle so unloaded shall be properly fed and watered during such rest by the owner or person having the custody thereof, or in case of his default in so doing, then by the railway company, or owner or master of the vessel transporting the same, at the expense of the owner or person in custody thereof; and such company, owner or master shall, in such case, have a lien upon such cattle for food, care and custody furnished, and shall not be liable for any detention of such cattle: R. S. C. c. 172, s. 9.

Where cattle are unladen from cars for the purpose of receiving food, water and rest, the railway company then having charge of the cars in which they have been transported shall, except during a period of frost, clear the floors of such cars, and litter the same properly with clean sawdust or sand before reloading them with live stock; R. S. C. c. 172, s. 10.

The proceeding for recovery of any penalty, under Articles 606 and 607, must be commenced within one month after the commission of the offence; R. S. C. c. 172, s. 13.

hours, unless prevented from so unlading and furnishing water and food by storm or other unavoidable cause, or by necessary delay or detention in the crossing of trains.

In reckoning the period of confinement, the time during which the cattle have been confined without such rest and without the furnishing of food and water, on any connecting railways or vessels from which they are received, whether in the United States or in Canada, shall be included.

The foregoing provisions as to cattle being unladen shall not apply when cattle are carried in any car or vessel in which they have proper space and opportunity for rest and proper food and water.

Every railway company, owner or master of a vessel, having cattle in transit, as aforesaid, who knowingly and wilfully fails to comply with the foregoing provisions, is liable for every such failure to a penalty not exceeding one hundred dollars.

### ARTICLE 607.

SEARCH OF PREMISES—PENALTY FOR REFUSING ADMISSION TO PEACE OFFICER.

[1] Every peace officer and constable may, at all times, enter any premises where he has reasonable grounds for supposing that any car, truck or vehicle, in respect whereof any company or person has failed to comply with the provisions of Article 606, or of the note thereto, is to be found, or enter on board any vessel in respect whereof he has reasonable grounds for supposing that any company or person has, on any occasion, so failed;

Every one who refuses admission to such peace officer or constable, is liable, on summary conviction, to a penalty not exceeding twenty dollars and not less than five dollars, and costs, and in default of payment, to imprisonment for any term not exceeding thirty days.

[1] R. S. C. c. 172, s. 12.

## CHAPTER L.

### *OFFENCES CONNECTED WITH TRADE AND BREACHES OF CONTRACT.*

### [1] ARTICLE 608.

#### CONSPIRACIES IN RESTRAINT OF TRADE.

[[2] A CONSPIRACY in restraint of trade is an agreement between two or more persons to do or procure to be done any unlawful act in restraint of trade.

*Illustration.*

[3] The defendants, a body of shipowners, agreed that if persons in a certain trade would deal exclusively with them, such persons should have certain advantages at their hands; and that if they dealt with any other shipowner, to however small an extent, they should lose all the advantages which otherwise they would derive from dealing with the defendants. Plaintiffs (also shipowners) alleged that this was done for the purpose of injuring them by driving them out of the trade. Defendants said it was done for the protection of their own trade, and it was held that the question would be which of these views was in fact true.

### [4] ARTICLE 609.

#### WHAT ACTS DONE IN RESTRAINT OF TRADE ARE NOT UNLAWFUL.

[5] The purposes of a trade union are not, by reason merely that they are in restraint of trade, unlawful within the meaning of Article 608], but they may be unlawful within the meaning of Article 610. [6]

[1] S. D. Art. 390.

[2] [3 Hist. Cr. Law, 202-227.

[3] *Mogul Steamship Company* v. *McGregor*, L. R. 15 Q. B. D. 476. The law of conspiracy was much discussed in this case, which was an interlocutory application for an interim injunction.]

[4] S. D. Art. 391.

[5] R. S. C. c. 131, s. 22; 34 & 35 Vict. c. 31, s. 2.

[6] 52 Vict. (D.) c. 41, s. 6.

[1] No act done for the purposes of a trade combination is unlawful unless such act is an offence punishable by statute.

The expression "trade combination" means any combination between masters or workmen or other persons for regulating or altering the relations between any persons being masters or workmen, or the conduct of any master or workman, in or in respect of his business or employment, or contract of employment or service; and the expression "act" includes a default, breach or omission.

ARTICLE 610.

COMBINATIONS IN RESTRAINT OF TRADE.

[2] Every person who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully,

(*a.*) to unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or

(*b.*) to restrain or injure trade or commerce in relation to any such article or commodity; or

(*c.*) to unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or

(*d.*) to unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property,

Is guilty of a misdemeanor and liable, on conviction,

[1] R. S. C. c. 173, *s.* 13. See 38 & 39 Vict. c. 86, *s.* 3. The defendants, members of a trade union, conspire to injure a non-unionist workman by depriving him of his employment. This is a misdemeanor, and is not for the purposes of their trade combination within the statute: *R.* v. *Gibson* 16 O. R. 704.

[2] 52 Vict. (D) c. 41, *s.* 1.

to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to imprisonment for any term not exceeding two years; and if a corporation, is liable on conviction to a penalty not exceeding ten thousand dollars and not less than one thousand dollars.

[1] ARTICLE 611.

[2] CRIMINAL BREACHES OF CONTRACT.

[3] Every one is guilty of a misdemeanor and liable, on indictment or on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars or to imprisonment for a term not exceeding three months, with or without hard labor, who

(*a.*) wilfully and maliciously breaks any contract made by him, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to endanger human life, or to cause serious bodily injury, or to expose valuable property, whether real or personal, to destruction or serious injury; or

(*b.*) being under any contract made by him with any municipal corporation or authority, or with any company bound, agreeing or assuming to supply any city or any other place, or any part thereof, with gas or water, wilfully and maliciously breaks such contract, knowing or having reasonable cause to believe that the probable consequences of his so doing, either alone or in combination with others, will be to deprive the inhabitants of that city or place, or part thereof, wholly or to a great extent, of their supply of gas or water; or

(*c.*) being under any contract made by him with a railway company, bound, agreeing or assuming to carry Her

[1] S. D. Art. 893 (*a*) and (*b*).

[2] It is not material whether any offence defined in this Article is committed from malice conceived against the person, corporation, authority or company with which the contract is made or otherwise; R. S. C. c. 173, s. 18; 38 & 39 Vict. c. 86, s. 15.

[3] R. S. C. c. 173, s. 15; 38 & 39 Vict. c. 86, ss. 4, 5.

Majesty's mails, or to carry passengers or freight, or with Her Majesty, or any one on behalf of Her Majesty, in connection with a Government railway on which Her Majesty's mails, or passengers or freight are carried, wilfully and maliciously breaks such contract, knowing or having reason to believe that the probable consequences of his so doing, either alone or in combination with others, will be to delay or prevent the running of any locomotive engine, or tender, or freight or passenger train or car, on the railway.

[1] Every municipal corporation or authority or company which, being bound, agreeing or assuming to supply any city, or any other place, or any part thereof, with gas or water, wilfully and maliciously breaks any contract made by such municipal corporation, authority, or company, knowing or having reason to believe that the probable consequences of its so doing will be to deprive the inhabitants of that city or place or part thereof, wholly, or to a great extent, of their supply of gas or water, is liable to a penalty not exceeding one hundred dollars.

[2] Every railway company which, being bound, agreeing or assuming to carry Her Majesty's mails, or to carry passengers or freight, wilfully and maliciously breaks any contract made by such railway company, knowing or having reason to believe that the probable consequences of its so doing will be to delay or prevent the running of any locomotive engine or tender, or freight or passenger train or car on the railway, is liable to a penalty not exceeding one hundred dollars.

### ARTICLE 612.

POSTING UP COPIES OF PROVISIONS RESPECTING CRIMINAL BREACHES OF CONTRACT—DEFACING SAME.

[3] Every such municipal corporation, authority, or com-

[1] R. S. C. c. 173, s. 16.
[2] R. S. C. c. 173, s. 17.
[3] R. S. C. c. 173, s. 19.

pany, shall cause to be posted up at the gas works, or water-works, or railway stations, as the case may be, belonging to such corporation, authority or company, a printed copy of sections 15, 16, 17 and 18 of R. S. C. c. 173, in some conspicuous place, where the same may be conveniently read by the public; and as often as such copy becomes defaced, obliterated or destroyed, shall cause it to be renewed with all reasonable despatch:

Every such municipal corporation, authority or company which makes default in complying with such duty is liable to a penalty not exceeding twenty dollars for every day during which such default continues:

Every person unlawfully injuring, defacing or covering up any such copy so posted up is liable, on summary conviction, to a penalty not exceeding ten dollars.

### [1] ARTICLE 613.

#### INTIMIDATION.

[2] Every one is guilty of a misdemeanor and liable, on indictment or on [3] summary conviction before two justices of the peace, to a fine not exceeding one hundred dollars or to imprisonment for a term not exceeding three months, who, wrongfully and without lawful authority, with a view to compel any other person to abstain from doing anything which he has a lawful right to do, or to do anything from which he has a lawful right to abstain;

(*a.*) uses violence to such other person, or his wife or children, or injures his property;

(*b.*) intimidates such other person, or his wife or chil-

[1] S. D. Art. 393 (*d*).

[2] R. S. C. c. 173, s. 12; 38 & 39 Vict. c. 86, s. 7.

[3] The offender must not be tried summarily if he objects to being so tried, and in that case the justices are to deal with the case as though the offender were charged with an indictable offence; (R. S. C. c. 173, s. 12 (3). No person who is a master, or the father, son or brother of a master, in the particular business incident to which the offence is committed can act as such justice; (R. S. C. c. 173, s. 12 (5). This same provision is in *The Trade Union Act*; (R. S. C. c. 131, s. 21).

dren, by threats of using violence to him, her or any of them, or of injuring his property;

(*c.*) persistently follows such other person about from place to place;

(*d.*) hides any tools, clothes or other property owned or used by such other person, or deprives him or hinders him in the use thereof;

(*e.*) follows such other person, with one or more other persons, in a disorderly manner, in or through any street or road; or

(*f.*) besets or watches the house or other place where such other person resides or works, or carries on business or happens to be.

Attending at or near or approaching to such house or other place as aforesaid, in order merely to obtain or communicate information, is not deemed a watching or besetting within the meaning of this Article.

### ARTICLE 614.

### INTIMIDATION OF ANY PERSON TO PREVENT HIM FROM WORKING AT ANY TRADE.

[1] Every one is guilty of a misdemeanor, and liable to imprisonment for any term less than two years, who, in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business or manufacture, or respecting any person concerned or employed therein, unlawfully assaults any person, or, in pursuance of any such combination or conspiracy, uses any violence or threat of violence to any person, with a view to hinder him from working or being employed at such trade, business or manufacture.

[1] R. S. C. c. 173, s. 9; 24 & 25 Vict. c. 100, s. 41.

## [1] ARTICLE 615.

### INTIMIDATION OF ANY PERSON TO PREVENT HIM DEALING IN WHEAT, ETC.—UNLAWFULLY PREVENTING SEAMEN FROM WORKING.

Every one is guilty of a misdemeanor and liable, on summary conviction before two justices of the peace, to imprisonment, with hard labor, for any term not exceeding three months, who

(*a.*) [2] beats or uses any violence or threat of violence to any person, with intent to deter or hinder him from buying, selling or otherwise disposing of any wheat or other grain, flour, meal, malt or potatoes or other produce or goods, in any market or other place; or

(*b.*) beats or uses any such violence or threat to any person having the charge or care of any wheat or other grain, flour, meal, malt or potatoes, whilst on the way to or from any city, market, town or other place, with intent to stop the conveyance of the same; or

(*c.*) [3] unlawfully and by force or threats of violence, hinders or prevents or attempts to hinder or prevent any seaman, stevedore, ship carpenter, ship laborer or other person employed to work at or on board any ship or vessel, or to do any work connected with the loading or unloading thereof, from working at or exercising any lawful trade, business, calling or occupation in or for which he is so employed; or

(*d.*) [3] beats or uses any violence to, or makes any threat of violence against any such person, with intent to hinder or prevent him from working at or exercising the same, or on account of his having worked at or exercised the same.

[1] S. D. Art. 251.

[2] R. S. C. c. 173, s. 10; 24 & 25 Vict. c. 100, s. 39.

[3] 50 & 51 Vict. (D) c. 49, s. 1; 24 & 25 Vict. c. 100, s. 40.

### ARTICLE 616.

INTIMIDATION OF ANY PERSON TO PREVENT HIM BIDDING FOR PUBLIC LANDS.

[1] Every person is guilty of a misdemeanor, and liable to a fine not exceeding four hundred dollars or to two years' imprisonment, or to both, who, before or at the time of the public sale of any Indian lands, or public lands of Canada, or of any Province of Canada, by intimidation, combination or unfair management, hinders or prevents, or attempts to hinder or prevent, any person from bidding upon or purchasing any lands so offered for sale.

### [2] ARTICLE 617.

BREACHES OF EMPLOYER'S DUTY TO SEAMEN—LEAVING SEAMEN BEHIND.

[[3] Every one commits a misdemeanor who

(*a.*) [4] being the master or other person belonging to any British [5] ship wrongfully forces on shore and leaves behind, or otherwise wilfully and wrongfully leaves behind, in any place on shore or at sea, in or out of Her Majesty's dominions, any seaman or apprentice belonging to such ship before the completion of the voyage for which such person was engaged, or the return of the ship to the United Kingdom [6]; or

(*b.*) [7] who being the master of a British ship,

(i.) discharges any seaman or apprentice in any place

[1] R. S. C. c. 173, s. 14.

[2] S. D. Art. 394.

[3] 17 & 18 Vict. c. 104; R. S. C. c. 74. By section 114 of the latter Act it is provided that offenders may be tried summarily before certain judges and magistrates therein mentioned. As to punishment see Arts. 12 and 17.

[4] R. S. C. c. 74, s. 65; 17 & 18 Vict. c. 104, s. 206.

[5] Any Canadian foreign sea-going ship; R. S. C. c. 74, s. 65.

[6] Canada; R. S. C. c. 74, s. 65.

[7] R. S. C. c. 74, s. 66; 17 & 18 Vict. c. 104, s. 207.

situate [1] in any British possession abroad [2] (except the possession in which he was shipped) without previously obtaining the sanction in writing, endorsed on the agreement of some public shipping master, or other officer duly sanctioned by the local [3] government in that behalf, or (in the absence of any such functionary) of the chief officer of customs resident at or near the place where the discharge takes place;

(ii.) discharges any seaman or apprentice at any place out of Her Majesty's dominions without previously obtaining the sanction so endorsed as aforesaid of the British consular officer there, or, in his absence, of two respectable merchants resident there;

(iii.) leaves behind any seaman or apprentice at any place situate[1] in any British possession abroad [2] on any ground whatever, without previously obtaining a certificate in writing so endorsed as aforesaid, from such officer or person as aforesaid, stating the fact and the cause thereof, whether such cause be unfitness or inability to proceed to sea, or desertion or disappearance;

(iv.) leaves behind any seaman or apprentice at any place out of Her Majesty's dominions, on shore or at sea, on any ground whatever without previously obtaining the certificate endorsed in manner and to the effect last aforesaid, of the British consular officer there, or in his absence, of two respectable merchants, if there are any such at or near the place where the ship then is.

[4] The said functionaries must, and the said merchants may, examine into the grounds of such proposed discharge, or into the allegation of such unfitness, inability, desertion or disappearance as aforesaid in a summary way, and may for that purpose, if they think fit so to do, administer oaths, and may either grant or refuse such sanction or certificate as appears to them to be just.

[1] In the United Kingdom or; R. S. C. c. 74, s. 66.

[2] Other than Canada; R. S. C. c. 74, s. 66.

[3] The word "local" is omitted in the Canadian Act, R. S. C. c. 74, s. 66.

[4] 17 & 18 Vict. c. 104, s. 207.

[1] [Upon the trial of any person for any of the offences in this Article mentioned, it lies upon such person to produce the sanction or certificate above mentioned, or to prove that he had obtained the same previously to having discharged or left behind such seaman or apprentice, or that it was impracticable for him to obtain such sanction or certificate.

[2] ARTICLE 618.

BREACHES OF SHIPOWNER'S DUTY TO SEAMAN UNDER ACT OF THE UNITED KINGDOM—SENDING UNSEAWORTHY SHIPS TO SEA.

[3] Every person commits a misdemeanor

(*a.*) who sends or attempts to send, or is a party to sending or attempting to send a British ship to sea in such unseaworthy state that the life of any person is likely to be thereby endangered, unless he proves that he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving such proof he may give evidence in the same manner as any other witness ;

(*b.*) who being the master of a British ship knowingly takes the same to sea in such unseaworthy state that the life of any person is likely thereby to be endangered, unless he proves that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving such proof he may give evidence like any other witness.

[1] R. S. C. c. 74, s. 67 ; 17 & 18 Vict. c. 104, s. 208.
[2] S. D. Art. 395.
[3] 39 & 40 Vict. c. 80, s. 4.

## ARTICLE 619.

### BREACHES OF SHIPOWNERS' DUTY TO SEAMEN UNDER CANADIAN ACT—SENDING OR TAKING UNSEAWORTHY SHIPS TO SEA.

[1] Every one is guilty of a [2] misdemeanor who sends or attempts to send or is a party to sending a ship, registered in Canada, to sea or on a voyage on any of the inland waters of Canada, or on a voyage from any port or place on the inland waters of Canada to any port or place on the inland waters of the United States, or on a voyage from any port or place on the inland waters of the United States to any port or place on the inland waters of Canada, in such unseaworthy state by reason of overloading or underloading or improper loading, or by reason of being insufficiently manned or from any other cause whatsoever, that the life of any person is likely to be endangered thereby, unless he proves that he used all reasonable means to insure her being sent to sea or on such voyage in a seaworthy state, or that her going to sea or on such voyage in such unseaworthy state was, under the circumstances, reasonable and justifiable; and for the purpose of giving such proof, he may give evidence in the same manner as any other witness.

Every master of a ship registered in Canada is guilty of a [2] misdemeanor who knowingly takes such ship to sea, or on a voyage on any of the inland waters of Canada, or on a voyage from any port or place on the inland waters of Canada to any port or place on the inland waters of the United States, or on a voyage from any port or place in the United States to any port or place on the inland waters of Canada, in such unseaworthy state by reason of overloading or underloading or improper loading, or by reason of being insufficiently

[1] 52 Vict. (D) c. 22, s. 3,

[2] A misdemeanor under this section shall not be punishable upon summary conviction.

manned or from any other cause, that the life of any person is likely to be endangered thereby, unless he proves that her going to sea or on such voyage in such unseaworthy state was, under the circumstances, reasonable and justifiable; and for the purpose of giving such proof he may give evidence in the same manner as any other witness.

No prosecution under this Article shall be instituted except by or with the consent of the Minister of Marine and Fisheries.[1]

[2]ARTICLE 620.

BREACH OF DUTY BY SEAMEN TO EMPLOYERS.

[3] [Every seaman who has been lawfully engaged, and every apprentice to the sea service, commits an offence and is liable, upon summary conviction therefor, to the consequences stated in the schedule hereto, who

(*a.*) deserts his ship [*i.e.* leaves the ship without intention to return and without just cause];

(*b.*) [4] neglects or refuses, without reasonable cause, to join his ship,[5] or is absent without leave at any time within twenty-four hours of the ship's sailing from any port, either at the commencement or during the progress of any voyage, or is absent at any time without leave and without sufficient reason from his ship or from his duty, in a manner not amounting to desertion, or not treated as such by the master;

(*c.*) quits the ship without leave after her arrival at her port of delivery and before she is placed in security;

[1] As to penalty for overcrowding steamboats see R. S. C. c. 78, ss. 51, 52.

[2] S. D. Art. 396.

[3] Any seaman lawfully engaged or bound to any ship registered in any of the Provinces of Quebec, Nova Scotia, New Brunswick, Prince Edward Island or British Columbia, and who has duly signed an agreement as required by this Act, or any apprentice who has executed indentures to the sea service in any of the said Provinces; R. S. C. c. 74, s. 91; 17 & 18 Vict. c. 104, s. 243.

[4] [*Two Sisters*, 2 W. Rob. 125; 24 L. J. (Q.B.) 12.]

[5] Or to proceed to sea or on any voyage in his ship.

[(*d.*) wilfully disobeys any lawful command;

(*e.*) continues wilfully to disobey lawful commands, or continues wilfully to neglect duty;

(*f.*) assaults any master or mate:

(*g.*) combines with any other or others of the crew to disobey lawful commands, or to neglect duty, or to impede navigation of the ship or the progress of the voyage;

(*h.*) wilfully damages the ship, or embezzles or wilfully damages any of her stores or cargo;

(*i.*) commits any act of smuggling [1] whereby loss or damage is occasioned to the master or owner.[2]

[3] SCHEDULE.

| Clause. | Imprisonment with or without hard labor. | Other forfeitures. |
|---|---|---|
| (*a.*) | Not exceeding twelve weeks, and not less than eight weeks with hard labor. | Forfeiture of all or any part of clothes and effects left on board, and of wages or emoluments then earned, also if such desertion takes place abroad (at the discretion of the court) to forfeit all or any part of the wages or emoluments he may earn in any other ship in which he may be employed till his next return to Canada, [4] and to satisfy any excess of wages paid to any substitute engaged in his place at a higher rate. |
| (*b.*) | Not exceeding ten weeks, and not less than four weeks with or without hard labor. | Two days' pay, and for every twenty-four hours absence either a sum not exceeding six days' pay or expense of hiring a substitute. |

[1] Of which he is convicted.

[2] Provision is made for the punishment of like offences in respect to Government vessels by R. S. C. c. 71, s. 8. And by seamen on inland waters by R. S. C. c. 75, s. 18.

[3] The punishments, which are those prescribed in R. S. C. c. 74, s. 91, differ from those prescribed in 17 & 18 Vict. c. 104, s. 243 only in fixing a minimum term of imprisonment.

[4] "The United Kingdom" in 17 & 18 Vict. c. 104, s. 243; "any of the said Provinces" *i.e.* (Quebec, Nova Scotia, New Brunswick, Prince Edward Island and British Columbia) in R. S. C. c. 74, s. 91.

SCHEDULE.

| Clause. | Imprisonment with or without hard labor. | Other forfeitures. |
|---|---|---|
| (*c.*) | None. | Sum not exceeding a month's pay. |
| (*d.*) | Not exceeding four weeks, and not less than two weeks with or without hard labor. | Two days' pay. |
| (*e.*) | Not exceeding twelve weeks, and not less than four weeks with or without hard labor. | Not exceeding six days' pay for every twenty-four hours' disobedience, or expenses of substitute. |
| (*f.*) | Not exceeding twelve weeks, and not less than six weeks with hard labor. | None. |
| (*g.*) | Not exceeding twelve weeks, and not less than six weeks with hard labor. | |
| (*h.*) | Not exceeding twelve weeks, and not less than six weeks with hard labor. | Sum equal to loss sustained out of his wages. |
| (*i.*) | None. | Sum sufficient to reimburse the master or owner for such loss or damage. The whole or a proportionate part of the wages may be retained in satisfaction of or on account of such liability without prejudice to any further remedy. |

## [1] ARTICLE 621.

BREACH OF DUTY OF SEAMEN TO EACH OTHER OR OTHER PERSONS ON BOARD.

[2] Every master of, or seaman or apprentice belonging to, any British [3] ship commits a misdemeanor who by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, does any act tending to the immediate loss, destruction, or serious damage of such ship, or tending immediately to endanger the life or limb of any person belonging to or on board of such ship, or who by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, refuses or omits to do any lawful act proper and requisite to be done by him for preserving such ship from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board of such ship from immediate danger to life or limb. [4]

## [5] ARTICLE 622.

BREACH OF DUTY TO OTHER SHIP IN CASE OF A COLLISION.

[6] In every case of collision between two vessels, it is the duty of the master or person in charge of each vessel, if and in so far as he can do so without danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew, and passengers (if any), such assistance as may be practicable, and as may be necessary in order to save them from any danger caused by the collision; and

[1] S. D. Art. 397.

[2] R. S. C. c. 74, s. 90; 17 & 18 Vict. c. 104, s. 239.

[3] Any ship registered in any of the Provinces of Quebec, Nova Scotia, New Brunswick, Prince Edward Island or British Columbia; R. S. C. c. 74, s. 90.

[4] For like offences by seamen on inland waters, see R. S. C. c. 75, s. 17; and by pilots in charge of vessels, see R. S. C. c. 80, s. 74.

[5] S. D. Art. 398.

R. S. C. c. 79, ss. 10, 11; 36 & 37 Vict. c. 85, s. 16.

also to give the master or person in charge of the other vessel the name of his own vessel, and of her port of registry, or of the port or place to which she belongs, and also the names of the ports and places from which and to which she is bound.

If he fails to do so, and no reasonable cause for such failure is shewn, the collision is, in absence of proof to the contrary, deemed to have been caused by his wrongful act, neglect, or default. Every master or person in charge of a British vessel who fails, without reasonable cause, to render such assistance, or give such information as aforesaid, is guilty of a misdemeanor.]

## CHAPTER LI.

### [1] ADULTERATION OF FOOD.

#### ARTICLE 623.

#### DEFINITIONS.

(*a.*) [2] The EXPRESSION "food" includes every article used for food or drink by man or by cattle;

(*b.*) The expression "drug" includes all medicines for internal or external use for man or for cattle;

(*c.*) [3] Food is deemed to be adulterated.

(i.) if any substance has been mixed with it, so as to reduce or lower or injuriously affect its quality or strength;

(ii.) if any inferior or cheaper substance has been substituted, wholly or in part, for the article;

(iii.) if any valuable constituent of the article has been wholly or in part abstracted;

(iv.) if it is an imitation of, or is sold under the name of another article;

(v.) if it consists wholly or in part of a diseased or decomposed, or putrid or rotten animal or vegetable substance, whether manufactured or not, or in the case of milk or butter, if it is the produce of a diseased animal, or of an animal fed upon unwholesome food;

(vi.) if it contains any added poisonous ingredient, or any ingredient which may render such an article injurious to the health of a person consuming it;

(*d.*) [4] Every drug is deemed to be adulterated,

(i.) if, when sold, or offered or exposed for sale, under

[1] See 38 & 39 Vict. c. 63.
[2] R. S. C. c. 107, s. 2.
[3] R. S. C. c. 107, s. 2 (*e*).
[4] R. S. C. c. 107, s. 2 (*f*).

or by a name recognized in the British or United States Pharmacopœia, it differs from the standard of strength, quality or purity laid down therein;

(ii.) if, when sold, or offered or exposed for sale, under or by a name not recognized in the British or United States Pharmacopœia, but which is found in some other generally recognized pharmacopœia or other standard work on *materia medica*, it differs from the standard of strength, quality or purity laid down in such work;

(iii.) if its strength or purity falls below the professed standard under which it is sold or offered or exposed for sale;

(*e.*) [1] The foregoing definitions do not apply

(i.) if any matter or ingredient not injurious to health has been added to the food or drug because the same is required for the production or preparation thereof as an article of commerce, in a state fit for carriage or consumption, and not fraudulently to increase the bulk, weight or measure of the food or drug, or to conceal the inferior quality thereof, if such articles are distinctly labelled as a mixture, in conspicuous characters, forming an inseparable part of the general label, which shall also bear the name and address of the manufacturer;

(ii.) if the food or drug is a proprietary medicine, or is the subject of a patent in force, and is supplied in the state required by the specification of the patent;

(iii.) if the food or drug is unavoidably mixed with some extraneous matter in the process of collection or preparation;

(iv.) if any articles of food not injurious to the health of the person consuming the same are mixed together and sold or offered for sale as a compound, and if such articles are distinctly labelled as a mixture, in conspicuous characters, forming an inseparable part of the general

[1] R. S. C. c. 107, s. 2 (*g*).

label, which shall also bear the name and address of the manufacturer.

(*f*.) [1] Milk is deemed to be adulterated in a manner injurious to health if any valuable constituent is abstracted therefrom, or if water is added thereto, or if it is the product of a diseased animal or of an animal fed upon unwholesome food.

(*g*.) [2] Vinegar is deemed to be adulterated in a manner injurious to health if any mineral acid is added thereto, either during the process of manufacture or subsequently, or if it contains any soluble salt having copper or lead as a base thereof.

(*h*.) [3] alcoholic, fermented or other potable liquors are deemed to be adulterated in a manner injurious to health if they contain any of the articles mentioned in the [4] note hereto, or any article hereafter designated by the Governor-in-Council. [5]

## ARTICLE 624.

### ADULTERATING FOOD OR DRUG.

[6] Every one who wilfully adulterates any article of food or any drug, or orders any other person so to do, is liable, [7] on summary conviction before two justices of the peace, for the first offence to a penalty not exceeding

[1] R. S. C. c. 107, s. 15.

[2] R. S. C. c. 107, s. 16.

[3] R. S. C. c. 107, s. 17.

[4] Cocculus indicus, chloride of sodium (otherwise common salt), copperas, opium, cayenne pepper, picric acid, Indian hemp, strychnine, tobacco, darnel seed, extract of logwood, salts of zinc, copper or lead, alum, methyl alcohol and its derivatives, amyl alcohol, and any extract or compound of any of the above ingredients: R. S. C. c. 107, sch.

[5] The Act also contains a definition of agricultural fertilizers and of what constitutes adulteration thereof, and a general prohibition of the manufacture, sale, or offering for sale any adulterated agricultural fertilizer. The subject is further dealt with by R. S. C. c. 108, which provides for the inspection of certain fertilizers and contains regulations as to their sale and penalties for offences in respect thereof. The provisions are, however, so special that it is not necessary to embody them in the text.

[6] R. S. C. c. 107, s. 22.

[7] R. S. C. c. 107, s. 30; c. 84, s. 113.

fifty dollars, and not less than ten dollars and costs, and for each subsequent offence to a penalty not exceeding two hundred dollars, and not less than fifty dollars and costs, if such adulteration is injurious to health; and

for a first offence to a penalty not exceeding thirty dollars and costs, and for each subsequent offence to a penalty not exceeding one hundred dollars, and not less than fifty dollars and costs, if such adulteration is not injurious to health.

### ARTICLE 625.

#### SELLING ADULTERATED FOOD OR DRUGS.

[1] Every one who, by himself or his agent, sells, offers for sale, or exposes for sale, any article of food or any drug which is adulterated, is liable, [2] on summary conviction before two justices of the peace, for a first offence to a penalty not exceeding fifty dollars and costs, and for each subsequent offence to a penalty not exceeding two hundred dollars, and not less than fifty dollars and costs, if such adulteration is injurious to health; and

for each such offence to a penalty not exceeding fifty dollars and not less than five dollars and costs, if such adulteration is not injurious to health.

If the person accused proves to the court before which the case is tried that he did not know of the article being adulterated, and shows that he could not, with reasonable diligence, have obtained that knowledge, he is not liable to such penalty, but such articles shall be forfeited under the twenty-first section of [3] *The Adulteration Act.*

### ARTICLE 626.

#### WHEN SELLING SKIMMED MILK NOT AN OFFENCE.

[4] It is not an offence under the article next preceding

[1] R. S. C. c. 107, s. 23.
[2] R. S. C. c. 107, s. 30; c. 34, s. 113.
[3] R. S. C. c. 107.
[4] R. S. C. c. 107, s. 15.

to sell skimmed milk as such if it is contained in cans bearing upon their exterior, within twelve inches of the tops of such vessels, the word "skimmed" in letters of not less than two inches in length, and served in measures also similarly marked, and if such quality of milk has been asked for by the purchaser.

### ARTICLE 627.

#### HAVING ADULTERATED LIQUORS IN POSSESSION.

[1]Every compounder or dealer in, and every manufacturer of, intoxicating liquors, who has in his possession, or in any part of the premises occupied by him as such, any adulterated liquor, knowing it to be adulterated, or any deleterious ingredient specified in the note (') to page 498, or added by the Governor-in-Council, for the possession of which he is unable to account to the satisfaction of the court before which the case is tried, is deemed knowingly to have exposed for sale adulterated food, and is liable, for the first offence, to a penalty not exceeding one hundred dollars, and for each subsequent offence to a penalty not exceeding four hundred dollars.

### ARTICLE 628.

#### ATTACHING FALSE LABEL TO FOOD OR DRUG.

[2]Every person who knowingly attaches to any article of food, or to any drug, any label which falsely describes the article sold, or offered or exposed for sale, is liable to a penalty not exceeding one hundred dollars and not less than twenty dollars and costs.

[1] R. S. C. c. 107, s. 24.
[2] R. S. C. c. 107, s. 25.

## ARTICLE 629.

### OTHER OFFENCES RESPECTING SALE OF MILK.

[1] Every one is guilty of a misdemeanor, and liable, on summary conviction, to a penalty not exceeding fifty dollars, and not less than five dollars, together with the costs of prosecution, and, in default of payment of such penalty and costs, to imprisonment with or without hard labor for a term not exceeding six months, who

(*a.*) [2] sells, supplies or sends to any cheese or butter or condensed milk manufactory, or the owner or manager thereof, or to any maker of butter, cheese or condensed milk, to be manufactured, milk diluted with water, or in any way adulterated, or milk from which any cream has been taken, or milk commonly known as skimmed milk; or

(*b.*) [3] supplies, sends, sells or brings to any cheese or butter or condensed milk manufactory, or to the owner or manager thereof, or to the maker of cheese or butter or condensed milk, any milk to be manufactured into butter or cheese or condensed milk, and keeps back any portion of that part of the milk known as strippings; or

(*c.*) [4] knowingly sells, supplies, brings or sends to a cheese or butter or condensed milk manufactory, or to the owner or manager thereof, any milk that is tainted or partly sour; or

(*d.*) [5] sells, sends or brings to a cheese or butter or con-

[1] 52 Vict. (D.) c. 43. Provisions such as are contained in this Article are not within the legislative authority of a Provincial Legislature; *R.* v. *Wason*, 17 O. R. 58.

The person on whose behalf any milk is sold, sent, supplied or brought to a cheese or butter or condensed milk manufactory for any of the purposes aforesaid, is liable for any such offence.

[2] 52 Vict. (D.) c. 43, s. 1. The fact that the milk, when tested by a competent person by means of a lactometer or cream gauge or some other proper and adequate test is substantially inferior in quality to pure milk, is *primâ facie* evidence that it is diluted, adulterated or skimmed, or that the strippings have been kept back; 52 Vict. (D.) c. 43, s. 7.

[3] 52 Vict. (D.) c. 43, s. 2.

[4] 52 Vict. (D.) c. 43, s. 3.

[5] 52 Vict. (D.) c. 43, s. 4.

densed milk manufactory, or to the owner or manager thereof, or to the maker of such butter or cheese or condensed milk, any milk taken or drawn from a cow that he knows to be diseased at the time the milk is so taken or drawn from her.

# APPENDIX OF NOTES.

## NOTE I.

(TO ARTICLE 30.)

[HARDLY any legal doctrine is less satisfactory than the one embodied in this Article. The rule has been too long settled to be disputed; but on examining the authorities in their historical order, it appears to me to have originated, like some other doctrines, in the anxiety of judges to devise means by which the excessive severity of the old criminal law might be evaded.

The doctrine as it now stands is uncertain in its extent and irrational as far as it goes. It is, besides, rendered nearly unmeaning by the rule that the presumption is liable to be rebutted by circumstances. The first authority on the subject is Bracton, in whose time the more recent doctrine appears to have been unknown. He says:—"Uxor vero furi desponsata, non tenebitur ex furto viri, quia virum accusare non debet nec detegere furtum suum nec feloniam, cum ipsi sui potestatem non habeat, sed vir. Consentire tamen non debet feloniæ viri sui nec coadjutrix esse, sed nequitiam et feloniam viri impedire debet quantum potest. In certis vero casibus de furto tenebitur, si furtum inveniatur sub clavibus uxoris, quas quidem claves habere debet uxor sub custodiâ et curâ suâ. Claves videlicet dispensæ suæ, archæ suæ, et scrinii sui: et si aliquando furtum sub clavibus istis inveniatur, uxor cum viro culpabilis erit. Sed quid si res furtiva in manu uxoris inveniatur, numquid tenebitur vir? Non ut videtur, nisi ei expresse consenserit, vel cum rem ei warrantizaverit cum ipsum vocaverit ad warrantum, et tunc consensisse præsumitur nisi expresse dissentiat, vel nisi de eo præsumatur quod fidelis sit eo quod societatem talis uxoris devitavit in quantum potuit. Item quid erit si uxor cum viro conjuncta fuerit, vel confessa quod viro suo consilium præstiterit et auxilium, numquid tenebuntur ambo? Imo ut videtur, quia vir potest teneri per se cum sit malus, et uxor poterit esse bona et fidelis et liberari. Item uxor mala per se et vir fidelis. Cum ergo uterque possit esse malus per se et alter eorum bonus, ita

[poterit uterque eorum, simul et conjunctim, esse malus sicut bonus. Solutio. Non igitur erit in omni casu uxor deliberanda propter consensum, auxilium et consensum, desicut sunt participes in crimine, ita erunt participes in pœna. Et licet obedire debeat viro, in atrocioribus tamen suis latrociniis ei non erit obediendum. Poterit quidem vir ligare et tenere, et uxor sponte et non coarta occidere, et ita ut videtur tenetur maleficio uterque. De concubina vero, vel familia domus, non erit sicut de uxore. Ipsi vero accusare tenentur, vel a servitio recedere alioquin videntur consentire."

The effect of this passage is that the wife is not bound to accuse her husband, nor is she to be regarded as accessory after the fact to a theft committed by him merely because she receives the stolen goods, though she may be so regarded if she so conducts herself as to shew actual consent to the theft. The passage does not contain a word about her right to steal with impunity in his presence.

The next authority is Assise (27 Edw. 3), which is in these words:— "Un feme fuit arraine de c. q. el aver felon. emble ii s. de pain; q. disq. l le fist per commandem't de celuy qui fuit son baron a cel temps. Et les justices ne voilent prendre pur pite a sa conis, mes pristerent l'enquest; per q. fut trove quel el' le fit per cohersion de son baron maugre le soe. per que el' ala quite, et dit fuit q. p. command de baron sans auter cohersion, ne serra nul manner de felon." &c.

In this case the jury seem to have found actual coercion by the husband. The dictum that the husband's command, he being absent, relieves the wife from guilt is clearly wrong according to more modern authorities. In Fitzherbert's Abridgment (A.D. 1565), Corone, 199, the case in the Book of Assizes is quoted in an abridged form: and Staundforde (A.D. 1583), c. 19, quotes Fitzherbert, but adds a *quære* to the dictum appended to the case, on which Fitzherbert relies. He does not, however, quote the case itself.

Coke (3rd Inst. ch. xlvii. p. 108) says:—"A feme covert committed not larceny if she does it by the coertion of her husband; but a feme covert may commit larceny if she doth it without the coertion of her husband." He quotes 27 Ass. 40, and Staundforde, but does not say that the bare presence of the husband is to be regarded as coercion, and does not notice the dictum as to the husband's command.

Bacon, upon the maxim "Necessitas inducit privilegium quoad jura privata," observes, "the second necessity is of obedience, and therefore where baron and feme commit a felony, the feme can neither be principal nor accessory, because the law intends her to have no will in regard of the subjection and obedience she owes to her husband." For this he quotes the passage in Staundforde already referred to, and Fitzherbert (Corone, 160), which states, as the effect of a case, in 2 Edw. 3, that eight men and a woman being convicted of felony, and the woman declaring that she was the wife of one of the men, and the jury saying they knew nothing of it, the judge inquired of the bishop. Lord Bacon's proposition thus goes infinitely beyond his authorities.

[Dalton (Justice, ch. clvii.) says:—"A feme covert doth steal goods by the compulsion or constraint of her husband. This is no felony in her." And he quotes Fitzherbert and the case quoted by Fitzherbert. He also quotes Bracton in a very unintelligible and fragmentary way, and says that in murder and treason the husband's compulsion does not excuse the wife. As to murder, his authority is Marrow, [1] an author of the time of Henry VII. As to treason he quotes Fitzherbert (Cor. 130). This passage refers to the case of a woman sentenced to be burnt for coining, respited on the ground of pregnancy, delivered of her child, and becoming pregnant again before she was burnt. The case does not say that she was married at all, and rather implies that she was not.

Hale (1 P. C. 45) says:—"If she (the wife) commit larceny by the coercion of the husband, she is not guilty (27 Ass. 40), and according to some, if it be by the command of her husband, which seems to be law if the husband be present, but not if her husband be absent at the time and place of the felony committed."

"But this command or coercion of the husband doth not excuse in case of treason nor of murder, or in regard of the heinousness of those crimes." He quotes for this the passage in Dalton given above and the cases of Arden and Somerville as to treason, and Lady Somerset as to murder. He goes on: "If the husband and wife together commit larceny or burglary, by the opinion of Bracton (lib. iii. ch xxxii. s. 10), both are guilty," (Bracton says nothing of the sort,) "and so it hath been practised by some judges. *Vide* Dalt., *ubi supra*, ch. civ." (Dalton does not say so.) "And possibly, in strictness of law, unless the actual coercion of the husband appears, she may be guilty in such a case; for it may many times fall out that the husband doth commit larceny by the instigation, though he cannot in law do it by the coercion, of his wife; but the latter practice hath obtained, that if the husband and wife commit burglary and larceny together, the wife shall be acquitted, and the husband only convicted; and with this agrees the old book (2 E. 3, Corone, 160). And this being the modern practice, and *in favorem vitæ*, is fittest to be followed: and the rather because otherwise for the same felony the husband may be saved by the benefit of his clergy, and the wife hanged, where the case is within clergy, though I confess this reason is but of small value; for in manslaughter committed jointly by husband and wife the husband may have his clergy, and yet the wife is not on that account to be privileged by her coverture."

"And accordingly in the modern practice where the husband and wife, by the name of his wife, have been indicted for a larceny or burglary jointly, and have pleaded to the indictment, and the wife convicted, and the husband acquitted, merciful judges have used to reprieve the wife before judgment, because they have thought, or at least doubted, that the

[1] Lambard's "Preface" begins, "To write of the office and duties of a justice of the peace, after H. Marrow," is like "bringing owls to Athens." In *Willes* v. *Bridger*, 2 B. & Ald. 282, Marrow is said to have been a Master in Chancery.

[indictment was void against the wife, she appearing by the indictment to be a wife, and yet charged with felony jointly with her husband."

"But this is not agreeable to law, for the indictment stands good against the wife, inasmuch as every indictment is as well several as joint."

This extract probably gives the key to the confusion of the law upon this subject. It was thought hard that a woman should be hanged for a theft for which her husband had his clergy, and accordingly a loophole was devised for married women, similar, as far as theft was concerned, to clergy for men. Hale's remark as to manslaughter shews how incomplete and unsystematic the arrangement was.

Hawkins (1—4) says: If she . . . be guilty of treason, murder *or robbery*, in company with, or by the coercion of, her husband, she is punishable as much as if she were sole." And Blackstone excepts "treason and *mala in se*, as murder and the like."

The recent cases on the subject are referred to in the Illustrations to the Article and in the foot note

Surely, as matters now stand, and have stood for a great length of time, married women ought, as regards the commission of crimes, to be on exactly the same footing as other people. But owing partly to the harshness of the law in ancient times, and partly to its uncertain and fragmentary condition, it is disfigured by a rule which is tolerable only because it is practically evaded on almost every occasion where it ought to be applied.

## NOTE II.

(TO ARTICLE 50.)

In *R.* v. *Welham* (1 Cox, C. C. 193), Mr. Justice Patteson, after consulting Baron Parke, said: "We are both clearly of opinion that there can be no inciting to commit a felony unless the party incited knows that the act in which he is to engage is a felony." Upon this Mr. Greaves (1 Russ. Cr. 84, note (o)) asks: "How can the guilt of the inciter depend upon the state of mind of the incited? The inciting and the intention of the inciter constitute the offence." As I understand the facts of *R.* v. *Welham*, Welham incited Hood to carry off corn which Hood supposed Welham to have a right to carry off. If this were so, Welham's offence, if any, was an attempt to commit a felony by an innocent agent, and not an incitement to commit a felony, which view would justify the language of the two eminent judges. A tells B to put into C's tea something which B supposed to be powdered sugar, but which is really arsenic. This is an attempt by A to murder C, but it is not an inciting B to commit murder.

This view is strengthened by *Williams' Case* (1 Den. C. C. 39), in which it was held that to instigate a person to poison another under such circumstances that the instigator would have been an accessory before the fact if the poison had been given, was not an attempt to administer poison.

## NOTE III.

(TO ARTICLE 182; MAINTENANCE.)

[It is not without hesitation that I have inserted these vague and practically obselete definitions in this book. As, however, maintenance and champerty hold a place in all the text books, I have not thought it proper to omit all notice of them. A full account of the crimes themselves, of the vagueness of the manner in which they are defined, and of the reasons why they have so long since become obsolete, may be seen in the Fifth Report of the Criminal Law Commissioners, pp. 34—9. The Commissioners observe in conclusion: "Prosecutions for offences comprehended under the general head of maintenance are so rare that their very rarity has been a protection against the disapproval of judges, and those alterations which a frequent recurrence of doubt and vexation would probably have occasioned . . . But although no cases have occurred where the doctrine of maintenance has been discussed in the Courts, it is by no means true that this law has not been used as the means of great vexation. Instances of this have fallen within our own professional observation in the case of prosecutions commenced, although not persevered in." The commissioners recommend that all these offences should be abolished. The definition of barratry in particular is so vague as to be quite absurd; and the statutory provision as to attorneys practising after a conviction would be utterly intolerable if it had not been long forgotten. I should suppose that there is no other enactment in the whole statute book which authorizes any judge to sentence a man to seven years' penal servitude after a summary enquiry conducted by himself in his own way.

These offences, as sufficiently appears from the preambles of the various statutes relating to them, are relics of an age when courts of justice were liable to intimidation by the rich and powerful and their dependents. As long as the verdict of a jury was, more or less, in the nature of a sworn report of local opinion, made by witnesses officially appointed to make such reports, intimidation must have been possible, and, in many cases, easy. Many statutes on this subject[1] are still in force, and the law relating to it is to be found in 1 Hawkins, 454. The exceptions to the general rule, that a man is not to assist another in a quarrel in which the maintainer has no interest, are so numerous, and, in some cases, so vague (*e.g.* a man may assist his neighbor from charity), that no less vague proposition than the one in the text would faithfully represent the law.

## NOTE IV.

(TO ARTICLES 200, 201.)

These offences have, at least in modern times, been made the subject

[1] 3 Edw. 1, c. 25; 13 Edw. 1, c. 49; 28 Edw. 1, c. 11; 20 Edw. 3 4; 1 Ric. 2, c. 4; 7 Ric. 2, c. 5; 32 Hen. 8, c. 9.

[of few, if of any, prosecutions. The excessive severity of the judgment for misprision of treason no doubt escaped notice when forfeitures for felony were abolished. The 33 & 34 Vict. c. 23 takes no notice of misprisions.

The definition of misprision of felony is extremely vague. I have found no authority as to what amounts to a concealment. The obligation to discover treason to a judge or magistrate is mentioned by Hale. In early times, when the offence was commoner and more important, the obligation was very clearly set forth. "Si sit aliquis qui alium noverit inde" (*i.e.* of treason) "esse culpabilem, vel in aliquo criminosum, statim et sine intervallo aliquo accedere debet ad ipsum regem si possit, vel imittere si venire non possit ad aliquem regis familiarem et omnia ei manifestare per ordinem. Nec enim debet morari in uno loco per duas noctes vel per duos dies antequam personam regis videat, nec debet ad aliqua negotia quamvis urgentissima se convertere, quia vix permittitur ei ut retro aspiciat." Bracton, Lib. iii., fo. 118 *b*.

## NOTE V.

(TO ARTICLE 218.)

The latter part of this Article is grounded partly upon general considerations and partly upon the case referred to in the Illustrations. Further illustrations of the same principle might easily be given. For instance, the publication of an edition of Juvenal, Aristophanes, Swift, Defoe, Bayle's Dictionary, Rabelais, Brantôme, Boccaccio, Chaucer, etc., cannot be regarded as a crime; yet each of these books contains more or less obscenity for which it is impossible to offer any excuse whatever. I know not how the publication of them could be justified except by the consideration that upon the whole it is for the public good that the works of remarkable men should be published as they are, so that we may be able to form as complete an estimate as possible of their characters and of the times in which they lived. On the other hand, a collection of indecencies might be formed from any one of the authors I have mentioned, the separate publication of which would deserve severe punishment.

In scientific matters the line between obscenity and purity may be said to trace itself, as is also the case in reference to the administration of justice. It may be more difficult to draw the line in reference to works of art, because it undoubtedly is part of the aim of art to appeal to emotions connected with sexual passion. Practically I do not think any difficulty could ever arise, or has ever arisen. The difference between naked figures which pure-minded men and women could criticize without the slightest sense of impropriety, and figures for the exhibition of which ignominious punishment would be the only appropriate consequence, makes itself felt at once, though it would be difficult to define it.

## NOTE VI.

(TO ARTICLES 232-235, 241-2.)

[There is a good deal of difficulty in bringing into a clear and systematic form the provisions of the various statutes relating to the suppression of disorderly houses, and especially gaming-houses. I think, however, that the text represents their effect with substantial accuracy.

The matter stands thus. The earliest Act upon the subject now in force is 33 Hen. 8, c. 9, "An Act for Maintenance of Artillery and Debarring of Unlawful Games." This Act was intended to compel people to practise archery by making all other amusements unlawful, and it accordingly forbids by name bowls, quoits, tennis, and various other games, cards and dice, and all other unlawful games prohibited by any of the statutes which it repealed, as well as all other unlawful games to be subsequently invented. The expression "unlawful games" is nowhere defined, unless it means every amusement except archery.

By the 10 Will. 3, c. 23, lotteries were forbidden. By the 12 Geo. 2, c. 28, "the games of ace of hearts, pharaoh, basset and hazard," were declared to be lotteries, and, as well as what we now call raffles, were forbidden under penalties. By the 13 Geo. 2, c. 19, the same course was taken as to a game called passage, "and all other games invented or to be invented with one or more die or dice," backgammon only excepted. By 18 Geo. 2, c. 34, these enactments were extended to "a certain pernicious game called roulet or roly poly," and that game and "any game at cards or dice, already prohibited by law," were prohibited afresh.

The 8 & 9 Vict. c. 109, repeals so much of the Act of Henry VIII. as relates to games of mere skill, and provides that upon any information or indictment for keeping a common gaming-house "it shall be sufficient to prove" the matter stated in Article 235.

This enactment was passed in order to dispose of doubts that apart from its provisions it would have been necessary to prove that the parties played at one of the games specifically prohibited by the Acts of Geo. II. or at one of the games of chance prohibited by the Act of Henry VIII.

## NOTE VII.

(GENERAL NOTE TO PART V.)

The arrangement of this part, and in particular the composition of Chapters XXII. and XXIII. has been the most difficult portion of the task of preparing this Digest. No one who has not made a special study of the subject, can have any adequate notion of the extreme confusion of the authorities, or of the difficulty of extracting anything systematic and definite from of a number of scattered hints and isolated decisions upon particular cases—mostly relating to the law of homicide. Upon a full

[examination of the authorities on this subject it appeared to me that the law contained in them ought to be divided into four parts; namely:—

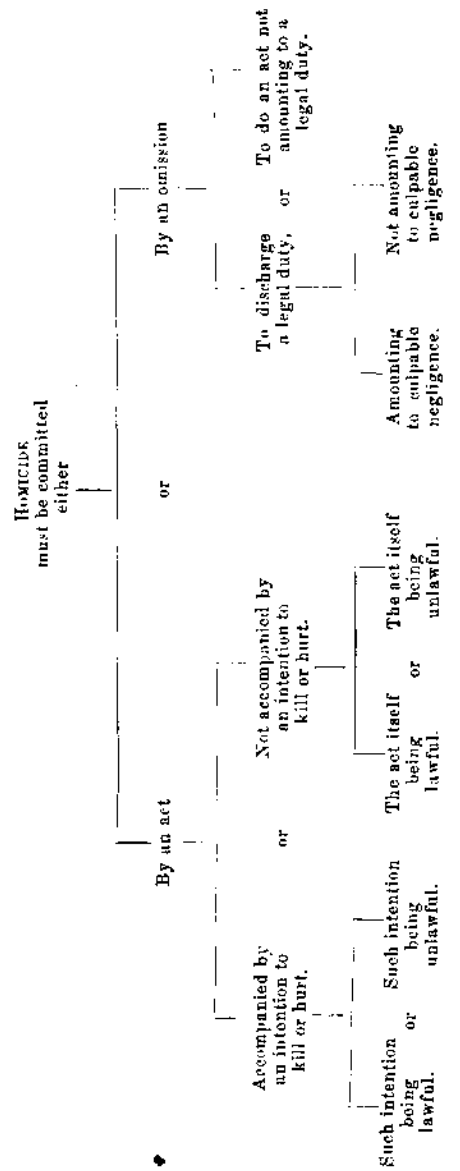
1. Cases in which it is not criminal to inflict death, or bodily harm intentionally. These are the execution of legal sentences, keeping the peace, prevention of crime, self-defence, the use of lawful force, consent and accident. The expression "lawful force" is unavoidably vague. To enumerate every case in which the use of personal violence may be justified would be inconsistent with the scheme of this work. It would, for instance, be going beyond the limits of criminal law to enquire into the extent of the right of correction vested in parents, masters, captains of merchant ships, &c., or of the right of the owner of a personal chattel to take it away from a trespasser, or to try to enumerate all the cases in which civil and criminal process may be executed by the use of force, and the conditions necessary to make it legal. I have accordingly confined myself to the general principles stated in Articles 256-257.

2. Cases in which the infliction of death or bodily harm by omissions is or is not criminal. Injuries caused by the omission to do an act which the negligent person is under a legal duty to do stand on the same footing as injuries caused by unlawful acts. It is, therefore, necessary to define the commoner and more important of the legal duties which tend to the preservation of life. I have, therefore, deduced them in Chapter XXIII. from the different decisions in which a violation of them has been held to occur. Of course the chapter does not contain an exhaustive list of all the duties which might tend to the preservation of life under particular circumstances, though I hope it notices the most important of them.

3. Cases relating to homicide generally and apart from the distinction between murder and manslaughter. Such are the point of time at which a child becomes a human being, the degree of connection between an act and the death caused by it necessary in order to enable us to say that the agent has killed the deceased, and the case in which the act done is not the sole cause of death. Thus, if an unborn child receives an injury of which it dies before it is fully born, the infliction of the injury cannot be either murder or manslaughter. If it dies after it is fully born the infliction of the injury may be either justifiable homicide, accidental homicide, manslaughter, or murder, according to circumstances. This makes it possible to enumerate the cases in which homicide is unlawful, and so to give a specific meaning to the expression "unlawful homicide."

4. The definition of malice aforethought. Unlawful homicide must be manslaughter at least, and may be murder if it is accompanied by malice aforethought; and, after dealing with this, the transition to the less serious bodily injuries, felonious or otherwise, is easy.

When this division of the subject is carried out it looks simple; at least I hope so; but any one who will try the experiment of referring to the authorities will believe me when I assert that it cost me weeks of thought and labor to put the matter in this shape. I believe, however, that it is now not very incomplete.


Homicide must be committed either
By an act
or
By an omission
Accompanied by an intention to kill or hurt.
or
Not accompanied by an intention to kill or hurt.
To discharge a legal duty,
or
To do an act not amounting to a legal duty.
Such intention being lawful.
or
Such intention being unlawful.
The act itself being lawful.
or
The act itself being unlawful.
Amounting to culpable negligence.
Not amounting to culpable negligence.

[The table on p. 511 shews, I think, that every imaginable kind of homicide has been considered, and has been classified as lawful or unlawful in some part or other of Chapters XXII. XXIII. and XXIV. and if this be so the definitions of murder and manslaughter must also be complete.

This table gives seven distinct kinds of homicide, as follows:—

1. Homicide by an act accompanied by a lawful intention to kill or hurt (Chapter XXII.)

2. Homicide by an act accompanied by an unlawful intention to kill or hurt (Article 278 (*a*).)

3. Homicide by an act in itself lawful, and not accompanied by an intention to kill or hurt (Article 266).

4. Homicide by an act in itself unlawful, but not accompanied by an intention to kill or hurt (Article 278 (*c*).)

5. Homicide by an omission to discharge a legal duty amounting to culpable negligence (Chapter XXIII.; Article 278 (*b*).)

6. Homicide by an omission to discharge a legal duty not amounting to culpable negligence (Article 267).

7. Homicide by an omission to do an act not amounting to a legal duty (Article 268).

Of these Nos. 1, 3, 6, and 7 are not unlawful in the sense of being criminal. Nos. 2, 4, and 5 are unlawful. Every act falling within these definitions must be manslaughter at least, and may be murder if it is accompanied by malice aforethought, as defined in the next chapter, and is not provoked.

Unless some kind of homicide can be suggested which is not comprehended in one or other of these classes, the subject is exhausted in these chapters.

## NOTE VIII.

### (Article 279.)

### Definition of Murder and Manslaughter.

This definition represents the solution at which I have arrived after much consideration of one of the most difficult problems presented by the criminal law—the problem of giving in a short compass the result of a great number of decisions and statements by authoritative writers upon the subject of murder.

I do not propose in this note to examine the history of the law on this subject, or to enter into any enquiry as to its merits and demerits. I propose simply to show that it is stated correctly in the text. It will be sufficient for this purpose to show, first, that the definition which I have given coincides with the theory laid down by the authorities on the subject; and secondly, that all the points decided by the various cases relating to any form of homicide are comprehended in what I have said on the subject in the different Articles contained in Chapters XXII.—XXV., both inclusive, for the various decisions in question range over all

[the subjects treated of in those chapters indiscriminately. The first of these points I shall try to establish by showing that my definition of murder and manslaughter respectively will be found upon examination to be equivalent to what is stated in Coke's 3rd Institute, Chapters VII. and VIII., 1 Hale's Pleas of the Crown, pp. 411—502 (Chapters XXXI.—XLII., both inclusive), and Foster's Discourse on Homicide (Crown Law, 255—337). The existing law on the subject is founded mainly upon these works, and the almost innumerable decisions bearing upon the subject are all applications of the theory which is there laid down. The decisions have been collected more or less fully, and arranged in a more or less satisfactory way, by various writers, but for every practical purpose the collection contained in Russell on Crimes is sufficient, though in point of arrangement it is, I think, inferior to the older work of East.[1] It fills 212 pages (640—852) of the first volume of the 5th edition, and 231 pages (667-898) of the 4th edition, to which I refer.

After establishing the correctness of the general definition in the manner already described, I will give an analysis of the collection of cases in Russell, and show how each group of cases is accounted for in the text of the Digest. The intricacy, confusion and uncertainty of this branch of the law may be traced to the statute 23 Hen. 8, c. 1, s. 3, which took away benefit of clergy in cases of "wilful murder of malice prepensed," and which thus created the necessity of preserving the expression, "malice prepense," and at the same time explaining it away. Coke endeavored to effect this by the doctrine of constructive or fictitious malice, of which, if not the author, he was the most conspicuous expounder, and he showed in his exposition of it that utter incapacity for anything like correct language or consecutive thought which was one of his great characteristics. Hale amplifies Coke, Foster rationalizes Hale,

[1] Only two decisions on the subject of the law of murder of any great importance were given between 1865, when the 4th edition of Russell was published, and 1876, when the 5th edition was published. These decisions not having been reported in the ordinary law reports, have not been noticed in the last edition of Russell. They are the cases of *R.* v. *Allen and Others*, the Fenians, tried at Manchester for the murder of the policeman Brett, in 1867, and the case of *R.* v. *Desmond and Others*, for killing people by blowing up the wall of Clerkenwell Prison, in 1868. Neither of these cases is reported in the common reports. I have quoted what was said by Lord Chief Justice Cockburn in *Desmond's Case* in Art. 279, Illust. (8), and I have reprinted in the note next following from the *Times*, the correspondence which passed between the counsel for the prisoner and Lord (then Mr. Justice) Blackburn, in *R.* v. *Allen and Others*. Though not in form it constitutes in fact an argument and a written judgment on a very important point. The difference of ten pages between the collection of cases in the 4th and the collection in the 5th edition of Russell is owing to the circumstance that in the 4th edition a large number of cases are referred to twice over, once in order to show what degree of provocation reduces murder to manslaughter, and again in order to show what amount of provocation justifies a charge of manslaughter as distinguished from murder. A cat is produced twice, first to show the difference between tigers and cats, and again to show the resemblance between cats and tigers.

[and the judges have, in an unsystematic occasional way, worked out, bit by bit, the result recorded in the text.

According to Coke malice aforethought is the criterion by which murder is distinguished from manslaughter. Malice may be either express or implied

[1] "Malice prepensed is where one compasseth to kill, wound, or beat another and doth it *sedato animo*."

[2] "Malice implied is in three cases:—

"First, in respect of the manner of the deed, as if one killeth another without any provocation of the part of him that is slain, the law implieth malice.

"Second, in respect of the person slain. As if a magistrate or known officer, or any other that hath lawful warrant, and in doing or offering to do his office or to execute his warrant, is slain, this is murder by malice implied in law, as the" [3] person killed is "the minister of the king."

"Third, in respect of the person killing. If A assault B to rob him, and in resisting A killeth B (*i.e.* if B resists and A kills him) this is murder by malice implied, albeit he" (A) "never saw or knew him" (B) "before."

These passages, overloaded, as Coke's manner is, with a quantity of loose, rambling gossip, form the essence of his account of murder.

Hale, who arranges his matter more systematically (though he also is exceedingly confused), [4] adopts Coke's theory in slightly different language. "Such a malice, therefore, that makes the killing of a man to be murder is of two kinds: 1. Malice in fact, or 2. Malice in law, or *ex præsumptione legis*."

"Malice in fact is a deliberate intention of doing some corporal harm to the person of another."

"Malice in law, or presumed malice, is of several kinds, viz., 1. In respect of the manner of the homicide, when without provocation. 2. In respect of the person killed, viz., a minister of justice in the execution of his office. 3. In respect of the person killing." (As to which he [5] afterwards repeats Coke in the abridged form.)

Manslaughter, Coke [6] tells us (in the middle of a bewildering chapter about homicide in general) is homicide, "not of malice forethought" but "upon some sudden falling out."

Manslaughter is treated by Hale in a manner so meagre and yet so confused, that no notion of it can be obtained except by reading through Chapters XXXVIII.—XL., and trying to make sense of them. Hale's whole definition of the offence is in these words, "Manslaughter, or simple homicide, is the voluntary killing of another without malice express or implied."

[1] 3rd Inst. 51.
[2] Ibid. 52.
[3] The sentence here is not even grammatical.
[4] 1 Hale, P. C. 451.
[5] Page 465.
[6] 3rd Inst. 55.

[These definitions are open to the remark that the definition of express malice includes all the three cases of implied malice.

Express malice, means the deliberate intentional infliction of bodily harm. Malice is implied if the act is done without provocation, or in resisting an officer of justice, or in committing a crime. But in each of these cases the infliction of bodily harm must be intentional, and there is no reason why in each of them it should not be deliberate.

Thus the distinction between express and implied malice is a distinction without a difference.

It has involved the whole subject in an obscurity from which it can never be rescued except by legislation, though I think the way in which it is stated in the text is correct, and may contribute to dispelling the confusion.

Coke's theory, however, and that of Hale may be exhibited in the following propositions :—

1. Unlawful killing by any sort of premeditated intentional personal violence is murder.

2. Premeditation is to be presumed if the violence is intentional and unprovoked.

3. Unlawful killing by unpremeditated intentional personal violence is murder if the violence is employed in the commission of a crime or in resistance to lawful authority.

4. Unlawful killing by unpremeditated intentional violence provoked is manslaughter.

These four propositions may be also stated thus—so as to shew their connection :

Unlawful killing by any sort of intentional personal violence, is murder, unless such violence is used "upon a sudden falling out," constituting provocation to the offender, but neither the exercise of force by an officer of justice against an offender, nor resistance to the offender by a person against whom a crime is attempted, constitutes such a provocation, and killing in such cases is murder.

That this proposition is the equivalent of the four propositions given above is thus proved :

[1] All intentional violence must be either provoked or unprovoked.

[1] This may be expressed thus in a tabular form :—

| Intentional Violence must be | Premeditated | or | Unpremeditated. |
|---|---|---|---|
| Provoked ..... or | Murder by proposition 1. | | Not murder by proposition 4, except in cases under proposition 3. |
| Unprovoked..... | Murder by proposition 1. | | Murder by proposition 2. |

[All intentional violence must be either premeditated or unpremeditated.

Killing by premeditated intentional personal violence is murder by (1).

Killing by unpremeditated, unprovoked intentional personal violence is, by (2), equivalent to killing by premeditated intentional personal violence, and is therefore murder. Therefore, all killing by intentional personal violence is murder, unless such violence is both provoked and unpremeditated.

By (3) killing by intentional personal violence unpremeditated, and provoked only by the exercise of lawful force in the ways mentioned, is murder.

Therefore the four propositions are equivalent to the one last stated.

The legal character of unintentional killing was held by Coke and Hale to depend on the character of the act by which death was caused. If the act was unlawful the offence was murder. If lawful the death was killing by misadventure, which, in Hale's time, seems to have covered, at all events in part, the ground now occupied by manslaughter by negligence. As to this Hale says:—[1] "Though the killing of another *per infortunium* be not in truth felony, nor subjects the party to a capital punishment * * * though it was not his crime, but his misfortune, yet, because the King hath lost his subject, *and that men may be more careful*, he forfeits his goods, and is not presently absolutely discharged of his imprisonment, but bailed," etc.

Upon the whole, the law as to unlawful homicide, as understood by Coke and Hale (the effect of what they say on justifiable homicide is given in Chapter XXII.) may be summed up as follows:—

Murder is unlawful killing.

(*a.*) by any intentional personal violence not inflicted upon a sudden falling out;

(*b.*) by any unintentional personal violence inflicted in an unlawful act.

Manslaughter is killing by any intentional personal violence inflicted upon a sudden falling out, provided that if a man attempting to commit a crime upon another is resisted, and kills the person resisting, or if a man resists an officer of justice in the exercise of his duty, and kills him, the offence is murder, and not manslaughter, although there is something which may be described as a sudden falling out between the parties.

The following theory was collateral to this definition and was supposed to be its basis:—

In all murder there is malice aforethought. In murder as defined in (*a.*) there is express malice aforethought if the circumstances show premeditation. There is implied malice aforethought if the act was done suddenly, and without provocation.

In murder as defined in (*b.*), and in the proviso to the definition of manslaughter, the malice is always implied.

[1] 1 Hale, P.C. 477.

[In manslaughter there is no express malice aforethought, and it is not thought proper to imply it.

These explanations show the true nature and real use of the expression "malice aforethought"—a mere popular phrase unluckily introduced into an Act of Parliament, and half explained away by the judges. It throws no light whatever on the nature of the crime of murder, and never was used in its natural sense of premeditation. On the other hand, it served as a sort of standing hint at the kind of definition which was wanted, for it was equivalent to saying that there were two degrees of homicide—homicide with premeditation, or other circumstances indicating the same sort of malignity; and homicide provoked by a sudden quarrel, or accompanied with other circumstances indicative of a less degree of malignity.

Foster's discourse on Homicide is little more than an amplification of this thesis. He goes through all the principal cases which have been decided in his time, and compares them with the theories of Hale and Coke, drawing the conclusion that malice means "that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit; * * * a heart regardless of social duty, and fatally bent upon mischief;"[1] a principle more shortly expressed by Holt, L.C.J., in the words, "He that doth a cruel act voluntarily doth it of malice prepensed."[2]

This principle gives its due prominence to a distinction which appears to have been quite unknown to Coke, though it had attracted the attention of Hale, and is, one would think, obvious enough in itself, the distinction, namely, between causing death unintentionally by an act likely to cause death, and causing death unintentionally by an act unlikely to cause death.

According to Coke[3] and Hale[4] a settled design to beat a man makes killing him by such beating murder. Hale, however, seems to doubt whether, if the beating was moderate, the killing might not be manslaughter, and mentions[5] one case in which, a soldier having killed a woman who abused him by throwing a broomstick at her, the judges were divided on the question whether the act was murder or not, and recommended a pardon. This view of the matter is developed at length by Foster, who discusses many cases in connection with it, and may be regarded as having laid the foundation of the modern doctrine on the subject, which has since his time been recognized in a vast number of cases, that the general presumption of malice which arises from the fact

[1] Foster, 256.

[2] *R.* v. *Mawgridge*, Kelyng (3rd ed.), 174. This judgment contains an admirable summary of the law of murder and manslaughter as it was understood in the beginning of the eighteenth century.

[3] 3rd Inst. 50.

[4] 1 Hale, P. C. 472.

[5] 1 Hale, P. C. 456.

[of killing is rebutted if it appear that the means used were not likely to cause death.

Foster to some extent mitigates the barbarous rule laid down by Coke as to unintentional personal violence, by confining it to cases in which the unintentional violence is offered in the commission of a felony. This rule has in modern times had a singular and unexpected effect. When Coke and Hale wrote, the infliction of hardly any bodily injury [1] short of a maim was a felony. Cutting with intent to disfigure was made felony by the Coventry Act; shooting was made felony by what was called the Black Act; and by later statutes it has been provided that the intentional infliction of grievous bodily harm in any way whatever shall be felony (see Article 293). The result is that Foster's rule as to the intent to do grievous, as distinguished from minor, bodily harm being essential to malice aforethought now rests on statutory authority, for no one can intentionally inflict on another grievous bodily harm without committing a felony, and to cause death by a felonious act is murder.

The law as to homicide by omission is more modern, but closely follows the lines of the older part of the law. The authorities on it will be found in the Illustrations.

I now pass to the cases, and propose to shew, by going through the collection contained in 1 Russell, Cr. pp. 667-898, that all the points which have been decided are included in one part or another of the Digest—I hope in a more intelligible order.

Those cases fill the first three chapters of the Third Book, which chapters are entitled :—

1. Of murder; pp. 667-782.

2. Of manslaughter; pp. 783-882.

3. Of excusable and justifiable homicide; pp. 883-898.

Pages 667, 668 contain extracts from the text writers as to malice; as to which see the earlier part of this note, also the rule of evidence embodied in Article 286.

669. Provocation no answer in cases of express malice. Art. 281. Party killing must be a free agent. See Article 27.

670-674. Cases as to the time when a child becomes a human being. Art. 274.

Means of killing :—

675. If probable consequence of act is death, it is murder. Art. 279 (*b.*), (c.), and see Illustration (5).

676. Forcing a person to kill himself is murder. Art. 276 (c.)

677. Harsh treatment of an apprentice. Art. 277 (*b.*) Illustration (1).

678-686. Cases on causing death by omission to supply necessaries, and on the extent of the legal duty of doing so. See Chapter XXIII.

687. Savage animals. Art. 272.

688-699. Homicide by medical men. Art. 273.

699. Lord Hale's *quære* as to infection. Art. 277, note (9).

[1] Cutting out the tongue, or putting out the eyes, was felony by 5 Hen. 4, c. 5.

[700. Year and a day. Art. 277 (*a*.)

700-702. Treatment of wounds being the immediate cause of death. Art. 276. (*a*).

702-703. Killing a person laboring under a disease. Art. 278 (*d*.)

703. Poisoning (superfluous).

703-706. Suicide and accessories to suicide. Art. 283.

706-710. Accessories before and after the fact. See Chapter V.

710. Punishment. Art. 287.

Petit treason abolished (superfluous).

The general part of Chapter I. is followed by seven sections as follows :—

Sect. 1. Provocation ; pp. 711-727.

" 2. Mutual combat ; pp. 727-732.

" 3. Resistance to officers of justice and others ; pp. 732-738.

" 4. Killing in prosecution of an unlawful act ; pp. 739-746.

" 5. Killing in consequence of a lawful act improperly performed ; pp. 747-752.

" 6. Indictment and trial (under which is included the law as to concealment of birth [1]) ; pp. 753-780.

" 7. Judgment and execution ; pp. 780-782.

SECT. 1. *Provocation*—Pages 711-727.

Pages 711-717. Words, &c., no provocation. Art. 280 (*f*.).

712. Act of killing without adequate provocation a form of malice. Art. 279.

Words of menace. Art. 280 (*f*.).

713-716. Provocation by assault. Art. 280 (*a*.). And see Art. 281.

716-727. Intention to kill or do personal bodily harm is one test as to murder and manslaughter. Art. 279 (*a*.).

Much of this is to the same purpose as pp. 713-716. Art. 281.

SECT. 2. *Cases of Mutual Combat*—Pages 727-732.

Page 727. Deliberate duelling is murder. Art. 263.

730-732. Major Oneby's case (and others) ; provocation. Art. 281.

SECT. 3. *Resisting Officers of Justice executing Legal Process.*—Pages 732-738.

Art. 279 (*d*.).

[1] This strange arrangement is suggested by the circumstance that a woman indicted for murder may be convicted of concealment. This is as bad a specimen of arrangement as the introduction of the plea of *autrefois acquit* under the head of burglary. It is fair to say that the credit of these additions is due to the late Sir William Russell, and not to his editors. After all, it is not more surprising than the arrangement (if such it can be called) of the Pandects.

[SECT. 4. *Cases where the killing takes place in the prosecution of some other criminal, unlawful, or wanton act.*—Pages 739-746.

Pages 739-742. Cases in which one person was killed by injury designed for another, Art. 279 (*a.*) and (*b.*); and cases in which death was caused by an injury not intended to cause death, but inflicted in the commission of a felony. Art. 279 (*c.*).

742-746. Cases in which all the persons joining in a common enterprise are responsible for the act of any one. See Chapter V. on accessories.

SECT. 5. *Killing by a lawful act criminally or improperly performed.*—Pages 747-752.

A "lawful act criminally performed" is a contradiction in terms. If a police officer arrests a thief who neither resists nor runs away by giving him a violent blow on the head, it is as absurd to call the blow a "lawful act criminally performed," because the arrest might have been lawfully made, as it would be to call picking a pocket a lawful act criminally performed, because the thief had a right to walk along the street without picking pockets.

A lawful act improperly performed can mean only culpable negligence in the performance of a lawful act. The cases in this section are accordingly superfluous. All of them fall directly under the definitions of murder or manslaughter given in Articles 279, 280. Thus, for example, in *R.* v. *Smith* (p. 749), A shoots B dead for pretending to be a ghost and frightening people. This was held to be murder. It would fall under Articles 278 and 279, thus:—It was unlawful homicide, because the deed was done by an act intended to cause bodily harm not falling within any of the exceptions specified in the Article. The homicide was with malice aforethought, because the intention was (if not to kill) at least to cause grievous bodily harm.

In *R.* v. *Hopley* (751) a schoolmaster was convicted of manslaughter for flogging a boy with extreme severity. Here the homicide was unlawful, because the act which caused death was intended to cause bodily harm, and was not within the exceptions (see particularly Art. 260). If the prisoner had been indicted for murder (as Mr. Greaves thinks he ought to have been, and I agree with him), the question for the jury would have been whether or not his acts were such as, according to common knowledge, would cause death or grievous bodily harm.

SECT. 6. *Indictment, Trial, &c.*—Pages 753-774.

This is foreign to my purpose.

Pages 774-780. Concealment of the birth of children. See Article 292.

SECT. 6. *Judgment and Execution.*—Pages 780-782.

As to judgment, see Articles 287-288.

[Execution is part of the law of procedure; but see S. D. Art. 231 (note 2).

Chapter II. relates to manslaughter; pp. 783-882.

Page 783. The page begins by defining manslaughter (see Art. 279).

The rest of the page is about accessories in manslaughter (see Art. 285).

The rest of the chapter is divided into six sections:—

Sect. 1 Provocation; pp. 784-790.

" 2. Mutual combat; pp. 790-798.

" 3. Resistance to officers of justice, &c.; pp. 798-848.

" 4. Killing by an unlawful act; pp. 849-856.

" 5. Lawful act improperly performed; pp. 856-880.

" 6. Indictment and judgment; pp. 880-882.

The greater part of the matter of these six sections repeats what is contained in the chapter on murder.

SECT. 1. *Provocation.*—Pages 784-790.

This adds nothing to what is said on the same subject in pp. 711-727. See Articles 280-2.

Some cases are referred to in this section which contributed to the establishment of the general rule that to cause death by the infliction of injury intended to cause slight harm only is manslaughter, *e.g.*, A drowns a pickpocket, meaning only to duck him (*Fray's case*, p. 787); A seeing his son bleed from a fight with another boy runs after the other boy and gives him a slight stroke with a stick, which happens to kill him (787; and see Foster, 294, for a careful discussion of the case).

SECT. 2. *Mutual Combat.*—Pages 790-798.

Repeats 727-732. See Art. 256 (*d.*)

Some of the cases referred to in this section relate also to the case of one person being killed by a blow intended for another. See Art. 279 (*a.*)

SECT. 3. *Resistance to Arrest by Officers, &c.*—Pages 798-848.

Nearly the whole of this section is made up of reports of cases on the authority of different persons to arrest in particular cases, on notice, &c. This seems to me to belong rather to the law of civil and criminal procedure than to the criminal law. One point of importance is, however, noticed in Art. 280 (*c.*)

SECT. 4. *Killing in an unlawful, criminal, or wanton act.*—Pages 849-856.

Page 849. One person killed by violence intended for another. See Art. 279.

849-854. Negligent acts. Chapter XXIII., and see Articles 278-279.

855-856. See Art. 266 (iii.)

[Sect. 5. *Killing by a lawful Act improperly performed.*—Pages 856-880.

Pages 856-864. These are cases of excess in the use of force when some force would have been lawful. See Art. 257.

864-880. These are all cases of negligence in doing acts which are or may be dangerous. Art. 272. Pages 877, 878 contain cases relating to the law as to the effect of joint negligence, Art. 276 (*c.*); and at 864 are cases bearing on the degree of remoteness consistent with an act being the cause of death. Art. 275.

Sect. 6. *Indictment and Judgment.*—Pages 880-882.

As to the punishment for manslaughter, see Art. 288. The rest is omitted as belonging to the subject of procedure.

Chapter III. Excusable and Justifiable Homicide.—Pages 883-898.

As the distinction between excusable and justifiable homicide is now unimportant (see 24 & 25 Vict. c. 100, s. 7), I have not noticed it.

Page 884, Sect. 1. Excusable homicide by misadventure, pp. 884-8. See Art. 266.

885-888. Gives over again what is said in 861, &c., as to manslaughter by negligence.

888—892, Sect. 2. Homicide in self-defence. See Art. 256

893—898, Sect. 3. Justifiable homicide. Chapter XXII.

All the cases referred to in Russell on Crimes are thus disposed of in the different Articles of the Digest. Nothing short of studying the contents of these 200 pages can give any one any notion, either of the amount of patient thought and sound good sense which have been employed in the decision of particular cases by many generations of judges, or of the immense amount of material which has been gradually accumulated by reporters, or of the helpless bewilderment, the utter incapacity to take general views, or to see the relation to each other of different principles, or to arrange an intricate question according to the natural distribution of the subject, which characterizes English text writers. The cases above referred to, as they stand in Russell, are like the stores at Balaklava, in the winter of 1854-5. Every thing is there, nothing is in its place, and the few feeble attempts at arrangement which have been made serve only to bring the mass of confusion to light.

## NOTE IX.

(To Articles 280 (*c.*), 281.)

The following correspondence was published in the *Times* of Nov. 21, 1867. It refers to the case of *R.* v. *Allen and Others*, convicted at the Manchester Special Commission of the murder of Brett, a police officer, whom they shot in an attempt to rescue a Fenian prisoner from a police van in

[Manchester. There is no legal report of the case so far as I know, but, as will be seen, the letter of the prisoner's counsel, and the reply of Lord (then Mr. Justice) Blackburn are substantially an argument and a judgment on a matter of very great importance. I have, therefore, republished them from the *Times* with Lord Blackburn's permission.

STATEMENT submitted to Mr. JUSTICE BLACKBURN and Mr. JUSTICE MELLOR.

"REGINA *v.* ALLEN AND OTHERS.

"Upon the trial of Allen and Others for the murder of Sergeant Brett, two points of law arose, under the following circumstances:—

"On the morning of the 11th September last, two men, who turned out afterwards to be Kelly and Deasy, were arrested by a Manchester policeman, as he alleged, under section 216 of the Manchester Police Act (7 & 8 Vict. c. 40), which enacts that it shall be lawful for any constable belonging to the police force of the borough to take into custody, without a warrant, all loose, idle or disorderly persons whom he may find disturbing the public peace, or in his own view committing an offence against this Act, or whom he shall have good cause to suspect of having committed, or being about to commit, any felony, misdemeanor, or breach of the peace, or to instigate or abet any such breach.

"The two men, who gave the names of White and Williams, were taken before a magistrate on the 11th, and remanded until the 18th by a warrant, which stated the charges against them to be, not for suspicion of felony, on which charge they were arrested, but for 'felony,' and omitted to specify what felony, or other offence, they were charged with. They were brought up again on the 18th, when no evidence whatever was given upon the charge on which they were alleged to have been arrested, but an inspector of detectives from London, who stated he had a warrant against Kelly for treasonable practices, alleged to have been committed in Ireland, and a constable from Ireland, who was stated to have a similar warrant against Deasy, appeared, and on their application, without the production of either of the warrants, which, in fact, were not then backed as the statute required, the prisoners were again remanded for a week.

"No warrant for such second remand was produced upon the trial, but it was stated that a warrant had been signed, a copy of that signed on the 11th inst., and had been destroyed by the police after the escape of the prisoners.

"Kelly and Deasy were then placed in the prison van, for the purpose of being taken to prison, and on the way the van was attacked, the prisoners rescued, and Brett killed.

"The two questions were: 1st, whether or not Kelly and Deasy were in legal custody; and 2nd, if they were not in legal custody, whether the crime of killing Brett, in the act of rescuing them, amounted to murder or manslaughter.

[" As to the first point, it would seem (1st) that the magistrate had no jurisdiction to commit for felony, no charge of felony having been made; and (2nd) that the magistrate had no jurisdiction to entertain the charge of treasonable practices committed in Ireland, or to remand the prisoners upon such a charge. By the 11 & 12 Vict. c. 42, s. 22, justices are empowered to take the examination of witnesses against persons who are brought before them charged with an offence alleged to have been committed in any county or place within England and Wales wherein they have not jurisdiction. By sect. 2 of the same Act they are empowered to issue their warrant to apprehend any one within their jurisdiction charged with having committed any crime or offence on the high seas, or in any creek, harbor, &c., or any 'crimes or offences committed on lands beyond the seas for which an indictment may legally be preferred in any place within England or Wales.' By sect. 11, where an English warrant is backed in England, the offender, when apprehended, may be taken before the justice who issues the warrant, or, if so directed by the justice backing the warrant, before such last mentioned justice, or any other justice of the same county or place; but by sect. 12, where an Irish warrant is backed in England, the offender must be taken before the justice who granted the warrant, and there is no power to take him before the magistrate who has backed it. It would seem, therefore, that in this case the proper course would have been, in the case of Deasy, at least, for the magistrate to have backed the Irish warrant, and for the prisoner to have been taken, under the authority of the warrant so backed, to Ireland, and that the magistrate had no jurisdiction to examine any witnesses against Deasy, or to remand him upon the charge of felony.

" Thirdly.—It is laid down in Coke's Second Institute, p. 591, when speaking of prison breaking, that a *mittimus* must 'contain the cause, but not so certainly as an indictment ought, and yet with such convenient certainty as it may appear judicially that the offence (prison breaking), *tale judicium requirit* as *pro altâ proditione*, viz., *in personam domini regis*, *&c.*, or *pro felonid*, viz., *pro morte tali*, &c.;' and he lays it down that a *mittimus pro felonid* generally is bad. So again, Hale (P. C. vol. ii. p. 122), says that a *mittimus* 'must contain the certainty of the cause, and therefore if it be for felony, it ought not to be generally *pro felonid*, but it must contain the especial nature of the felony briefly, as for felony for the death of J. S., or for burglary in breaking the house of J. S., &c., and the reason is because it may appear to the Judges of the King's Bench upon an *habeas corpus* whether it be a felony or not.' Hale, however, adds that he does not think the absence of such particularity would make the warrant void. It is worthy of notice that in the forms of remand given by Chitty in his Criminal Law, vol. iv. pp. 33, 116, and in the form given in the 11 & 12 Vict. c. 42 (Q. 1), the felony is specifically described.

" The second point, which appears to be of the greater importance, looking at the actual direction to the jury, and to the fact that they were not asked to find the existence, contents, or form of the warrant, is

[whether, assuming the detention of one or both of the prisoners to have been illegal, the killing of Brett amounted to murder.

"The first case on the subject is that of Sir H. Ferrers (Cro. Car. 371) who was arrested for debt, and thereupon Nightingale, his servant, in seeking to rescue him, as was pretended, killed the bailiff, 'but because the warrant to arrest him was by the name of Henry Ferrers, Knight, and he never was a knight, it was held by all the Court that it was at variance in an essential part of the name, and they had no authority by that warrant to arrest Sir Henry Ferrers, Baronet, so it is an ill warrant, and the killing of an officer in executing that warrant cannot be murder.' This case is also reported by Sir W. Jones (p. 346), where it is said to have been held not to be murder either in the servant or in the prisoner, because the warrant was not good.

"The next case is that of *Hopkin Hugget*, which was tried in 1666, and is best reported in Kelyng (p. 59; 3 ed. p. 93). In that case, Hugget and three others pursued three constables who had impressed a man, and demanded to see their warrant. The constables showed a paper which the prisoner said was no warrant, and thereupon they drew their swords and Hugget killed one of the constables. Of the twelve judges eight delivered their opinion that this was no murder, but only manslaughter, and they said that if a man be unduly arrested or restrained of his liberty by three men, although he be quiet himself, and do not endeavor any rescue, yet this is a provocation to all other men of England, not only his friends, but strangers also, for common humanity's sake, as my Lord Bridgman said, to endeavor his rescue; and if in such endeavor of rescue they kill any one, that is no murder, but only manslaughter. The four other judges held it murder, and thought the case in question to be much the stronger, because the party himself who was impressed was quiet and made no resistance, and they who meddled were no friends of his or acquaintances, but mere strangers, and did not so much as desire them which had him in custody to let him go. Although all the Judges of the King's Bench thought it murder, they conformed to the opinion of the other eight, and gave judgment of imprisonment for eleven months.

"In *R.* v. *Maugridge*, which was tried in 1707 (Kelyng, 166), the Chief Justice alludes to *Hugget's Case* as having settled the law upon the point.

"In *Tooley's Case* (2 Lord Raymond, 1296), which was tried in 1710, Ann Dakin was in custody of one Bray, when the prisoners, who were strangers to Dakin, assaulted Bray, but withdrew. They afterwards assaulted Bray again, after the woman had been locked up, and killed one Dent, whom Bray had called to his assistance. One of the prisoners gave the stroke, the two others were aiding and abetting. Seven of the twelve judges held this to be manslaughter, and five held it to be murder, one of the five thinking that the constable had authority. Those judges who held the offence to be manslaughter only, so held on the opinion that the prisoners had sufficient provocation, for if, say they, one be im-

[prisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion, much more where it is done under a colour of justice, and where the liberty of the subject is invaded it is a provocation to all the subjects of England.

"In *R.* v. *Adey* (1 Leach, 206), which was tried in 1779, a somewhat similar point arose, and the presiding judge, on the authority of *Tooley's Case*, reserved the point for the consideration of the twelve judges. The prisoner escaped in the riots of 1780, and no judgment was given, but Leach says that it was understood the judges held it to be manslaughter only.

"Again, in *R.* v. *Osmer* (5 East, 304), argued in 1804, Lord Ellenborough, C.J., says, that 'if a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose.'

"In *R.* v. *Phelps* (Car. & M. 180), tried in 1841, a policeman attempted to apprehend a man on suspicion of having stolen growing potatoes. He resisted, and some persons came to his aid and killed one Southwood, whom the policeman had called to his assistance. Upon proof of these facts, Coltman, J., directed the jury that as the policeman had no right to apprehend the man the offence of those who killed Southwood was manslaughter only, and not murder.

"These appear to be the cases bearing most closely on the subject, but turning to the authority of text writers, and the *dicta* of judges, we find Hawkins, in his Pleas of the Crown (Book I. chap. XIII. sec. 60), stating the law as it was laid down in *Hugget's* and *Tooley's Cases*, and adding that 'since in the event it appears that the persons slain were trespassers, covering their violence with a show of justice, he who kills them is indulged by the law, which in these cases judges by the event, which those who engage in such unlawful actions must abide at their peril.'

"Hale (P.C. vol. i. p. 465) also cites *Hugget's Case*, and apparently with approval.

"On the other hand, Foster, J., in his Discourse upon Crown Law (p. 312), while he appears to approve of the law as laid down in *Hugget's Case*, combats the doctrine of the majority of the judges in *Tooley's Case*, and appears to doubt the propriety of that decision, partly upon general principles, and partly because the second assault on the constable seemed to him rather to have been grounded upon resentment or a principle of revenge for what had before passed, than upon any hope or endeavour to assist the woman.

"It is these observations of Foster, J., which Alderson, B., appears to have had in his mind when he is reported to have said in *R.* v. *Warner* (1 Moo. C. C. 385), that *Tooley's Case* had been overruled. *Tooley's Case* had, in fact, no bearing upon *Warner's Case*, in which no attempt was made to arrest the prisoners at all, and Alderson, B., does not refer to any authority for his statement. A similar remark was made by Pollock, C.

[B., in *R.* v. *Davis* (Leigh & Cave, C. C. 71), but there again no authority is given.

"East, in his Pleas of the Crown, vol. i. p. 325, states the question with the arguments on either side, without shewing much leaning either way; and so does Russell (Criminal Law, vol. i. p. 832), although his editor, Mr. Greaves, from his note (p. 848 of the 4th edition), appears to have been convinced by the arguments adduced by Foster.

"It would thus seem that the doctrine laid down by the majority of the judges in the cases of *Ferrers*, *Huggett*, and *Tooley*, has been acted upon, and not only in those cases, but also in *R.* v. *Adey* and *R.* v. *Phelps*, and recognized in *R.* v. *Mawgridge* and *R.* v. *Osmer*, and by Hawkins and Hale.

"The opposite doctrine is supported by a minority of the Judges in *Huggett* and *Tooley's Cases*, and by Foster, J., and receives some sort of sanction from the observations of Alderson, B., and Pollock, C.B., if they can be considered to display a sufficiently accurate knowledge of the subject to entitle them to any weight. This view of the law, however, has never once been acted upon, and it follows that if the prisoners convicted at Manchester be executed without any discussion of the law, they will be put to death in opposition to the decided cases on the subject, upon the authority solely of extra-judicial arguments and *dicta*.

"In some of these arguments a distinction has been taken between the interference of a friend or a relative, and that of a mere stranger; but this distinction does not appear to rest on any authority. Hawkins, in his Pleas of the Crown (Book I. ch. XIII. ss. 56 and 57), says, that 'if a man's servant, or friend, or even a stranger, coming suddenly and seeing him fighting with another, side with him and kill the other—or, seeing his sword broken, send him another wherewith he kills the other—he is guilty of manslaughter only. Yet in this very case, if the person killed were a bailiff, or other officer of justice, resisted by the master, &c., in the execution of his duty, such friend or servant, &c., are guilty of murder, whether they knew that the person slain were an officer or not.'

"For these and other reasons, we are of opinion that the points raised in this case are of such a grave and serious character as to demand further discussion and consideration, and that they ought only to be decided after full and deliberate argument before the Court of Criminal Appeal.

"W. Digby Seymour, Q.C.
"Michael O'Brien, S.L.
"Ernest Jones.
"James Cottingham.
"Lewis W. Cave."

[Reply of Mr. Justice Blackburn.

"*November* 20, 1867.

"Dear Mr. Seymour,

"Mr. Justice Mellor and I have received and carefully pursued the paper signed by you, my brother O'Brien, and Mr. Cave.

"It contains nothing that is new to us, but it puts all the authorities in the light most favourable for your clients, and I need not say that it is a great satisfaction to us to think that nothing has been overlooked which could bear on so grave a question.

"The Legislature have by the 11th and 12th of Victoria, cap. 78, cast upon the presiding Judges the very disagreeable and invidious duty of determining whether their own view of the law at the trial is or is not so questionable as to justify an appeal. If they refuse to reserve any point made, it is still open to the prisoners to appeal to the equitable consideration of the Sovereign, but no appeal lies to any court of law.

"In the present case, my brother Mellor and I considered the points raised before us on the trial, and entertained no doubt that the direction which we then gave was strictly according to law. We, therefore, reserved no question for the Court of Appeal at the time, but simply postponed our final determination on the subject until we had the means of referring to the authorities and considering the case more at leisure. We have now considered the authorities, and have consulted the other Judges, not with a view of dividing our responsibility, nor in order to obtain a judicial opinion from them which they could not give on a point not regularly before them, but because, in a case so serious, we were very anxious to have the best advice and assistance that we could obtain for our guidance. I do not say, that if the result of such consultation and research had been to lead to the conclusion that there was doubt enough to justify a further appeal, it would have relieved us from a most painful responsibility. I regret to say that the result has been to satisfy us that the law is too clear to justifying us in reserving any point for the consideration of the Court of Criminal Appeal.

"Entertaining that opinion, we have officially informed the Secretary of State for the Home Department that there will be no further appeal to a court of law, and that it is now for Her Majesty's Government alone to determine what shall be done with the convicts.

This decision of ours is final; but, as a satisfaction to you and the other Counsel for the prisoners, I will briefly state the reasons which have induced us to think the law too clear for argument.

When a constable, or other person properly authorized, acts in the execution of his duty, the law casts a peculiar protection around him, and consequently, if he is killed in the execution of his duty, it is in general murder, even though there be such circumstances of hot blood and want of premeditation as would in an ordinary case reduce the crime to manslaughter. But where the warrant under which the officer is acting is not sufficient to justify him in arresting or detaining prisoners, or

[there is no warrant at all, he is not entitled to this peculiar protection, and consequently, the crime may be reduced to manslaughter when the offence is committed on the sudden, and is attended by circumstances affording reasonable provocation.

"The cases which you have cited are authorities that where the affray is sudden, and not premeditated, when, as Lord Holt says in *R.* v. *Tooley* (2 Lord Raymond, 1300), 'it is acting without any precedent malice or apparent design of doing hurt,' the mere fact that the arrest was not warranted may be a sufficient provocation.

"But in every one of these cases the affray was sudden and unpremeditated.

"In the present case the form of warrants adopted may be open to objection, and probably might, on application to the Court for a writ of *habeas*, have entitled the prisoners to be discharged from custody; but we entirely agree with the opinion of Lord Hale (2 Pleas of the Crown) that, though defective in form, the gaoler or officer is bound to obey a warrant in this general form, and consequently is protected by it. This is a point which, had the affray been sudden and unpremeditated, we probably should have thought it right to reserve.

"In the present case, however, it was clearly proved that there was on the part of the convicts a deliberate, pre-arranged conspiracy to attack the police with fire-arms, and shoot them, if necessary, for the purpose of rescuing the two prisoners in their custody, and that they were all well aware that the police were acting in obedience to the commands of a justice of the peace, who had full power to remand the prisoners to gaol if he made a proper warrant for the purpose. It was further manifest that they attempted the rescue in perfect ignorance of any defect in the warrant, and that they knew well that if there was any defect in the warrant, or illegality in the custody, that the courts of law were open to an application for their release from custody. We think it would be monstrous to suppose that under such circumstances, even if the justice did make an informal warrant, it could justify the slaughter of an officer in charge of the prisoners, or reduce such slaughter to the crime of manslaughter.

"To cast any doubt upon this subject would, we think, be productive of the most serious mischief, by discouraging the police in the performance of their duties, and by encouraging the lawless in a disregard of the authority of the law.

"We feel bound, under these circumstances, to decline to take a course which might lead to the belief that we considered the matter as open to doubt.

"COLIN BLACKBURN."

## NOTE X.

(TO CHAPTER XXXI.)

LIBEL.

[The statement of the law of libel contained in this chapter is, I believe, complete, though it is very short in comparison to the standard works on the subject.

Folkard's edition of Starkie on Slander and Libel consists of 775 large 8vo pages, besides an appendix of statutes. It contains much other matter besides a definition of the crime of libel; but that definition and the explanation of the offence itself, fill more than 150 pages.

The greater part of this mass of matter consists of illustrations, but something is also due to the singularly complicated manner in which the law has grown up.

The word "malicious" in reference to the offence of libel has been elaborated by the judges into a whole body of doctrine on the subject in the same sort of way as the words "malice aforethought" in the definition of murder.

The process was of this sort. Malice was first divided into malice in fact and malice in law—malice in fact being personal spite, and malice in law being defined to be "a wrongful act done intentionally, and without just cause or excuse."

Inasmuch as the publication of a libel must always be intentional, and inasmuch as the Courts held that to publish defamatory matter of another was, generally speaking, a wrongful act, the result of this was that every publication of defamatory matter was a crime, unless there was some just cause or excuse for it. What amounts to a "just cause or excuse" was decided by a multitude of cases. The phraseology employed in their decision has been as follows. Defamatory matter which it was considered lawful to publish has been described as a "privileged communication." This "privilege" has been regarded as rebutting the presumption of malice arising from the fact of publication; and it has further been divided into absolute privilege and qualified privilege—absolute if it justifies the publication, whatever may be the state of mind of the publisher; qualified if it justifies such publication only under particular circumstances, as, for instance, when the publisher in good faith believes the defamatory matter to be true, when the defamatory matter actually is true, and its publication is for the public good, &c.

The law thus falls into the singular condition of a see-saw between two legal fictions, Implied Malice on the one hand, and privilege absolute or qualified on the other.

I will give a single instance of the intricacy to which this leads. A writes of B. to C., "B. is a thief." Here the law implies malice from the words used. It appears that B was a servant, who had been employed by A, and was trying to get into C's employment, and that A's letter was

[in answer to an enquiry from C. Here the occasion of publication raises a qualified privilege in A, viz., the privilege of saying to C that B is a thief qualified by the condition that A really thinks that he is one, and the qualified privilege rebuts the implied malice presumed from the fact of publishing the defamatory matter. B, however, proves not only that he was not a thief, but that A must have known it when he said that he was. This raises a presumption of express malice, or malice in fact in A, and proof of the existence of express malice overturns the presumption against implied malice raised by the proof of the qualified privilege.

This machinery of express and implied malice and qualified and absolute privilege is only a roundabout and intricate way of saying that as a general rule it is a crime to publish defamatory matter; that there are, however, certain exceptions to that rule by virtue of which it is not a crime to defame a man—

(*a.*) If the defamatory matter is true, and its publication is for the public good.

(*b.*) Although the defamatory matter is false,

(i.) if the libeller in good faith believes it to be true, and publishes it for certain specified reasons.

(ii.) Although he knows it to be false, if he publishes it in a particular character.

By working out this scheme, and stating in general terms that the publication of a libel is always malicious unless it falls within one or more of the specified exceptions, the intricate fictions about malice in law and in fact, and absolute and qualified privilege, may be dispensed with. They are merely the scaffolding behind which the house was built, and now that the house is convenient and proximately complete the scaffold may be taken down.

## NOTE XI.

(TO ARTICLE 355, ON POSSESSION IN RELATION TO THE LAW OF LARCENY).

I do not think it would be possible to assign to the expressions "possession," "actual possession," "constructive possession," "legal possession," senses which would explain and reconcile all the passages in which these phrases occur in works of authority. Some of them indeed are absolutely contradictory. Thus is it said that the taking in larceny must be a taking out of the possession of the owner. It is also said that the owner retains the legal possession notwithstanding the larceny. If both of these propositions were true, it would follow that larceny could never be committed at all. Again, we are told on the other hand that the taking in larceny must be a taking out of the possession of the owner, the inference from which would naturally be that when a thing is out of the owner's possession it cannot be stolen. We are then told, in order to avoid this conclusion, that a thing is always in its owner's possession; so that a box of plate at the bottom of the

[Thames, things of the existence of which the owner is not aware, as money vested in him as executor, and which without his knowledge is in the actual custody of another person,[1] or a dead rabbit in his wood, are all in the owner's possession and capable of being taken out of it. This way of stating the matter makes the assertion that the taking in larceny must be a taking out of the owner's possession insignificant. If, from the nature of the case, every taking must be a taking out of the possession of the owner, it is impossible to see how the takings which do, differ from those which do not, constitute larceny. All men being mortal, it is useless to define an Englishman as a mortal man living in England. However, though it is impossible either to justify the manner in which the word "possession" is used, or to free it entirely from the fictions with which it has been connected, it is, I think, not impossible to define it in such a manner as to express all the distinctions which it is intended to mark in language differing very slightly, if at all, from that which has generally been used upon the subject.

As I have shewn in the articles on theft, and in the notes upon them, there are five different ways in which theft can be committed, viz.:

1. By taking and carrying away goods which do not belong to the thief from any place where they happen to be.

2. By converting property entrusted by the owner to a servant.

3. By obtaining the possession of property (as distinguished from the right of property) from the owner by fraud with intent to convert it.

4. By converting property given by the owner to the thief under a mistake.

5. By converting property bailed to the thief.

It will be found upon consideration that the distinctions between these cases all arise out of the doctrine of possession, but it is, I think, less generally perceived that the important point is not the taking out of the possession of the owner, but the taking into the possession of the thief. The five cases in question may be thus arranged:—

In No. 1 (common larceny) the thief has neither the possession nor the custody of the stolen property at the time when the theft is committed, and it is immaterial whether the owner has it or not.

In No. 2 (larceny by a servant) the thief at the time of his offence may have either the custody or the possession. If he has the custody his offence is theft. If he has the possession his offence is embezzlement.

In No. 3 (larceny by trick) the thief obtains the possession by a mistake, caused by his own fraud.

In No. 4 (larceny by taking advantage of a mistake) the thief receives the possession by a mistake not caused by his own fraud.

[1] A. put 900 guineas in a secret drawer in a bureau and died. B., her son and executor, lent the bureau to his brother C., who took it to India, kept it there for several years, and brought it back. B. then sold it to D., who gave it to E. to repair, who found the money. This was held to be such a taking by E. out of the possession of A. as to constitute larceny; *Cartwright* v. *Green*, 8 Ves. 405.

In No. 5 (larceny by a bailee) the thief receives the possession under a contract of bailment.

Besides this view of the subject the doctrine of possession is important in relation to procedure, and in that case the matter to be considered is not the possession of the thief but the possession of the owner. It is necessary in indictments for theft that the ownership of the stolen property should be correctly stated, and as possession constitutes special ownership (at all events, as against a thief) it is important, with a view to this subject, to understand what possession implies.

Passing from the law upon this subject, let us examine the facts to which the law applies—the different relations which, as a fact, exist between men and things—in reference to the common use of language.

The most obvious case of possession is that of a person who holds something in his hand. But it must appear upon the slightest consideration that neither this nor any other physical act whatever can be accepted as more than an outward symbol of the state of things which the word denotes. Unless the article possessed is very small, part of it only can be held in the hand, trodden on by the foot, or so dealt with by any other part of the possessor's body as to exclude a similar dealing with it by others. It would, however, I think, be felt by every one that neither actual bodily contact with an object, nor even exclusive bodily contact with it, was essential to what, in the common use of language, is meant by possession. No one would think of using different words to express the relation of a man to a coin clenched in his fist, to a pocketbook in his pocket, to a portmanteau of which he carried one end and a railway porter the other, to a carriage in which he was seated whilst his servant was driving it, to a book on the shelves of his library, and to the plate in his pantry under the charge of his butler. He would, in the common use of language, be said to be in possession of all these things, and no one would feel any difficulty in perceiving the correctness of the expression even if it were added that he was not the owner of any one of them, that some had been lent, and others let to hire to him. On the other hand, any one but a lawyer would be surprised at the assertion that a man, whether the owner or not, was in possession of a watch which he had dropped into the Thames, of sheep which had been stolen from his field and driven to a distance by the thief, of a dead grouse which, having been wounded at a distance from his moor, had managed to reach it and die there without his knowledge or that of any other person.

The common feature of all the cases to which the word "possession" would obviously be applicable is easily recognized. It is to be found in the fact, that the person called the possessor has in each instance the power to act as if he were the owner of the thing possessed, whether he actually is the owner or not. Several of the illustrations given, however, shew that though this is one of the things which the word conveys, it is not the only thing conveyed by it. The butler in charge of the plate, the porter helping to carry the portmanteau, the

[coachman who is driving the coach, have the physical power of acting as the owner of those things as much as their master or employer. Indeed, in two of the three cases their physical control over the object is more direct than his. The difference is that the circumstances are such as to raise a presumption that their intention is to act under the orders of their superior, and that he (at least for the present) has no definite superior whose orders he intends to obey. Take, for instance, the case of a dinner party; there is no visible difference between the master of the house and his guests; each uses the article which he requires for the moment, and they are, from time to time, removed from place to place by the servants; as, however, the master retains throughout not merely the legal right to dispose of them absolutely, but the immediate means of enforcing that right if from any strange circumstance it should become necessary to do so, the assertion that the plate is in his possession, and that his guests and servants have merely a permission to use it under his control, has a plain meaning; nor would that meaning be altered or obscured if the fact were added that the plate did not belong to the master of the house, but was hired by him for the occasion. Indeed, if he had stolen the plate, or received it knowing it to be stolen, the fact denoted by the word "possession" would remain. These illustrations, which might be multiplied to any extent, appear to me to shew clearly that possession means, in the common use of language, a power to act as the owner of a thing, coupled with a presumable intention to do so in case of need; and that the custody of a servant, or person in a similar position, does not exclude the possession by another, but differs from it in the presumable intention of the custodian to act under the orders of the possessor with reference to the thing possessed, and to give it up to him if he requires it. Thus far, I think, my definitions correspond with the common use of language, though of course popular language upon such a subject is not, nor is there any reason why it should be, minutely exact.[1]

I will now compare it with the way in which the word is used by legal authorities. I know of no set dissertations on the subject of the use of the word "possession" in English law like those which are to be found in abundance upon the corresponding word in Roman law. It would be an endless and a useless labour to go through the cases in which the word has been used, endless on account of their great number, useless because it is the characteristic of English judges to care little for technical niceties of language in comparison with substantial clearness of statement in reference to the actual matter in hand. Upon such a matter as this accordingly, it is better to consider the different authorities in groups than individually.

[1] This view was suggested by a study of Savigny's Recht des Besitzes, which, however, deals with many topics to which nothing in English law corresponds. Mr. George Long's article on "Possessio" in the Dictionary of Greek and Roman Antiquities contains the substance of Savigny in a very convenient form. Mr. Hunter's Roman Law, pp. 193-222, may also be consulted.

[Possession (in reference to the subject of theft) is usually divided into two branches—actual possession and constructive possession.

It seems to have been pretty generally assumed that the words "actual possession" were sufficiently plain for practical purposes without further explanation; but it would be easy to show, by a multitude of cases, that actual possession differs from possession as I have defined it only in one point. It is usual to say that a thing in the possession of a servant on account of his master is only constructively in the possession of the master. But the expression "constructive possession" has another meaning besides this. As it was considered necessary that a thing stolen should be taken out of the possession of the owner, and as in very many instances goods are stolen which are not in any natural sense in the possession of any one whatever, it has become a maxim that goods are always in the possession of the owner; if not in his actual, then in his constructive possession, or, as it is sometimes called, in his legal possession.

Thus, constructive possession means:—

1. The possession of goods in the custody of a servant on account of his master; and

2. The purely fictitious possession which the owner of goods is supposed to have, although they are in reality possessed by no one at all.

The phrase thus appears to me to be objectionable, not only because it is ambiguous, but because, in the first of its two senses, it conceals a truth, whilst in the second it needlessly conveys a false impression. The truth concealed is that a man may have, and may intend to use, the power implied in the word "possession," although he acts through a servant. The false impression conveyed is that things cannot be out of possession, or, that if they are, they cannot be stolen.

I avoid this by abstaining altogether from the use of the expression "constructive possession." In "possession" I include that which has to be exercised through a servant, and my language implies that a person may commit theft on objects which are not in the possession of any one at the time of the theft. The existing law may by these means be expressed in well recognized and established phraseology, without any resort to legal fictions.

The point upon which the most subtle questions as to possession arise is the distinction between theft and embezzlement—a perfectly useless distinction, no doubt, and one which the legislature has, on two separate occasions, vainly tried to abolish. So long, however, as it is allowed to exist, it is necessary to understand it.

I have already explained how a man may retain the possession of a thing of which he gives his servant the custody. He retains a power over the thing which is not the less real or effective because he has to exercise it through the will of another person, who has undertaken to be the instrument of his will. Suppose, however, that instead of the master's having given his horse to his groom or his plate to his butler, a horse-

[dealer has delivered the horse to the groom, or a silversmith has delivered plate to the butler for his master; I should have thought that there was no real difference between these cases; that inasmuch as the servant in each case was acting for the master in the discharge of a duty towards him, and under an agreement to execute his orders, the master would come into possession of the horse or the plate as soon as his servant received it from the dealer or the silversmith, just as he remains in possession of the horse or the plate when he gives the custody of it to his groom or his butler. I should also have thought that the servant who appropriated his master's property to his own use, after receiving it from another on his master's account, was for all purposes in precisely the same position as the servant who did the same thing after receiving it from his master. The Courts, however, decided otherwise. They have held on many occasions that, though the master's possession continues when he gives the custody of a thing to his servant, it does not begin when the servant receives anything on account of his master; on the contrary, the servant has the possession, as distinguished from the custody, until he does some act which vests the possession in his master, though it may leave the custody in himself. If during that interval he appropriates the thing, he commits embezzlement. If afterwards, theft. The most pointed illustration of this singular doctrine which can be given occurs in the case of *R.* v. *Reed* (Dear. 257). B. sent A. his servant, with a cart to fetch coals. A. put the coals into the cart, and on the way home sold some of them and kept the money. A. was convicted of larceny, and the question was whether he ought to have been convicted of embezzlement. It was held that the conviction was right, because though A. had the custody of the cart all along, yet the possession of it and its contents was in B., and though A. had the possession of the coals whilst he was carrying them to the cart, that possession was reduced to a mere custody when they were deposited in the cart, so that A.'s offence was larceny, and not embezzlement, which it would have been if he had misappropriated the coals before they were put into the cart.

These explanations will, I hope, render the article in the Digest intelligible. In order to justify it legally, it is necessary to state the manner in which I arrived at it. I examined a large number of cases, of which I have put eleven in the form of illustrations to the article. In some of these cases it was decided that the offence was theft; in others that the offence was embezzlement. I have assumed (as I was entitled to do, as appears from the explanations given above) that whenever an offence was held to be theft the property stolen was in the possession of the owner or master, although it might be in the custody of a guest or servant; and that whenever the offence was held to be embezzlement the property embezzled was in the possession, as distinguished from the custody, of the servant. I might easily have enlarged the number of illustrations to any conceivable extent; but if those given are not enough to make the matter plain, I despair of making it plain or understanding it.

[and I do not wish to make it darker than it is. It is, perhaps, just worth while to add once more, that I am in this work merely stating, and not attempting to justify, the law. The technicalities on this subject appear to me to be altogether superfluous, and I think they might be easily dispensed with by re-defining the offence of theft, or even by removing the distinction between theft, embezzlement, and false pretences.]