

CHAPTER XVI.

*ESCAPE—RESCUE—PRISON BREACH—MISPRISONS—COM-
POUNDING OFFENCES—TAKING OR ADVERTISING REWARDS
FOR RECOVERY OF STOLEN PROPERTY,*¹ ARTICLE 185.VOLUNTARY PERMISSION BY OFFICERS OF ESCAPES BY
PRISONERS.

[EVERY one who knowingly, and with an intent to save him from trial or execution, permits any person in his lawful custody to regain his liberty, otherwise than in due course of law, commits the offence of voluntary escape; and

is guilty of high treason if the escaped prisoner was in his custody for and was guilty of high treason; and

becomes an accessory after the fact to the felony of which the escaped prisoner was guilty, if he was in his custody for and was guilty of felony; and

is guilty of a misdemeanor if the escaped prisoner was in his custody for and was guilty of a misdemeanor.

³ ARTICLE 186.NEGLIGENT PERMISSION BY OFFICERS OF ESCAPES BY
PRISONERS.

⁴ Every one is guilty of the misdemeanor called negli-

¹ S. D. Art. 143.

[² Hawk. P. C. 192, 196, 197; 1 Russ. Cr. 568. It does not appear what is the effect of voluntarily permitting the escape of a man lawfully charged, but innocent in fact. Draft Code, s. 138.]

³ S. D. Art. 144.

⁴ [1 Hale, P. C. 602; 2 Hawk. P. C. 194 (speaks doubtfully as to the second paragraph). Cf. Draft Code, s. 140.]

[gent escape who, by the neglect of any duty, or by ignorance of the law, permits a person in his lawful custody to regain his liberty otherwise than in due course of law.

The person escaping is deemed to have regained his liberty as soon as he gets out of sight of the person from whom he escapes, and not before.

¹ ARTICLE 187.

RESCUE DEFINED.

²Rescue is the act of forcibly freeing a person from custody against the will of those who have him in custody. If the person rescued is in the custody of a private person, the offender must have notice of the fact that the person rescued is in such custody.

³ ARTICLE 188.

QUALITY OF OFFENCE OF RESCUE.

⁴Every one commits high treason, felony, or misdemeanor who rescues a prisoner imprisoned on a charge of, or under sentence for, high treason, felony, or misdemeanor respectively.]

⁵ ARTICLE 189.

FELONIOUS RESCUES—PUNISHMENT.

⁶Every one who feloniously rescues any prisoner is liable to seven years' imprisonment, when no special punishment is otherwise provided by statute.

¹S. D. Art. 145.

²[1 Russ. Cr. 582; 2 Hawk. P. C. 201.]

³S. D. Art. 146.

⁴[1 Hale P. C. 696; 1 Russ. Cr. 583-4. Draft Code, s. 136.]

⁵S. D. Art. 147.

⁶R. S. C. c. 155 s. 1; 1 & 2 Geo. 4. c. 88 s. 1.

¹ ARTICLE 190.

RESCUING MURDERERS.

² [Every one commits felony and is liable] to seven years' imprisonment, [who by force sets at liberty, rescues, or attempts to rescue, or set at liberty, any person out of prison, committed for or found guilty of murder, or rescues or attempts to rescue any person convicted of murder, going to execution or during execution.

³ ARTICLE 191.

BREAKING PRISON.

⁴ Every one commits felony who, being lawfully detained on a charge of, or under sentence for, treason or felony, breaks out of the place in which he is so detained, against the will of the person by whom he is detained.

The expression "breaks out" means an actual breaking of the place in which the party is confined, whether intentional or not.

Illustrations.

(1.) ⁵ A, lawfully confined in prison under a charge of felony, climbs over the prison wall and escapes. A has not committed an offence within this Article.

(2.) ⁶ On the top of the prison wall loose bricks are arranged so as to fall if disturbed. In climbing over the wall A accidentally disturbs and

¹ S. D. Art. 148.

² 25 Geo. 2 c. 37 s. 9. I have left this provision in the text though it is not clear that it would be held to be in force in Canada.

The punishment in England was reduced from death to penal servitude for life by 7 Wm. 4 & 1 Vict. c. 91. In the Provinces other than British Columbia and Manitoba, the punishment would, if the act were held to be in force, be death unless it is reduced to imprisonment for life by R. S. C. c. 181 s. 24 (Art. 17) or to seven years by R. S. C. c. 155 s. 1. See Draft Code, s. 135.

³ S. D. Art. 153.

⁴ [2 Hawk. P. C. 183-189; 1 Russ. Cr. 577-581. There is a good deal of learning on the subject founded on 1 Edw. 2, st. 2, "De frangentibus prisonam," but it is mostly practically obsolete. This statute is not mentioned in the Revised Statutes. Draft Code, s. 132.

⁵ R. v. *Hanvell*, R. & R. 458.] But it might be an offence within Art. 192 or 195.

[throws down one of them. A has committed an offence within this Article.]

¹ ARTICLE 192.

PUNISHMENT OF CERTAIN ESCAPES, RESCUES, &c.

Every one who escapes from or rescues, or aids in rescuing, any other person from lawful custody, or makes or causes any breach of prison, if such offence does not amount to felony, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.

³ ARTICLE 193.

ASSISTING ESCAPE OF PRISONERS OF WAR.

⁴[Every one commits felony and is liable] to imprisonment for life (probably) who

[(a.) assists any alien enemy of Her Majesty, being a prisoner of war in Her Majesty's dominions, whether such prisoner is confined as a prisoner of war in any prison or other place of confinement, or is suffered to be at large on his parole in Her Majesty's dominions or in any part thereof, to escape from such prison or place of confinement, or from Her Majesty's dominions, if at large on his parole; or

(b.) who (owing allegiance to Her Majesty) after any such prisoner as aforesaid has quitted the coast of any part of Her Majesty's dominions in such his escape, knowingly and wilfully upon the high seas aids or assists such prisoner in his escape towards any other dominions or place.]

¹ S. D. Art. 152.

² R. S. C. c. 155 s. 2. 2 Hawk. P. C. 182. Draft Code ss. 133, 134.

³ S. D. Art. 149.

⁴ 52 Geo. 3, c. 126, ss. 1, 2, 3. The punishment prescribed by the Act is transportation for life or fourteen or seven years. I have assumed that R. S. C. c. 181, s. 24 (Art. 17), would apply to such a case.

ARTICLE 194.

UNLAWFULLY DIRECTING OR PROCURING DISCHARGE OF PRISONER.

¹ Every one is guilty of a misdemeanor, and liable to imprisonment for any term less than two years, who, knowingly and unlawfully, under color of any pretended authority, directs or procures the discharge of any prisoner not entitled to be so discharged.

The person so discharged is held to have escaped.

ARTICLE 195.

ESCAPING, ETC., FROM A PENITENTIARY.

² Every one is guilty of felony and liable to two years' imprisonment in case (a.), to three in case (b.), to one in case (c.), and to five in cases (d.), (e.) and (f.);

(a.) who being a prisoner ordered to be detained in any penitentiary, escapes from the person or persons having the lawful custody of him, when being conveyed thereto, or when being conveyed from one penitentiary to another;

(b.) who being a prisoner in a penitentiary, breaks prison or escapes, or attempts to escape from the custody of any officer, guard or other servant of the penitentiary while at work, or passing to or from work, either within or beyond the prison walls or penitentiary limits;

(c.) who being a prisoner in any penitentiary, at any time attempts to break prison, or who forcibly breaks out of his cell, or makes any breach therein with intent to escape therefrom, whether successful or not;

(d.) who rescues or attempts to rescue any prisoner while being conveyed to any penitentiary, or while imprisoned therein, or while being conveyed from one peni-

¹ R. S. C. c. 155, s. 8.

² R. S. C. c. 155, ss. 3, 4, 5, 6, 7. 1 & 2 Vict. c. 82, ss. 12, 13; 5 & 6 Vict. c. 29, ss. 24, 25; 6 & 7 Vict. c. 26, ss. 22, 23; 23 & 29 Vict. c. 126, s. 37.

tentiary to another, or while passing to or from work at or near any penitentiary ; or

(e.) who by supplying arms, tools or instruments of disguise, or otherwise in any manner aids any such prisoner in any escape or attempt at escape ; or

(f.) who having the custody of any such prisoner, or being employed as a keeper, turnkey, guard or assistant, by the person having such custody, knowingly and wilfully allows such prisoner to escape.

ARTICLE 196.

KEEPERS, ETC., CARELESSLY ALLOWING PRISONERS TO ESCAPE FROM A PENITENTIARY.

¹ Every one is guilty of a misdemeanor, and liable to fine or imprisonment, or to both, in the discretion of the court, who, having the custody of any prisoner ordered to be detained in any penitentiary, or being employed as a keeper, turnkey, guard or assistant by the person having such custody, carelessly allows any such prisoner to escape.

ARTICLE 197.

ESCAPING, ETC., FROM A REFORMATORY.

² Every one who, being sentenced to be detained in any reformatory prison or reformatory or industrial school, escapes therefrom, may, at any time before the expiration of his term of detention, be apprehended without warrant, and brought before any justice of the peace or magistrate, who, on proof of his identity, must remand him to such prison or school, there to serve the remainder of his original sentence, with such additional term, not exceeding one year, as to such justice or magistrate seems proper.

¹ R. S. C. c. 155, s. 7.

² R. S. C. c. 155, s. 9.

¹ Every one is liable, on summary conviction before two justices of the peace, to a penalty not exceeding eighty dollars, or to imprisonment with or without hard labor for any term not exceeding two months, who

(a.) knowingly assists, directly or indirectly, any offender detained in a reformatory prison or reformatory or industrial school, to escape from such prison or school; or

(b.) directly or indirectly induces such an offender to escape from such prison or school; or

(c.) knowingly harbors, conceals or prevents from returning to the prison or school, or assists in harboring, concealing or preventing from returning to the prison or school, any offender who has escaped from such prison or school.

ARTICLE 198.

PUNISHMENT OF PRISONERS WHO ESCAPE.

² Every one who escapes from imprisonment must, on being retaken, undergo, in the prison he escaped from, the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape; and any imprisonment awarded for such offence may be to the penitentiary or prison from which the escape was made.

³ ARTICLE 199.

TRANSPORTS OR PERSONS SENTENCED TO PENAL SERVITUDE BEING AT LARGE.

⁴ [Every one commits felony and is liable, upon conviction thereof, to be kept in penal servitude for life, and

¹ R. S. C. c. 155, s. 10.

² R. S. C. c. 155, s. 11.

³ S. D. Art. 135.

⁴ [5 Geo. 4, c. 84, s. 22. Punishment altered by 4 & 5 Will. 4, c. 67] and by 20 & 21 Vict. c. 3. The punishment defined in the Article is that to which the offender would now be liable if tried in England. Draft Code, s. 130.

[to be previously imprisoned with or without hard labor for any term not exceeding four years,

(a.) who having been sentenced or ordered to be transported, or kept in penal servitude, or having agreed to transport himself on certain conditions, either for life or for any number of years] according to the provisions of the Act of the United Kingdom, 5 Geo. 4, c. 84, or any other Act therein mentioned [is afterwards at large within any part of Her Majesty's dominions, without some lawful cause, before the expiration of the term for which he was ordered to be transported or kept in penal servitude, or agreed to transport himself;

¹ (b.) who aids, abets, counsels, or procures the commission of the offence defined in clause (a).]

² ARTICLE 200.

MISPRISION OF TREASON:

³ Every one who knows that any other person has committed high treason, and does not within a reasonable time give information thereof to a judge of assize, or a justice of the peace, is guilty of misprision of treason, and must upon conviction thereof be sentenced to imprisonment for life, and to forfeit to the Queen all his goods and the profits of his lands during his life.

⁴ ARTICLE 201.

MISPRISION OF FELONY.

⁵ Every one who knows that any other person has committed felony and conceals or procures the concealment thereof, is guilty of misprision of felony, and upon con-

¹ 4 & 5 Will. 4, c. 67.

² S. D. Art. 156.

³ [1 Hawkins, P. C. 60. As to punishment, ii. 630; 1 Hale, P. C. 371-74. See Appendix Note IV. Cf. Draft Code, s. 18.]

⁴ S. D. Art. 157.

⁵ [1 Hawkins, P. C. 73. See Appendix, Note IV.]

[viction thereof the offender, if a sheriff, coroner, or their bailiff,¹ "shall have one year's imprisonment and after "make a grievous fine" at the discretion of the² court, and if they "have not whereof they shall have imprisonment of³ three years."

In other cases the offender is guilty of a misdemeanor.⁴

⁵ ARTICLE 202.

AGREEMENT NOT TO PROSECUTE.

⁶ Every one commits a misdemeanor who, in respect of any valuable consideration, enters into an agreement not to prosecute any person for felony, or to show favor to any person in any such prosecution.

¹ [3 Edw. 1, c. 9.

² The words "at the king's pleasure," mean this; see 1 Hale, P. C. 375.

³ Others read "four." See Revised Statutes.]

⁴ The rule that when one has suffered from a felony he cannot maintain against the felon a civil action for the injury until he has discharged his duty to the public by carrying on, or at least setting on foot, a criminal prosecution for the public wrong is, according to Bishop, founded upon the fact that his neglect to prosecute the criminal, or to discover his offence to the magistrate, is misprision of felony, and that until he discharges this duty he does not come into court with "clean hands." The result he says is the same whether the proposition assumes the form in which he states it, or the similar form that it wears in most of the English cases, namely, that the policy of the law requires this stimulant to induce men to bring felons to justice. 1 Bish. Cr. L., ss. 267, 274. In *Schohl v. Kay*, 5 Allen 244, and *Livingstone v. Massey*, 23 U. C. Q. B. 156, nonsuits were directed to be entered, the evidence showing that the defendants had committed felonies, and had not been proceeded against therefor. That was the course adopted in *Wellcock v. Constantine*, 2 H. & C. 146; but in that case a felony was set out on the face of the declaration, and yet the correctness of the decision was questioned in *Wills v. Abraham*, L. R. 7 Q. B. 554, where the question is discussed at considerable length. And see *Midland Ins. Co. v. Smith*, L. R. 6 Q. B. D. 561; *Brown v. D'Arcy*, L. R. 10 Q. B. D. 412; *Appleby v. Franklin*, L. R. 17 Q. B. D. 93; *Taylor v. McCullough*, 8 O. R. 309.

In many cases the Legislature in creating or defining offences has provided that any remedy which any person aggrieved by any such offence might otherwise have had should not be affected. The following are instances:—

R. S. C. c. 22, s. 72 (Arts. 160, 161).

R. S. C. c. 164, s. 14 (2) (Arts. 399, 400); s. 20 (2) (Arts. 412-414); s. 55 (2) (Art. 431); s. 72 (Arts. 432, 477-483); s. 31 (3) (Art. 455); s. 95 (2) (Art. 460); s. 97 (2) (Art. 456).

R. S. C. c. 168, s. 42 (2) (Art. 599).

R. S. C. c. 172, s. 14 (Arts. 604-607).

51 Vict. (D.) c. 41, s. 20 (Arts. 524-529).

⁵ S. D. Art. 158.

⁶ [1 Hale, P. C. 619. Precedents of indictment, 2 Chit. Crim. Law, 219. It is not necessary to allege that the defendant did actually desist from prosecuting; *R. v. Burgess*, L. R. 18 Q. B. D. 141.]

¹ ARTICLE 203.

COMPOUNDING PENAL ACTIONS.

² [Every one commits a misdemeanor who, having brought, or under color of bringing, an action against any person under any penal statute in order to obtain from him any penalty, compounds the said action without order or consent of the court ³ (⁴ whether any offence has in fact been committed or not).]

⁵ ARTICLE 204.CORRUPTLY TAKING A REWARD FOR HELPING TO RECOVER
STOLEN PROPERTY WITHOUT USING DILIGENCE TO
BRING OFFENDER TO TRIAL.

⁶ Every one is guilty of felony and liable to seven years' imprisonment who corruptly takes any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security or other property whatsoever, which, by any felony or misdemeanor, has been stolen, taken, obtained, extorted, embezzled, converted or disposed of, as in *The Larceny Act* mentioned, unless he has used all due diligence to cause the offender to be brought to trial for the same.

¹ S. D. Art. 159. See R. S. C. c. 103, s. 120, as to compounding offences against *The Canada Temperance Act*.

² [18 Eliz. c. 5, ss. 4, 5 (very much compressed). The punishment was the pillory, but see now 56 Geo. 3, c. 138, s. 2. See also *R. v. Southerton*, 6 East 123; *R. v. Gotley*, Russ. & Ry. 84.] *Garrett v. Roberts*, 10 Ont. App. R. 650. The statute does not apply to summary proceedings before justices; *R. v. Mason*, 17 U. C. C. P. 534. As to when proceedings may be compromised, see *Kneeshaw v. Collier*, 30 U. C. C. P. 265.

³ In Quebec, "of the Crown." R. S. C. c. 173, s. 31.

⁴ [*R. v. Best*, 2 Moody C. C. 124.]

⁵ S. D. Art. 354 (*d*).

⁶ R. S. C. c. 164 s. 89; 24 & 25 Vict. c. 96 s. 101.

ARTICLE 205.

UNLAWFULLY ADVERTISING A REWARD FOR RETURN OF
STOLEN PROPERTY.

¹Every one is liable to a penalty of two hundred and fifty dollars for each offence, recoverable with costs by any person who sues for the same in any court of competent jurisdiction, ² who

(a.) publicly advertises a reward for the return of any property, which has been stolen or lost, and in such advertisement uses any words purporting that no questions will be asked;

(b.) makes use of any words in any public advertisement purporting that a reward will be given or paid for any property which has been stolen or lost, without seizing or making any inquiry after the person producing such property;

(c.) promises or offers in any such public advertisement to return to any pawnbroker or other person who advanced money by way of loan on, or has bought, any property stolen or lost, the money so advanced or paid, or any other sum of money for the return of such property; or

(d.) prints or publishes any such advertisement.

¹ R. S. C. c. 164 s. 90; 24 & 25 Viet. c. 96 s. 102.

² No action to recover any such penalty shall be brought against the printer or publisher of a newspaper, defined as a newspaper for the purposes of the Acts, for the time being in force, relating to the carriage of newspapers by post, except within six months after the cause of action arises; R. S. C. c. 164 s. 90; 33 & 34 Viet. c. 65 ss. 2, 3.

PART IV.

ACTS INJURIOUS TO THE PUBLIC IN GENERAL.

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| CHAP. XVII.—UNDEFINED MISDEMEANORS. | CHAP. XX.—COMMON NUISANCES—DISORDERLY HOUSES—GAMING—LOTTERIES. |
| CHAP. XVIII.—OFFENCES AGAINST RELIGION. | CHAP. XXI.—VAGRANCY—LOITERING NEAR SHIPS. |
| CHAP. XIX.—OFFENCES AGAINST MORALITY. | |

CHAPTER XVII.

UNDEFINED MISDEMEANORS.

¹ ARTICLE 206.

ACTS INVOLVING PUBLIC MISCHIEF.

² [ACTS deemed to be injurious to the public have in some instances been held to be misdemeanors, because it appeared to the court before which they were tried that there was an analogy between such acts and other acts

¹ S. D. Art. 160.

² [See 3 Hist. Cr. Law, 351-60, and 2 Hist. Cr. Law, 197-9; see the whole of chapter i. of Sir W. Erie's work on Trade Unions, pp. 1-54, particularly pp. 48-53; also his account of *R. v. Rowlands* and *R. v. Duffield*, Ibid. 81-7. Wright on the Laws of Conspiracy should be studied, and contrasted with this. See also my account of the law of conspiracy in Roscoe's Criminal Evidence (8th ed.), pp. 409-414. As to offences relating to the administration of justice, see 5th Rep. C. L. C. *passim*, but particularly p. 29, &c., p. 50, &c., and *R. v. Opie*, 1 Saund. 391; *R. v. King*, 8 T. R. 585, and other cases there cited. As to public officers, *R. v. Bembridge*, 22 St. Tr. 1. After quoting the judgment of Willes, J. (the colleague of Lord Mansfield), in *Millar v. Taylor* (4 Burr. 2312), to the effect that "justice, moral fitness, and public convenience, when applied to a new subject, make common law without precedent," Pollock, C. B., said, "I entirely agree with the spirit of this passage so far as it regards the repressing what is a public evil and preventing what would become a public mischief; but I think there is a wide difference between protecting the community against a new source of danger and creating a new right. I think the common law is quite competent to pronounce anything to be illegal which is manifestly against the public good; but I think the common law cannot create new rights," &c. (*Jefferys v. Boosey*, 4 H. L. C. 936). As to cheats affecting the public, see 2 East, P. C. 818-822.]

[which had been held to be misdemeanors, although such first mentioned acts were not forbidden by any express law, and although no precedent exactly applied to them.

This has been done especially in the case of agreements between more persons than one to carry out purposes which the judges regarded as injurious to the public, in which case such acts have been held to amount to the offence of conspiracy ;

or when they have been done by a public officer in relation to his official duty ;

or when they tended in any way to pervert the administration of justice, or to disturb the public peace ;

or when the proceeding has been by parliamentary impeachment.]

CHAPTER XVIII.

¹ OFFENCES AGAINST RELIGION.² ARTICLE 207.

BLASPHEMY DEFINED—ALTERNATIVE DEFINITIONS.

³ [EVERY publication is said to be blasphemous which contains

Matter relating to God, Jesus Christ, the Bible, or the Book of Common Prayer, intended to wound the feelings of mankind, or to excite contempt and hatred against the church by law established, or to promote immorality.

Publications intended in good faith to propagate opinions on religious subjects, which the person who publishes them regards as true, are not blasphemous (within the meaning of this definition) merely because their publication is likely to wound the feelings of those who believe such opinions to be false, or because their general adoption might tend by lawful means to alterations in the constitution of the church by law established.

(a.) A denial of the truth of Christianity in general, or of the existence of God, whether the terms of such publication are decent or otherwise ;

(b.) Any contemptuous reviling or ludicrous matter relating to God, Jesus Christ, or the Bible, whatever may be the occasion of the publication thereof, and whether the matter published is, or is not, intended in good faith as an argument against any doctrine or opinion, unless the publication is made under circumstances constituting a lawful excuse.

¹ [See 2 Hist. Cr. Law, ch. xxv. 396-497, and Draft Code, Part XII.]

² S. D. Art. 161.

³ [There is authority for each of these views, as may be seen from a collection of all the]

[Every one who publishes any blasphemous document is guilty of the misdemeanor of publishing a blasphemous libel.

Every one who speaks blasphemous words is guilty of the misdemeanor of blasphemy.

¹ ARTICLE 208.

DENYING TRUTH OF CHRISTIANITY, &c.

Every one commits a misdemeanor and upon conviction thereof is liable to the punishments hereinafter mentioned, who having been educated in, or at any time having made profession of, the Christian religion within this realm, by writing, printing, teaching, or advised

cases on the subject in Folkard's Edition of Starkie on Libel, pp. 593-603. Most of the cases are old, and I do not think that, in fact, any one has been convicted of blasphemy in modern times for a mere decent expression of disbelief in Christianity. Mr. Starkie many years ago wrote, "A wilful intention to pervert, insult, and mislead others by means of contumelious abuse applied to sacred subjects, or by wilful misrepresentations and artful sophistry calculated to mislead the ignorant and unwary, is the criterion and test of guilt." This is the language of a man who means, but is reluctant to say plainly "You may deny Christianity to be true, but you must do it in a decent way, and with regard to the feelings of others." Lord Coleridge allows me to say that the left hand side of the page correctly states the law laid down in the last trial which took place for blasphemy, *R. v. Pooley*, tried at the Bodmin Summer Assizes, in 1857, before Coleridge, J. Lord Coleridge was counsel in that case. For the reasons given in the chapter on offences against religion in my History of the Criminal Law, Vol. II, p. 474, I am now unable to agree with the milder view of the law. See Draft Code, s. 141. In 1883, shortly after the publication of the last edition of this work, a man named Foote was tried for blasphemous libel before Lord Coleridge. He directed the jury according to the doctrine stated in the left hand column. His summing up was published by Stevens and Sons in 1883. I wrote an article on the subject maintaining my own view in the *Fortnightly Review* for March, 1884, and Mr. Aspland afterwards published an able pamphlet on the other side of the question. It did not convince me. It has been often suggested, and would, I think, be highly desirable, that the question should be settled by Parliament.]

¹ S. D. Art. 163.

² 9 & 10 Win. 3 c. 35. I have omitted Article 162 respecting heresies, such offences being cognizable by a competent ecclesiastical court and the ecclesiastical law of England not having any force in Canada; *In re Lord Bishop of Natal* 3 Moo. P. C. C. N. S. 115. I have, however, retained in the text Articles 208, 209, 210 and 211 as they are founded on statutes of a date sufficiently early to be in force in Canada, and as the offences are punishable on indictment before any court of competent criminal jurisdiction, though it is doubtful how far, if at all, the courts of Canada would hold such statutes to be applicable to, and in force in, Canada. See 2 Bishop Cr. Law s. 76 Note (5).

[speaking] ¹ denies any one of the persons in the Holy Trinity to be God, or asserts or maintains that there are more Gods than one, or [denies the Christian religion to be true, or the holy scriptures of the Old and New Testament to be of Divine authority.

For the first offence the offender must be adjudged incapable and disabled in law, to all intents and purposes whatsoever, to have or enjoy any office or employment, ecclesiastical, civil or military, or any part in them, or any profit or advantage appertaining to them, and if at the time of his conviction the person convicted enjoys or possesses any office, place, or employment, such office, place, or employment becomes void.

Upon a second conviction for all or any of the said crimes the offender is from thenceforth disabled to sue, prosecute, plead, or use any action or information in any court of law or equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office, civil or military, or benefice ecclesiastical, for ever within the realm, and must also suffer imprisonment for the space of three years from the time of such conviction.

Any person convicted of any of the aforesaid crimes for the first time shall be discharged from all penalties and disabilities incurred by such conviction, upon his acknowledgment or renunciation of such offence or erroneous opinions in the same court where he was convicted within four months after his conviction.

² ARTICLE 209.

DEPRAVING THE LORD'S SUPPER.

³ Every one commits a misdemeanor who depraves,

¹ 9 & 10 Wm. 3 c. 35 contains the provision not included in the brackets. It was repealed by 53 Geo. 3 c. 160. Where the offence is committed by words spoken there can be no conviction unless an information is made before a justice within four days and the offender is prosecuted within three months.

² S. D. Art. 164.

³ [1 Edw. 6, c. 1, s. 1, applied to the present Book of Common Prayer by 14 Car. 2, c. 4.]

[despises, or contemns the sacrament of the supper and table of the Lord, in contempt thereof by any contemptuous words, or by any words of depraving, despising, or reviling, or by advisedly in any other wise contemning, despising or reviling the said sacrament.

¹ ARTICLE 210.

DEPRAVING THE BOOK OF COMMON PRAYER.

² Every one commits a misdemeanor and is liable upon conviction thereof to the punishments hereinafter mentioned, who does any of the following things : that is to say,

(a.) who, in any interlude, play, song, rhymes, or other open words, declares or speaks anything in derogation, depraving, or despising of the Book of Common Prayer, or of anything therein contained, or any part thereof; or

(b.) who by open fact, deed, or open threatenings, compels, causes, or otherwise procures or maintains any parson, vicar, or other minister, in any cathedral or parish church or chapel, or in any other place, to sing or say any common or open prayer, or to minister any sacrament otherwise or in any other manner or form than is mentioned in the said book; or

(c.) who by any of the said means unlawfully interrupts and lets any parson, vicar, or other minister in any cathedral or parish church, or chapel, in singing or say-

[s. 20. I have retained these and the following provisions because, though they are practically obsolete, they relate to acts which might still be done. But I have not thought it worth while to encumber the book with the statutes of præmunire, which, with hardly an exception, are only historical monuments of bygone political and religious conflicts, imposing penalties on acts which it is barely conceivable that any one should do in the present state of society. The subject is treated fully in the 7th Report of the Criminal Law Commissioners, pp. 37-45. The offences are appealing to Rome from any of the Queen's Courts (24 Hen. 8, c. 12); asserting that Parliament has a legislative authority without the Crown (3 Car. 2, c. 1); and some others.]

¹ S. D. Art. 165.

² [1 Eliz. c. 2, s. 3, applied to the present Book of Common Prayer by 14 Car. 2, c. 4, s. 20.]

[ing common or open prayer, or ministering the sacraments, or any of them, in the manner mentioned in the said book.

For the first offence the offender must be fined one hundred marks, and in default of payment within six weeks after his conviction must be imprisoned for six months.

For the second offence the offender must be fined four hundred marks, and in default of payment as aforesaid must be imprisoned for twelve months.

For the third offence the offender must forfeit to the Queen all his goods and chattels and be imprisoned for life.

¹ ARTICLE 211.

CLERGYMEN REFUSING TO USE THE BOOK OF COMMON PRAYER.

² [Every one commits a misdemeanor, and is liable upon conviction thereof to the punishments hereinafter mentioned, who, being a parson, vicar, or other minister whatsoever, that ought or should sing or say common prayer according to the Book of Common Prayer,

(a.) refuses to use the said common prayer, or to minister the sacrament, in such cathedral or parish church, or other place, as he should use or minister the same;

(b.) uses, wilfully and obstinately standing in the same, any other rite, ceremony, order, or form of mass, openly or privily, or matins, evensong, administration of the sacrament, or other³ open prayer than is mentioned and set forth in the said book;

(c.) preaches, declares, or speaks anything in deroga-

¹ S. D. Art. 166.

² [2 & 3 Edw. 6, c. 1; 14 Car. 2, c. 4, s. 20, and see 1 Eliz. c. 2, s. 2, which slightly varies the penalty on one point.

³ By "open prayer is meant that prayer which is for others to come unto or hear, either in common churches or private chapels, or oratories, commonly called the Service of the Church."]

[tion or depraving of the said book, or anything therein contained, or of any part thereof.

For the first offence the offender must forfeit to the Queen one year's profit of such of his benefices as Her Majesty appoints, and be imprisoned for six months, whether he has any benefice or not.

For the second offence the offender must be deprived *ipso facto* of all his spiritual promotions, and be imprisoned for a year, and if he has no promotion he must be imprisoned for life.

For the third offence the offender must be imprisoned for life.]

¹ ARTICLE 212.

DISTURBING PUBLIC WORSHIP.

² Every one is guilty of a misdemeanor and liable to imprisonment for any term less than two years who,

(a.) by threats or force, unlawfully obstructs or prevents, or endeavors to obstruct or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-house, school-house or other place used for divine worship, or in or from the performance of his duty in the lawful burial of the dead, in any church-yard or other burial place; or

(b.) strikes or offers any violence to, or upon any civil process, or under the pretence of executing any civil process, arrests any clergyman or other minister who is engaged in or, to the knowledge of the offender, is about to engage in, any of the rites or duties in this article mentioned, or who, to the knowledge of the offender, is going to perform the same, or returning from the performance thereof.

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

¹ S. D. Art. 167.

² R. S. C. c. 156; 52 Geo. 3. c. 155, s. 12; 9 & 10 Vict. c. 59, s. 4; 23 & 24 Vict. c. 32, s. 2; 24 & 25 Vict. c. 100, s. 36. See *Reid v. Inglis*, 12 U. C. C. P. 191 as to 1 Will. & M. c. 18, s. 15,

summary conviction, to a penalty not exceeding twenty dollars and costs, and, in default of payment, to imprisonment for a term not exceeding one month, who wilfully disturbs, interrupts or disquiets any assemblage of persons met for religious worship, or for any moral, social or benevolent purpose, by profane discourse, by rude or indecent behavior, or by making a noise, either within the place of such meeting or so near it as to disturb the order or solemnity of the meeting.

against disturbers of religious worship being in force in Ontario. Draft Code, s. 143. A person may be convicted under 23 & 24 Viet. c. 32, s. 2, of violent behavior in a church, although such behavior is an assertion of a *bona fide* claim of right; *Asher v. Calcraft*, L. R. 8 Q. B. D. c. 607.

In the draft of the Revised Statutes of Canada, chapter 150, respecting offences against religion, was included a provision, founded on the statutes hereinafter referred to, against the desecration of the Lord's Day by shooting, gaming, sporting, frequenting tippling houses, or by servile labor (works of necessity and mercy excepted), but it was struck out by the Joint Committee of the two Houses of Parliament to which the draft was referred. Apart from the question as to how far 29 Car. 2, c. 7, may be in force in any Province there was, in each Province before it became a part of Canada, legislation on the subject. See C. S. U. C. c. 104; C. S. L. C. c. 23; R. S. N. B. c. 144, s. 2; R. S. N. S. 3rd Ser. c. 159, s. 2; 20 Geo. 3 (P. E. I.), 3rd Sess. c. 3; 24 Viet. (P. E. I.) c. 7, s. 10; 31 Viet. (P. E. I.) c. 14; R. S. B. C. (1871) No. 46. The legislature of Ontario has re-enacted C. S. U. C. c. 104, in the view, probably, that its provisions are of the character of police regulations affecting public morals. The English statutes on the subject will be found in 4 Steph. Comm. (9th ed. pp. 240-242. See *Hespeler v. Shaw*, 16 U. C. Q. B. 104, as to hauling hay. As to who are travellers within the exception contained in C. S. U. C. c. 104, s. 1, see *R. v. Tinning*, 11 U. C. Q. B. 636 and *R. v. Duggett*, 1 O. R. 537. A druggist who sells lozenges on Sunday is assumed to sell them as a medicine; *R. v. Howarth*, 33 U. C. Q. B. 537. A person in the public service of Her Majesty is not within R. S. O. c. 189 (C. S. U. C. c. 104) in respect of work done by him as such servant on Sunday; *R. v. Berriman* 4 O. R. 282. See Art. 242 as to opening places of public entertainment and amusement on the Lord's Day.

R. S. N. S. 3rd Ser. c. 159 contains a provision against loosing or injuring horses in the vicinity of meetings convened for religious or moral purposes (s. 4).

CHAPTER XIX.

¹ OFFENCES AGAINST MORALITY.² ARTICLE 213.

SODOMY.

³ [EVERY one commits the felony called sodomy, and is liable] to imprisonment for life [who
 (a.) carnally knows any animal; or,
 (b.) being a male, carnally knows any man or any woman (per anum).]

Any person above the age of fourteen years who permits himself or herself to be so carnally known as aforesaid is a principal in the first degree in the said felony.]

⁴ ARTICLE 214.

ATTEMPT TO COMMIT SODOMY.

⁵ Every one who attempts to commit sodomy is guilty of a misdemeanor, and is liable to ten years' imprisonment.

⁶ ARTICLE 215.

INCEST.

⁷ Every one who in Nova Scotia, New Brunswick or

¹ [As to rape and other offences of the same kind, see Chap. XXVIII. *post*, p. 248.]

² S. D. Art. 168.

³ R. S. C. c. 157, s. 1: [24 & 25 Vict. c. 100, s. 61; see cases in 1 Russ. Cr. (5th ed.) 879-82.

See 2 Hist. Cr. Law, 420-30. As to carnal knowledge see Article 322. Draft Code, s. 144.]

⁴ S. D. Art. 169.

⁵ R. S. C. c. 157, s. 2: 24 & 25 Vict. c. 100, s. 62. Draft Code, s. 145. As to assaults with intent to commit sodomy and indecent assaults on male persons see Art. 312.

⁶ S. D. Art. 170.

⁷ R. S. N. S. (3rd S.) c. 160, s. 2: R. S. N. B. c. 145, s. 2: 24 Vict. (P.E.I.) c. 27, s. 3. The following is article 170 of Stephens' Digest, and the note thereto.

Prince Edward Island commits incest is guilty of a misdemeanor and liable in Nova Scotia to two years' imprisonment, in New Brunswick to fourteen, and in Prince Edward Island to twenty-one years' imprisonment.

¹ ARTICLE 216.

ADULTERY.

² Every one who, in New Brunswick, commits adultery is guilty of a misdemeanor and liable to a fine of four hundred dollars or to two years' imprisonment.

³ ARTICLE 217.

PUBLIC INDECENCIES.

⁴ [Every one commits a misdemeanor who does any grossly indecent act in any open and public place in the

ARTICLE 170.

ECCLESIASTICAL CENSURES FOR IMMORALITY.

"Every person who commits incest, adultery, fornication, or any other deadly sin (not punishable at common law), is liable upon conviction thereof in an Ecclesiastical Court to be directed to do penance, and to be excommunicated, and to be imprisoned for such term not exceeding six months as the Court pronouncing the sentence of excommunication may direct."

¹ 13 Edw. 1, stat. 4 c. 1; 53 Geo. 3, c. 127, ss. 1-3; and see Phillimore's Ecol. Law, 1081, 1442; also *Phillimore v. Mauchon*, 1 P. D. 481; Co. Litt. 98 b. Incest, though not mentioned in the statute "Circumspecte agatis," is the only offence which in these days is ever prosecuted under the law here stated. Such a prosecution occurred within the last few years in the Bishop of Chichester's Court. See 2 Hist. Cr. Law, 396-420.

The offences are not, however, punishable in any part of Canada except as indicated in the text, there being no competent Ecclesiastical Court, and the ecclesiastical law of England not being in force here. *In re Lord Bishop of Natal*, 3 Moo. P. C. C. N. S. 115.

¹ S. D. Art. 170.

² R. S. N. B. c. 145, s. 3. A married man may be convicted of adultery though the offence is committed with an unmarried woman; *R. v. Egge*, 1 P. & B. 189. On an indictment against A for adultery with B, a woman married in a foreign state, A cannot be convicted unless it be proved that B was lawfully married according to the law of the place where the marriage was solemnized; *R. v. Ellis*, 22 N. B. R. 440.

³ S. D. Art. 171.

⁴ [1 Hawk. P. C. 358. The acts referred to are principally acts of open indecency, but an act scandalously profligate, though not in this sense openly indecent, might in some cases be a misdemeanor, as, e.g., selling a wife. See *per* Lord Mansfield in *R. v. Delaval*, 3 Burr. 1438.] *R. v. Levasseur*, 9 L. N. 386. See Art. 250 (c). *Drait Code*, s. 145.

[presence of more persons than ¹ one; but it is uncertain whether such conduct in a public place amounts to a misdemeanor if it is done when no one is present, or in the presence of one person only.

² A place is public within the meaning of this Article if it is so situated that what passes there can be seen by any considerable number of persons if they happen to look.

Illustrations.

The following are instances of public places :

- ³ The inside of an omnibus ;
- ⁴ The roof of a house visible from the back windows of several houses ;
- ⁵ The inside of a urinal open to the public, and by the side of a foot-path in Hyde Park ;
- ⁶ The inside of a booth on Epsom racecourse, which the public were invited to enter ;
- ⁷ A place out of sight of the public footway where people had no legal right to go, but did habitually go without interference.

⁸ ARTICLE 218.

OBSCENE PUBLICATIONS.

Every one commits a misdemeanor who, without justification,

(a.) publicly sells, or exposes for public sale or to public view, any obscene book, print, picture, or other indecent exhibition ; ⁹ or any publication recommending

¹ [*Elliot's Case*, L. & C. 103.] In *R. v. Levesque*, Rameay, J. expressed the opinion that an exposure of a grossly indecent character to one woman or child would be a misdemeanor.

² *Webb's Case*, 1 Den. 338 ; *Holmes's Case*, Dears. 207 ; *R. v. Orchard*, 3 Cox, C. C. 248 ; *R. v. Rouverard*, stated by Parke, B., in *R. v. Webb*, 1 Den. 344.

³ *R. v. Holmes*, Dears. 207.

⁴ *Thalman's Case*, L. & C. 326.

⁵ *R. v. Harris*, L. R. 1 C. C. R. 282.

⁶ *R. v. Saunders*, L. R. 1 Q. B. D. 18.

⁷ *R. v. Wellard*, L. R. 14 Q. B. D. 63.]

⁸ S. D. Art. 172. See Appendix Note V.

⁹ [Appendix Note V ; *Strange*, 790 ; and see 20 & 21 Vict. c. 83, s. 1 ; 14 & 15 Vict. c. 100, s. 29 ; *Starkie* (by Folkard), 603-12. Draft Code, s. 147.

⁹ These words are added in reference to the case of *R. v. Bradlaugh*, tried before Cockburn, C. J., 18 June, 1877. I have not seen any report of the trial itself. Proceedings in]

{sexual immorality, even if the recommendation is made in good faith and for what the publisher considers to be the public good.

(b.) publicly exhibits any disgusting object.

(SUBMITTED.)—A person is justified in exhibiting disgusting objects, or publishing obscene books, papers, writings, prints, pictures, drawings, or other representations, if their exhibition or publication is for the public good, as being necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest; but the justification ceases if the publication is made in such a manner, to such an extent, or under such circumstances, as to exceed what the public good requires in regard to the particular matter published.

Illustrations.

(1.)¹ A exhibits for money, to all comers, an unnatural and monstrous birth. A commits a misdemeanor.

B exhibits a similar object to students of medicine only. B does not commit a misdemeanor.

(2.)² A, a bookseller, publishes the work of a casuist, which contains amongst other things obscene matter. The work is published in Latin, and appears from the circumstances of its publication to be intended for *bonâ fide* students of casuistry only. A has not committed a misdemeanor.

B extracts the obscene matter from the work so published, translates it into English, and sells it as a pamphlet about the streets for the purpose of throwing odium upon casuists. B has committed a misdemeanor.]

[error on the ground that the indictment was defective were taken in 1878 and are reported in L. R. 3 Q. B. D. 607. The jury found that the work prosecuted called the "Fruits of Philosophy," was published in good faith for the public good, and that it recommended immoral practices. It appeared in evidence that it was not obscene in the sense of being calculated or intended to excite passion.

¹ [*Harring v. Walbond*, 1 Russ. Cr. 436.

² The second paragraph of this illustration is based upon *R. v. Hicklin*, L. R. 3 Q. B. 360; and see *Steele v. Brannan*, L. R. 7 C. P. 261. The first part is merely my suggestion as to what ought to be held to be the law if the question should arise, but the point cannot be called clear. Keating, J., referred in passing to the question in *Steele v. Brannan*, L. R. 7 C. P. 269, 270, but expressed no opinion upon it. I confine this article to obscenity because I have found no authority for the proposition that the publication of a work immoral in the wider sense of the word is an offence. A man might with perfect decency of expression, and in complete good faith, maintain doctrines as to marriage, the relation]

ARTICLE 219.

POSTING IMMORAL BOOKS, ETC.

¹ Every one is guilty of a misdemeanor who posts for transmission or delivery by or through the post,

(a.) any obscene or immoral book, pamphlet, picture, print, engraving, lithograph, photograph or other publication, matter or thing of an indecent, immoral, seditious, disloyal, scurrilous or libellous character ; or

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

(c.) any letter or circular concerning an illegal lottery, so-called gift concert or other similar enterprise, offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretences.

² ARTICLE 220.SEDUCTION OF GIRLS UNDER SIXTEEN—CARNALLY
KNOWING IDIOTS.

³ Every one is guilty of a misdemeanor and liable to two years' imprisonment who,

[of the sexes, the obligation of truthfulness, the nature and limits of the rights of property, &c., which would be regarded as highly immoral by most people, and yet (I think) commit no crime. Obscenity and immorality in this wide sense are entirely distinct from each other. The language used in reference to some of the cases might throw doubt on this, but I do not think any instance can be given of the punishment of a decent and *bona fide* expression of opinions commonly regarded as immoral. I leave this note unaltered, but since it was written the case cited above of *R. v. Bradlaugh* may be considered to have gone some way towards establishing a different principle, and to have invested juries to a certain extent with the powers of *ex post facto* censors of the press so far as such publications on the relation of the sexes are concerned. I think that juries ought to exercise such a power with the greatest caution, when a man writes in good faith on a subject of great interest and open to much difference of opinion, and when no indecency of language is used, except such as is necessary to make the matter treated of intelligible.]

¹ R. S. C. c. 35, s. 163.

² S. D. Art. 173.

³ R. S. C. c. 157, s. 3 ; 50 & 51 Vict. (D.) c. 48, s. 1. The prosecution for any offence defined in Articles 220-222 must be commenced within one year from the commission, thereof ; s. 6 (3).

(a.) seduces and has illicit connection with any girl of previously chaste character, or who attempts to have illicit connection with any girl of previously chaste character, being in either case of or above the age of twelve years and under the age of sixteen years ; or

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

ARTICLE 221.

SEDUCTION UNDER PROMISE OF MARRIAGE.

¹ Every one, above the age of twenty-one years, is guilty of a misdemeanor and liable to two years' imprisonment, who, under promise of marriage, seduces and has illicit connection with any unmarried female of previously chaste character and under twenty-one years of age.

² ARTICLE 222.

HOUSEHOLDERS PERMITTING DEFILEMENT OF GIRLS ON THEIR PREMISES.

³ Every one who, being the owner and occupier of any premises, or having, or acting, or assisting in the management or control thereof, induces, or knowingly suffers, any girl of such age as in this Article mentioned to resort to or be in or upon such premises for the purpose of being unlawfully and carnally known by any man, whether such carnal knowledge is intended to be with any particular man or generally,⁴—

¹ R. S. C. c. 157, s. 4 ; 50 & 51 Vict. (D.) c. 45, s. 2.

² S. D. Art. 173 A.

³ R. S. C. c. 157, s 5 ; 48 & 49 Vict. c. 69, s. 6.

⁴ [A father who allows his daughter living with him to act as a prostitute in his house is within this provision. *R. v. Webster*, L. R. 16 Q. B. D. 136.] As to belief, see *R. v. Packer*, 16 Cox, C. C. 57.

(a.) is guilty of felony, and liable to ten years' imprisonment, if such girl is under the age of twelve years; and

(b.) is guilty of a misdemeanor, and liable to two years' imprisonment, if such girl is of or above the age of twelve and under the age of sixteen years.

It shall be a sufficient defence to any charge under this Article if it is made to appear to the court or jury before whom the charge is brought, that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.

¹ ARTICLE 223.

UNLAWFULLY DEFILEING WOMEN.

² Every one is guilty of a misdemeanor, and liable to two years' imprisonment, who, by false pretences, false representations, or other fraudulent means,—

(a.) procures any woman or girl, under the age of twenty-one years, to have illicit carnal connection with any man other than the procurer; or

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

³ ARTICLE 224.

CONSPIRACY TO DEFILE.

⁴ [Every one commits the misdemeanor of conspiracy who agrees with any other person to induce any woman to commit adultery or fornication, or to take any woman from the lawful custody of her parents, in order to marry her to any person without their consent;

(SUBMITTED.) Provided, that an agreement between a

¹ S. D. Art. 173.

² R. S. C. c. 157, s. 7; 24 & 25 Vict. c. 100, s. 49; 48 & 49 Vict. c. 69, ss. 2, 10.

³ S. D. Art. 174.

⁴ [R. v. Lord Grey, 3 St. Tr. 519; 1 East P. C. 460; R. v. Mears, 2 Den. C. C. 79; R. v. De-laval 3 Burr. 1434. Draft Code, s. 149.]

[man and a woman to commit fornication or adultery, or that the woman shall leave the lawful custody of her parents without their consent, in order to marry the man, is not a conspiracy.]

ARTICLE 225.

SEDUCTION OF FEMALES WHO ARE PASSENGERS ON
VESSELS.

¹ Every one is guilty of a misdemeanor and liable to a fine of four hundred dollars, or to one year's imprisonment, who, being the master or other officer or a seaman or other person employed on board of any vessel, while such vessel is in any waters within the jurisdiction of the Parliament of Canada, under promise of marriage, or by threats, or by the exercise of his authority, or by solicitation, or the making of gifts or presents, seduces and has illicit connection with any female passenger.

The subsequent intermarriage of the seducer and the seduced is, if pleaded, a good defence to any indictment for any such offence.

ARTICLE 226.

PREVENTION OF IMMORAL INTERCOURSE WITH FEMALE
IMMIGRANTS.

² Every officer, seaman or other person employed on board of any vessel bringing immigrant passengers to

¹ R. S. C. c. 65, s. 37. This provision occurs in *The Immigrant Act*, but is not in terms limited to vessels bringing immigrants or to female immigrant passengers, as is the case in respect of the offences defined in Article 226.

² R. S. C. c. 65, s. 38. The penalties are recoverable at the suit of a collector of customs or Dominion immigration agent in a summary manner before two justices of the peace if the amount does not exceed eighty dollars, otherwise by civil action by such officer in a court of competent jurisdiction. See s. 42, by the third clause of which it is provided that if the penalty exceeds forty dollars the offence is a misdemeanor punishable by fine or imprisonment or both in the discretion of the court. By s. 39 the master of any such vessel is bound under a penalty of fifty dollars to post in a conspicuous place on the fore-castle, and in the parts of the vessel assigned to immigrant passengers, notices in English, French and German containing the provisions of s. 38, on which the text is founded.

Canada, who, while such vessel is in any waters within the jurisdiction of the Parliament of Canada, entices or admits any female immigrant passenger into his apartment, or, except by the direction or permission of the master of such vessel first made or given for such purpose, visits or frequents any part of such vessel assigned to female immigrant passengers, is liable to a penalty equal in amount to his wages for the voyage during which the said offence has been committed.

Every master of any such vessel who, while such vessel is in such waters, directs or permits any officer or seaman or other person on board of such vessel to visit or frequent any part of such vessel assigned to immigrant passengers, except for the purpose of doing or performing some necessary act or duty as an officer, seaman or person employed on board of such vessel, is liable to a penalty of twenty-five dollars for each such offence.¹

The provisions of this Article do not apply to cabin passengers, or to any part of the vessel assigned to their use.

ARTICLE 227.

PROSTITUTION OF INDIAN WOMEN.

² Every one is guilty of a misdemeanor, and liable to a penalty not exceeding one hundred dollars and not less than ten dollars or to six months' imprisonment,

(a.) who, being the keeper³ of any house, tent or wigwam, allows or suffers any Indian woman to be or remain in such house, tent or wigwam, knowing, or having probable cause for believing that such Indian woman is in

¹ "occasion on which he so directs or permits the provisions of this section to be violated by any such officer, seaman or other person."

² R. S. C., c. 43, s. 106; 50 & 51 Viet. (D.) c. 33, s. 11. Clause (a.) applies to Indians as well as to those who are not Indians.

³ Every person who appears, acts or behaves as master or mistress, or as the person who has the care or management of, any house, tent or wigwam in which any Indian woman is, or remains for the purpose of, prostituting herself therein, is deemed to be the keeper thereof, notwithstanding he or she is not in fact the real keeper thereof; R. S. C. c. 43, s. 107.

or remains in such house, tent or wigwam with the intention of prostituting herself therein ; or,

(b.) who, being an Indian woman, prostitutes herself therein ; or

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

¹ ARTICLE 228.

PREVENTING THE BURIAL OF DEAD BODIES AND DISINTER-
RING THEM.²

³ [Every one commits a misdemeanor who prevents the burial of any dead body, or who, without authority, disinters a dead body, even from laudable motives ; or

who, having the means, neglects to bury a dead body which he is legally bound to bury, provided that no one is legally bound to incur a debt for such a purpose ; or

⁴ who buries or otherwise disposes of any dead body on which an inquest ought to be taken, without giving notice to a coroner ; or

who, being under a legal duty to do so, fails to give notice to a coroner that a body on which an inquest ought to be held is lying unburied, before such body has putrified.

¹ S. D. Art. 175.

² [In *R. v. Price*, L. R. 12 Q. B. D. 247, I held that to bury a dead body instead of burying it was not in itself a misdemeanor, if it was so done as not to amount to a public nuisance. This decision is to a certain extent recognized in *R. v. Stephenson* (L. R. 13 Q. B. D. 331). There were no means of questioning it.

³ *R. v. Vann*, 2 Den. C.C. 32. Inquests ought to be held when the coroner on reasonable grounds and in good faith believes that the deceased person's death was of such a nature as would, if true, justify the holding of an inquest ; *R. v. Stephenson*, L. R. 13 Q. B. D. 331. A man is bound to bury his child's body, and, I suppose, his wife's. In *R. v. Vann*, Lord Campbell said, "A man is bound, if he has the means, to give his child Christian burial." This can hardly be a duty in the case of persons who are not Christians, but probably "Christian" means only decent. It appears from *R. v. Stewart*, 12 A. & E. 773, 779, that the person under whose roof another person dies is under a legal duty to carry the corpse, decently covered, to the place of burial if there is no one else who is bound to bury it. Draft Code, s. 153.

⁴ 1 Russ. Cr. 620 (6th ed.) 7th Rep. C. L. C, pp. 50, 51 ; and see *R. v. Stephenson*, L. R. 13 Q. B. D. 331.]

Illustrations.

(1.) ¹ A digs up a dead body and sells it for purposes of dissection. This is a misdemeanor.

(2.) ² A, without the consent of a dissenting congregation, to which a burial ground belonged, or of trustees having the legal estate therein, but with the leave of the person in charge, digs up his mother's coffin in order to bury it in his father's grave in a churchyard some miles off. This is a misdemeanor.

(3.) ³ A, a gaoler, refuses to deliver up for burial the dead body of a prisoner who had died in gaol to the executors, on the ground that the deceased person owed him money. This is a misdemeanor.]

¹ *R. v. Lynn*, 1 Leach 497.

² *R. v. Sharpe*, D. & B. 160.

³ *R. v. Scott*, 2 Q. B. 248 (in note to *R. v. Fox*.)

CHAPTER XX.

COMMON NUISANCES—DISORDERLY HOUSES—GAMING
—LOTTERIES.¹ ARTICLE 229.

COMMON NUISANCE.

² [A COMMON nuisance is an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects. It is immaterial whether the act complained of is convenient to a larger number of the public than it inconveniences, but the fact that the act complained of facilitates the lawful exercise of their rights by part of the public may shew that it is not a nuisance to any of the public.]

Illustrations.

(1.) ³ An electric telegraph company without legal authority erects a telegraph pole in a permanent manner on the waste at the side of and forming part of a highway, leaving room enough for the use of the highway, and not affecting either the metalled road or the footpath by the side of it. This is a public nuisance, because a small portion of space which the public had a legal right to use is obstructed.

(2.) ⁴ A tramway laid down on a high road in such a manner as to obstruct to some extent the use of the road by common carriages is a public nuisance, although it may be convenient to a large majority of those who use the road.

(3.) ⁵ The public have a right to use the Tyne as a highway, and to

¹ S. D. Art. 176.

² [1 Hawk. P. C. 692. The question as to the public benefit of the act complained of may arise indirectly. Draft Code, s. 159.]

³ *R. v. United Kingdom Telegraph Co.*, 3 F. & F. 73.

⁴ *R. v. Train*, 2 B. & S. 640.

⁵ *R. v. Russell*, 6 B. & C. 569. I think this is the effect of the case, which deserves careful study. It is referred to in *R. v. Train*, but I doubt whether it is not misunderstood there. Lord Tenterden differed in it from Bayley and Holroyd, JJ. [Of the eight]

[anchor ships therein for a reasonable time to take in cargoes of coal. A erects staiths and spouts at which ships moored for the purpose can take in coal, but which prevent ships not lying at them from sailing over part of the waterway where they would otherwise be able to sail. The fact that the arrangement is on the whole convenient with regard to the public use of the river may be considered by the jury in deciding whether the staiths are a nuisance or not.

(4.) The non-repair of a public highway is a public nuisance.

(5.) ¹ A railway company makes a railway within five yards of an ancient public highway in such a manner that the locomotives frighten the horses of persons using the highway as a carriage road. The railway is made and the locomotives used under Acts of Parliament, which do not require the railroad company to screen the line from the road. This is not a public nuisance because the act done is warranted by law.

² ARTICLE 230.

COMMON NUISANCE A MISDEMEANOR.

³ Every one who commits any common nuisance is guilty of a misdemeanor.

⁴ ARTICLE 231.

KEEPING DISORDERLY HOUSES.

⁵ Every one who keeps a disorderly house commits a common nuisance.

counsel engaged seven became judges. *R. v. Betts*, 16 Q. B. 1022, refers to it in a manner which seems to me inadequate. In *A. G. v. Terry* (L. R. 9 Ch. App. 425) Jessel, M. R., disapproved of *R. v. Russell*, though he approved of the doctrine which I understand to be laid down in it. The turning point of the case, as I understood it, is that the ships anchored under the spouts had a right to anchor there for a reasonable time to receive cargo, and that the spouts being recognized by statute could not be regarded as in themselves illegal. The question on which the judges differed was whether Bayley, J., had influenced the jury by referring to the collateral advantage of cheapening coal in the London market. The effect of time in legalizing a nuisance is somewhat similar. It has not in itself that effect, but the fact that a given state of things is of very long standing may be evidence that it is not in fact a nuisance; see cases in 1 Russ. Cr. 421 and 442. The view taken by the Criminal Law Commissioners is rather different; see 7th Rep. p. 69.

¹ *R. v. Pease*, 4 B. & Ad. 30.]

² S. D. Art. 177.

³ [Cf. Draft Code, ss. 151-2.]

⁴ S. D. Art. 178.

⁵ [Draft Code, s. 154.]

¹ [Any person who appears, acts, or behaves as master or mistress, or as the person having the care, government, or management, of any disorderly house, is to be deemed and taken to be the keeper thereof, and is liable to be prosecuted and punished as such, although, in fact, he is not the real owner or keeper thereof.]

² But the owner of a house, conducted as a disorderly house by a person to whom he lets it as a weekly tenant, is not the keeper of the house merely because he knows the use to which it is put, and does not give his tenant notice to quit.

³ ARTICLE 232.

DISORDERLY HOUSES.

The following houses are disorderly houses, that is to say, common bawdy houses, common gaming houses, common betting houses, disorderly places of entertainment.

⁴ ARTICLE 233.

COMMON BAWDY HOUSES.

⁵ A common bawdy house is a house or room, or set of rooms, in any house kept for purposes of prostitution. And it is immaterial whether indecent or disorderly conduct is or is not perceptible from the ⁶outside.

⁷ ARTICLE 234.

COMMON GAMING HOUSES.

⁸ A common gaming house is any house, room, or place

¹ [25 Geo. 2, c. 36, s. 8; 21 Geo. 3, c. 49, s. 2.]

² *R. v. Barrett*, L. & C. 263, and see *R. v. Stannard*, L. & C. 349, where the whole house was let in parts to different women as weekly tenants.]

³ S. D. Art. 179. See Appendix Note VI.

⁴ S. D. Art. 180.

⁵ [1 Russ. Cr. 427, see cases; *R. v. Pierson*, 2 Lord Raym, 1107; see also Chitty, and 3 Steph. Com. 353, n. Draft Code, s. 135.]

⁶ *R. v. Rice & Wilton*, L. R. 1 C. C. R. 21.]

⁷ S. D. Art. 181.

⁸ [This definition appears to me to be established by the interpretation put by *Jenks v. Turpin*, L. R. 13 Q. B. D. 505 on, *inter alia*, 17 & 18 Vict. c. 28, s. 4. The law is discussed at length in the judgments of Sir H. Hawkins and Smith, J.] *R. v. Shaw*, 4 Mau. L. R. 404.

[kept or used for the purpose of unlawful gaming therein by any considerable number of persons.

Gaming means playing at games either of chance, or of mixed chance and skill.

Unlawful gaming means gaming carried on in such a manner, or for such a length of time or for such stakes (regard being had to the circumstances of the players) that it is likely to be injurious to the morals of those who game.

All gaming is unlawful in which

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

(ii.) in which any game is played the chances of which are not alike favorable to all the players including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play or bet.]

¹ ARTICLE 235.

EVIDENCE THAT A HOUSE IS A COMMON GAMING HOUSE.

The following circumstances are evidence (until the contrary is proved) that a house, room, or place is a common gaming house, and that the persons found therein were unlawfully playing therein: that is to say,

(i.) ² Where any cards, dice, balls, counters, tables, or other instruments of gaming used in playing any unlawful game are found in any house, room, or place suspected to be used as a common gaming house, and entered under a warrant or order issued under The Revised Statutes, chapter 158, or about the person of any of those found therein.

(ii.) ³ Where any constable or officer, authorized as aforesaid to enter any house, room, or place, is wilfully prevented from, or obstructed, or delayed in entering the

¹ S. D. Art. 183.

² R. S. C. c. 158, s. 4; 8 & 9 Vict. c. 169, s. 5.

³ R. S. C. c. 158, s. 8; 17 & 18 Vict. c. 38, s. 2.

same or any part thereof, or where any external or internal door or means of access to any such house, room, or place so authorized to be entered is found to be fitted or provided with any bolt, bar, chain, or any means or contrivance for the purpose of delaying, preventing, or obstructing the entry into the same, or any part thereof, of any constable or officer authorized as aforesaid, or for giving alarm in case of such entry; or

(iii.) If any such house, room, or place is found fitted or provided with any means or contrivance for unlawful gaming, or for concealing, removing, or destroying any instruments of gaming.

ARTICLE 236.

GAMING IN STOCKS AND MERCHANDISE.

¹ Every one is guilty of a misdemeanor and liable to five years' imprisonment and to a fine of five hundred dollars who,

(a.) with the intent to make gain or profit by the rise or fall in price of any stock of any in incorporated or unincorporated company or undertaking, either in Canada or elsewhere, or of any goods, wares or merchandise,

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

(ii.) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock,

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

goods, wares or merchandise, in respect of which no delivery of the thing sold or purchased is made or received, and without the *bond fide* intention to make or receive such delivery; or

(b.) acts, aids, or abets in the making or signing of any such contract or agreement.

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

ARTICLE 237.

HABITUALLY FREQUENTING PLACES WHERE GAMING IN STOCKS IS CARRIED ON.

¹ Every one is guilty of a misdemeanor and liable to one year's imprisonment who habitually frequents any office or place wherein the making or signing, or procuring to be made or signed, or the negotiating or bargaining for the making or signing, of such contracts of sale or purchase as are mentioned in the Article next preceding is carried on.

ARTICLE 238.

PLAYING OR LOOKING ON IN GAMING HOUSE.

² Every one who plays or looks on while any other person is playing in a common gaming house is guilty of a misdemeanor, and liable, on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars and not less than twenty dollars, and, in default of payment, to imprisonment for a term not exceeding two months.

¹ 51 Vict. (D.) c. 42, s. 1 (2).

² R. S. C. c. 158 s. 6. This Article does not apply to persons who are in an office or place of business wherein the making of such contracts as are mentioned in Article 236 is carried on; *R. v. Murphy*, 17 O. R., 201.

ARTICLE 239.

OBSTRUCTING PEACE OFFICERS ENTERING A GAMING
HOUSE.

¹ Every one who

(a.) wilfully prevents any constable or other officer, authorized under The Revised Statutes, chapter 158, to enter any house, room or place, from entering the same or any part thereof; or

(b.) obstructs or delays any such constable or officer in so entering; or

(c.) by any bolt, chain or other contrivance, secures any external or internal door of, or means of access to, any house, room or place so authorized to be entered; or

(d.) uses any means or contrivance whatsoever for the purpose of preventing, obstructing or delaying the entry of any constable or officer, authorized as aforesaid, into any such house, room or place, or any part thereof,

Is guilty of a misdemeanor, and liable, on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars, with costs, and to imprisonment with or without hard labor for any term not exceeding six months.

ARTICLE 240.

GAMBLING IN PUBLIC CONVEYANCES.

² Every one is guilty of a misdemeanor, ³ and liable to imprisonment for any term less than one year, who

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

¹ R. S. C. c. 158, s. 7; 17 & 18 Vict. c. 38, s. 1.

² R. S. C. c. 160, ss. 1, 2, 3, 6.

³ The misdemeanor of obtaining the same by false pretences (s. 1).

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

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

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

Every company or person who owns or works any such railway car or steamboat, must keep a copy of chapter 160 of The Revised Statutes posted up in some conspicuous part of such railway car or steamboat.

Every company or person who makes default in the discharge of such duty, is liable to a penalty not exceeding one hundred dollars and not less than twenty dollars.

¹ ARTICLE 241.

BETTING AND POOL SELLING.

² Every one is guilty of a misdemeanor, and liable to a fine not exceeding one thousand dollars and to one year's imprisonment, who

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

¹ S. D. Art. 182. See Appendix, Note VI.

² R. S. C. c. 159, s. 9; 18 & 17 Vict. c. 119, ss. 1, 4, 6.

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

(c.) becomes the custodian or depository of any money, property, or valuable thing staked, wagered or pledged; or,

(d.) records or registers any bet or wager, or sells any pool,—

upon the result of any political or municipal election, or of any race, or of any contest or trial of skill or endurance of man or beast.

Nothing herein applies to any person by reason of his becoming the custodian¹ or depository of any money, property or valuable thing staked, to be paid to the winner of any lawful race, sport, game or exercise, or to the owner of any horse engaged in any lawful race, or to bets between individuals.

² ARTICLE 242.

DISORDERLY PLACES OF ENTERTAINMENT.

³ In Ontario, British Columbia, Manitoba and the North-West Territories [the following places are disorderly places of entertainment, that is to say—

³ Every house, room, or other place opened or used for public entertainment or amusement, or for public debating on any subject whatsoever upon any part of the Lord's Day called Sunday, and to which persons are

¹ The Act does not apply to the custodian of money staked by two persons upon a bet between themselves on the result of a boat race: *R. v. Dillon*, 10 Ont. P. R. 352. A trotting match for fifty pounds between two horses driven in harness in sleighs on the ice is a legal horse race within 18 Geo. 2, c. 19, and 18 Geo. 2, c. 34; *Fulton v. James*, 5 U. C. C. P. 182.

² S. D. Art. 184.

³ [21 Geo. 3, c. 49, s. 1.] *R. v. Barnes*, 45 U. C. Q. B. 276, in which a conviction under this statute for keeping a disorderly house, known as the Royal Opera House, opened and used for public entertainment and amusement on the Lord's Day, was sustained.

[admitted by the payment of money, or by tickets sold for money.

The following places are deemed to be places to which persons are admitted by the payment of money, although money is not taken in the name of or for admittance, that is to say, any house, room, or place—

¹ (i) at which persons are supplied with tea, coffee, or other refreshments of eating or drinking on the Lord's Day at any greater price than the common and usual prices at which the like refreshments are commonly sold upon other days thereat, or at places where the same usually are sold;

(ii) any house, room, or place opened or used for any of the purposes aforesaid at the expense of any number of subscribers or contributors to the carrying on of any such entertainment, or amusement, or debate, on the Lord's Day, and to which persons are admitted by tickets to which the subscribers or contributors are entitled.

² ARTICLE 243.

DISORDERLY INNS.

³ A disorderly inn is an inn kept in a disorderly manner and suffered to be resorted to by persons of bad character for any improper purpose.

Every person who keeps a disorderly inn, or who, being an innkeeper, refuses, without reasonable grounds, to entertain any person ready and willing to pay for entertainment therein, commits a misdemeanor.]

⁴ ARTICLE 244.

LOTTERIES.

⁵ Every one is guilty of a misdemeanor and liable on summary conviction to a penalty of twenty dollars who,

¹ 21 Geo. 3 c. 49 s. 2.

² S. D. Art. 185.

³ Precedent of indictment, 3 Chit. Crim. Law, 672-3. As to refusing entertainment, see *R. v. Hymer*, L. R. 2 Q. B. D. 136.

⁴ S. D. Art. 186.

⁵ [10 Will. 3, c. 23, s. 1; 42 Geo. 3, c. 119, s. 2. And see *R. v. Crawshaw*, Bell, C. C. 303.]

¹ (a.) makes, prints, advertises or publishes, or causes or procures to be made, printed, advertised or published, any proposal, scheme or plan, for advancing, lending, giving, selling or in any way disposing of any property, by lots, cards, tickets, or any mode of chance whatsoever; or

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

² (c.) buys, barter, exchanges, takes or receives any such lot, card, ticket, or other device.

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

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

⁵ This article applies to the printing or publishing, or causing to be printed or published, of any advertisement, scheme, proposal or plan of any foreign lottery, and to

¹ R. S. C. c. 159, s. 2; 8 Geo. 1, c. 2, s. 35; 6 & 7 Will. 4, c. 66. The disposition of property by a plan involving the exercise of judgment and skill, and not by lot, card, ticket or chance, is not within the prohibition; *R. v. Dollis*, 4 O. R. 390; *R. v. Jamieson*, 7 O. R. 149.

² R. S. C. c. 159, s. 3; 8 Geo. 1, c. 2, s. 37; 12 Geo. 2, c. 28, s. 3.

³ R. S. C. c. 159, s. 4; 12 Geo. 2 c. 28, s. 4. *Power v. Caviff*, 18 U. C. Q. B. 408; *Cronyn v. Wilder*, 16 U. C. Q. B. 356; *Corby v. McDaniel*, 16 U. C. Q. B. 378; *Marshall v. Platt*, 8 U. C. C. P. 189; *Loyd v. Clark*, 11 U. C. C. P. 248; *Clarke v. Donnelly*, 1 Ont. Dig. 1620; see also *La Société des St. Louis v. Villeneuve*, 21 L. C. J. 309.

⁴ R. S. C. c. 159, s. 5.

⁵ R. S. C. c. 159, s. 6; 9 Geo. 1 c. 19, s. 4; 6 Geo. 2 c. 35, s. 29; 6 & 7 Will. 4, c. 66.

the sale, or offer for sale, of any ticket, chance or share, in any such lottery, or to the advertisement for sale of such ticket, chance or share.

¹ This article does not apply to—

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

² (b.) raffles for prizes of small value, at any bazaar held for any charitable object, if permission to hold the same has been obtained from the city or other municipal council, or from the mayor, reeve or other chief officer of the city, town or other municipality, wherein such bazaar is held, and the articles raffled for have thereat first been offered for sale, and none of them are of a value exceeding fifty dollars ;

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

³ The expression “ property ” in this article includes every description of money, chattel and valuable security, and every kind of personal property and every description of land, and all estates and interests therein.

⁴ ARTICLE 245.

NUISANCES TO HEALTH, LIFE, AND PROPERTY.

⁵ [Every person commits a common nuisance who does anything which endangers the health, life, or property of the public or any part of it.

¹ R. S. C. c. 159, s. 7 ; 12 Geo. 2, c. 28, s. 11.

² R. S. C. c. 159, s. 8.

³ R. S. C. c. 159, s. 1.

⁴ S. D. Art. 137. See chapter 51 as to the adulteration of food, &c.

⁵ [See cases in Illustrations. The offences of being a common scold and of eaves-dropping would fall under this head, but they may be regarded as practically obsolete.]

¹ [Publicly and wilfully exposing or causing to be exposed for sale articles of food unfit for consumption, and knowingly permitting servants to mix unwholesome ingredients in articles of food, are acts endangering the health or life of the public within the meaning of this Article.

² Everything is deemed to endanger health, life, or property, which either causes actual danger thereto, or which must do so in the absence of a degree of prudence and care the continual exercise of which cannot be reasonably expected.

Illustrations.

(1.) ³ A carries a child infected with the small-pox along a public high way in which persons are passing, and near to inhabited houses. A commits a common nuisance.

(2.) ⁴ A permits his house standing by the highway to become so ruinous as to be likely to fall down, and to injure passengers. A commits a common nuisance.

(3.) ⁵ A burns down his own house, it being in a situation which makes such burning dangerous to others. A commits a common nuisance.

(4.) ⁶ A, a baker, under a contract to supply children at a military asylum with bread, delivers loaves into which his servant, to his knowledge, has introduced alum. A commits a common nuisance.

(5.) ⁷ A keeps in a warehouse in the city of London large quantities of a mixture of spirits of wine and wood naphtha, forming a substance more inflammable than gunpowder, and of such a nature that a fire lighted by it would be practically unquenchable. A commits a common nuisance, although he uses the most scrupulous care to avoid accidents.

¹ [Draft Code, s. 153.

² Illustration (5).

³ *R. v. Vautandillo*, 4 M. & S. 73. So of bringing a glandered horse to a fair; *R. v. Henson*, Dear. 24. An infected person exposing himself would commit the same offence.

⁴ *R. v. Watson*, 2 Ld. Raym. 859.

⁵ *R. v. Proberts*, 2 East P. C. 1030. If there were an intent to injure or defraud, this would be felony. See Article 562 (c).

⁶ *R. v. Dixon*, 3 M. & S. 11. See, too, *R. v. Crawley*, 3 F. & F. 109; *R. v. Jarvis*, 3 F. & F. 108.

⁷ *Lister's Case*, 1 D. & B. C. C. 209.] See to same effect in respect of gunpowder, *R. v. Dunlop*, 11 L. C. J. 186, and in respect of dynamite *R. v. Holmes*, 5 R. & G. 498.

¹ ARTICLE 246.

NUISANCES BY OFFENSIVE TRADES.

² [Every one commits a common nuisance who, for the purposes of trade or otherwise, makes loud noises, or offensive or unwholesome smells, in such places and under such circumstances as to annoy any considerable number of persons in the exercise of rights common to all her Majesty's subjects.

³ ARTICLE 247.

NUISANCES TO HIGHWAYS.

Every one commits a common nuisance who obstructs any highway, by any permanent work or erection thereon or injury thereto, which renders the highway less commodious to the public than it would otherwise be ; or who prevents them from having access to any part of it by an excessive and unreasonable temporary use thereof,⁴ or by so dealing with the land in the immediate neighborhood of the highway as to prevent the public from using and enjoying it securely.

Illustrations.

Each of the following acts is a nuisance to a highway :

- (1.) ⁵ Digging a ditch, or making a hedge across it, or ploughing it up.
- (2.) ⁶ Allowing waggons to stand before a warehouse for an unreasonable time, as, to occupy great part of the street for several hours by day and night.
- (3.) ⁷ Keeping up a hoarding in front of a house in a street for the purpose of repairs for an unreasonable time.

¹ S. D. Art. 188.

² [1 Russ. Cr. 419.]

³ S. D. Art. 189. *It. v. The Mayor & St. John*, Chipman, 155; *R. v. Britain*, 2 Kerr 614.

⁴ As to use of the streets by the Salvation Army, see *R. v. Brice*, 15 Q. L. R. 147, 152.

⁵ [1 Russ. Cr. 485.

⁶ *R. v. Russel*, 6 East, 427.

⁷ *R. v. Jones*, 3 Camp. 230.]

- [(4.) ¹ Excavating an area close to a footpath, and leaving it unfenced.
 (5.) ² Blasting stone in a quarry so as to throw stones upon the houses and road.

³ ARTICLE 248.

NUISANCES TO BRIDGES.

⁴ Every one is guilty of a common nuisance who, being bound by law to repair a bridge, leaves it unrepaired.

⁵ ARTICLE 249.

⁶ NUISANCES TO NAVIGABLE RIVERS.

Every one is guilty of a common nuisance who wilfully diverts or obstructs the course of any navigable river⁷ so as appreciably to diminish its convenience for purposes of navigation, even though the alteration may, upon the whole, be for the convenience of the public;⁸ but the owner of a vessel wrecked in a navigable river is not guilty of a common nuisance because he does not remove it.]

¹ [*Barnes v. Ward*, 9 C. B. 302.

² *R. v. Muters*, L. & C. 491.]

³ S. D. Art. 190.

⁴ [1 Russ. Cr. 530-57, where the whole law as to the liability to repair different classes of bridges is discussed.]

⁵ S. D. Art. 191.

⁶ 1 Russ. Cr. 529.]

⁷ *R. v. Rowthill*, C. & M. 496; *R. v. Russell*, 3 E. & B. 942.

⁸ *R. v. Watts*, 2 Esp. 675; *White v. Crisp*, 10 Ex. 518; *Brown v. Mallett*, 5 C. B. 509. *White v. Crisp* and *Brown v. Mallett* are not altogether consistent on the further question as to the duty of the owner to buoy his vessel, or otherwise provide against other vessels striking on it.) See R. S. C. c. 91, ss. 1-6, as to the duty of the owner or master to provide signals in such a case and as to their liability to remove the obstruction; and s. 7 as to the offence of throwing rubbish into navigable rivers.

CHAPTER XXI.

VAGRANCY—LOITERING NEAR SHIPS.

¹ ARTICLE 250.

IDLE AND DISORDERLY PERSONS.

² ALL persons are loose, idle or disorderly persons or vagrants who,

(a.) ³ not having visible means of maintaining themselves, live without employment,—

(b.) being able to work and thereby or by other means to maintain themselves and families, wilfully refuse or neglect to do so,—

(c.) openly expose or exhibit in any street, road, public place or highway, any indecent exhibition, or openly or indecently expose their persons,⁴—

(d.) without a certificate signed, within six months, by a priest, clergyman or minister of the gospel, or two justices of the peace, residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wander ⁵ about and beg, or go about from door to door, or place themselves in any street, highway, passage or public place to beg or receive alms,—

¹ S. D. Arts. 192, 193, 194. These Articles include some offences not defined in the Act from which the text is taken, part of which are founded on 5 Geo. 4, c. 83. I have not, however, thought it necessary to add anything to the text, although the latter Act might be held to be in force in British Columbia, Manitoba, and the North-West Territories so far as applicable thereto.

² R. S. C. c. 157, s. 8; 5 Geo. 4, c. 83, ss. 3, 4; 1 & 2 Vict. c. 38, s. 2; 3 Hist. Cr. Law, 266-275.

³ A person cannot be convicted of the offence defined in this clause unless he has acquired in some degree a character that brings him within its terms. *R. v. Bassett*, 10 Ont. P. R. 386.

⁴ See Art. 217.

⁵ [The wandering, &c., must be as a habit of life. Persons who go about collecting alms for a specific purpose, and not as a way of life, are not within the statute; *Pointon v. Hill*, L. R. 12 Q. B. D. 306.]

(e.) ¹ loiter on any street or highway, and obstruct passengers by standing across the footpaths or by using insulting language, or in any other way,—

(f.) cause a disturbance in any street or highway by screaming, swearing or singing, or by being drunk,² or by impeding or incommoding peaceable passengers,—

(g.) by discharging firearms, or by riotous or disorderly conduct in any street or highway, wantonly or maliciously disturb the peace and quiet of the inmates of any dwelling house near such street or highway,—

(h.) tear down or deface signs, break windows, doors or door plates, or the walls of houses, roads or gardens, or destroy fences,—

(i.) ³ being common prostitutes or night walkers, wander in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and do not give a satisfactory account of themselves,—

(j.) are keepers⁴ or inmates of disorderly houses, bawdy houses or houses of ill-fame, or houses for the resort of prostitutes, or persons in the habit of frequenting such houses, not giving a satisfactory account of themselves,⁵—or

(k.) ⁶ having no peaceable profession or calling to

¹ A licensed carter who, contrary to a city ordinance, loiters on the street near the entrance of a hotel in the City of Montreal and solicits passengers to hire his cab, but who does not obstruct passengers, is not within this provision: *Smith v. R.*, 4 M. L. R. 325.

² Being drunk is not an offence within clause (f). The offence consists in causing a disturbance by being drunk: *Ex parte Despatie*, 9 L. N. 387; *R. v. Daly*, 24 C. L. J. 157.

³ As to the necessity of there being evidence of place or circumstance to such impropriety of purpose and failure to give a satisfactory account of herself, see *R. v. Arscott*, 9 O. R. 541.

⁴ See R. S. C. c. 176, ss. 3(f), 11, and as to whether or not a substantive offence is thereby created; *R. v. Clerk*, 2 O. R. 523; *R. v. Flint*, 4 O. R. 214. A husband and wife may be jointly convicted of keeping a house of ill-fame. The keeping has to do with the management of the house, not the ownership thereof; *R. v. Warren*, 16 O. R. 590. As to evidence of keeping, see *R. v. Newton*, 11 Ont. P. R. 101.

⁵ The words "not giving a satisfactory account of themselves," do not apply to the keepers of disorderly houses, but to the frequenters thereof; *Arscott v. Lilley*, 11 O. R. 181; *R. v. Remon*, 16 O. R. 560, over-ruling *R. v. Arscott*, 9 O. R. 541.

⁶ It will not be inferred from the fact that the defendant has no peaceable profession or calling, and that he consorts with thieves, that he maintains himself by crime; *R. v. Organ*, 11 Ont. P. R. 437.

maintain themselves by, for the most part support themselves by gaming or crime, or by the avails of prostitution.

Every loose, idle or disorderly person or vagrant is liable, on summary conviction before two justices of the peace to a fine not exceeding fifty dollars or to imprisonment, with or without hard labor, for any term not exceeding six months, or to both.

ARTICLE 251.

LOITERING NEAR SHIPS.

¹ Every one who is found loitering near any ship, and who does not give a satisfactory account of his business there, is liable, on summary conviction,

(a.) to a penalty not exceeding one hundred dollars and not less than fifty dollars, and to imprisonment, with hard labor, for a term not exceeding twelve months and not less than three months, if he is unarmed at the time he is so found loitering; and

(b.) if at such time he is armed² to imprisonment for a term not exceeding three years and not less than two years.

¹ R. S. C. c. 74, s. 87.

² Armed with or carrying about his person any pistol, gun or other firearm or offensive weapon.

* PART V.

OFFENCES AGAINST THE PERSON, THE CONJUGAL
AND PARENTAL RIGHTS, AND THE REPUTATION
OF INDIVIDUALS.

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| CHAP. XXII.—CASES IN WHICH INFLICTION OF BODILY INJURY IS NOT CRIMINAL. | CHAP. XXVII.—ASSAULTS—KIDNAPPING—OBSTRUCTING OFFICERS AND OTHERS IN THE EXECUTION OF THEIR DUTY. |
| CHAP. XXIII.—OF CULPABLE NEGLIGENCE AND OF DUTIES TENDING TO THE PRESERVATION OF LIFE. | CHAP. XXVIII.—RAPE—CARNALLY KNOWING CHILDREN—ABORTION. |
| CHAP. XXIV.—HOMICIDE. | CHAP. XXIX.—CRIMES AFFECTING CONJUGAL AND PARENTAL RIGHTS—BIGAMY—ABDUCTION. |
| CHAP. XXV.—MURDER—MANSLAUGHTER—ATTEMPTS TO COMMIT MURDER—CONCEALMENT OF BIRTH. | CHAP. XXX.—OFFENCES AGAINST CHILDREN BY PARENTS AND OTHERS. |
| CHAP. XXVI.—BODILY INJURIES AND ACTS AND OMISSIONS CAUSING DANGER TO THE PERSON. | CHAP. XXXI.—LIBELS ON PRIVATE PERSONS. |

CHAPTER XXII.

*CASES IN WHICH INFLICTION OF BODILY INJURY
IS NOT CRIMINAL.*¹ ARTICLE 252.

EXCEPTIONS TO REST OF PART V.

[THE contents of Part V. are to be taken to be subject to the provisions contained in this chapter.

* [Appendix. Note VII. See also 3 Hist. Cr. Law, ch. xxvi. and xxvii. pp. 1-120.]
¹ S. D. Art. 196.

ARTICLE 253.

EXECUTION OF LAWFUL SENTENCES.

² [The intentional infliction of death or bodily harm is not a crime when it is done in the execution, in the manner prescribed by law by a person whose duty it is to execute it, of a lawful sentence duly passed by a competent court.

A court which, but for some formal defect in its authority or in its proceedings, would have had jurisdiction to pass a sentence, is deemed for the purposes of this Article to be a competent court; but a court which has by law no jurisdiction at all over the case in which sentence is passed is not deemed to be a competent court, and a mistaken belief on the part of the judge, or of the officer who executes the sentence, that it is competent, does not justify or excuse his act.

Illustrations.

(1.) ³ A sits under a commission of gaol delivery. The officer forgets to adjourn the court at the end of the first day's sitting. This determines the commission. On the following day A sits again, and sentences a felon to death, who is duly executed by B. Neither A nor B is guilty of murder or manslaughter, though the proceedings are irregular.

(2.) ⁴ A, a lieutenant or other having commission of martial authority in time of peace, causes B to be hanged by C by color of martial law. This is murder in both A and C.

¹ S. D. Art. 197.

[1 Hale, P. C. 497; Foster, 267; 1 Hawk. P. C. 80; 1 East, P. C. 332-4. These authorities contain (*inter alia*) discussions as to varying the form of punishment (as by substituting beheading for hanging) little likely to be of practical value. Draft Code, ss. 25, 28.]

² Per Lord Hale, 1 Hale, P. C. 499.

³ Coke, 3rd Inst. 52; 1 Hale P. C. 499, 500. The whole subject of martial law underwent full discussion in connection with the execution of Mr. Gordon by a court martial in Jamaica in 1865. An elaborate history of the case has been published by Mr. Finlason, and the charge to the grand jury, delivered at the Central Criminal Court by the Lord Chief Justice of England, has been published in a separate form. I know not whether the charge to the grand jury of Middlesex, delivered by Lord (then Mr. Justice) Blackburn, has been published or not. Much information on the subject will be found in Forsyth's *Cases and opinions on Constitutional Law*, pp. 484-563. Mr. Forsyth prints, *inter alia*, an opinion given by the late Mr. Edward James, Q.C., and myself, in 1866. See pp. 551-563; and see *Phillips v. Eyre*, L. R. 6 Q. B. 11.]

¹ ARTICLE 254.

SUPPRESSION OF RIOTS.

[The intentional infliction of death or bodily harm is not a crime when it is done either by justices of the peace, peace officers, or private persons, whether such persons are, and whether they act as, soldiers under military discipline or not for the purpose of suppressing a general and dangerous riot which cannot otherwise be suppressed.

³ ARTICLE 255.

PREVENTION OF THE COMMISSION OF CRIMES AND ARREST OF CRIMINALS.

The intentional infliction of death or bodily harm is not a crime when it is done by any person

⁴ in order to prevent the commission of treason, murder, burglary, rape, robbery, arson, piracy or any other felony in which the traitor, felon, or pirate so acts as to give the person who kills or wounds him reasonable ground to believe that he intends to accomplish his purpose by open force ;

⁵ or in order to arrest a traitor, felon, or pirate, or retake

¹ S. D. Art. 198.

² [See the charge of Tindal, C. J., to the grand jury of Bristol in 1832, printed in a note to *R. v. Pinney*, 5 C. & P. 261, and quoted and approved in *Phillips v. Eyre*, L. R. 6 Q. B. 15 (Court of Exchequer Chamber). The proper course in such cases is for the civil magistrate to direct and control what is done, but this is not absolutely necessary. The Riot Act (R. S. C. c. 147, ss. 1-3), 1 Geo. 1, st. 2, c. 5, (see Article 85) authorizes in express terms the dispersion of rioters who continue riotously assembled together for more than an hour after the proclamation made, and indemnifies the persons concerned if any of the rioters should be killed ; but this Act appears to be narrower than the common law as laid down by Tindal, C. J. See Draft Code, ss. 49-50.]

³ S. D. Art. 189.

⁴ [Coke, 3rd Inst. 55 ; 1 Hale, P. C. 486-7 ; Foster, 278 (more fully and satisfactorily) ; 1 Hawk. P. C. 82 (rather confusedly) ; 1 East, P. C. 271-4 (best and most fully stated) ; 1 Russ. Cr. 5th ed. 845-52 (taken substantially from East). Piracy is not mentioned by the authorities, but see 8 Geo. 1, c. 24, s. 8. (Article 141.) Draft Code, s. 54.

⁵ Coke, 3rd Inst. 56 ; 1 Hale, P. C. 489 ; 1 Hawk. P. C. 81 ; Foster, 270-1 ; 1 East P. C. 298-302. Draft Code, ss. 52-46.]

[or keep in lawful custody a traitor, felon, or pirate who has escaped, or is about to escape, from such custody, although such traitor, felon, or pirate offers no violence to any person ;

¹ or, when it is done by a constable, or other officer of justice, in order to execute a warrant of arrest for treason or felony, which cannot otherwise be executed, although the person named in the warrant offers no violence to any person ;

provided, in each of the said cases, that the object for which death or harm is inflicted cannot be otherwise accomplished.

² ARTICLE 256.

³ PRIVATE DEFENCE.

The intentional infliction of death or bodily harm is not a crime when it is inflicted by any person in order to defend himself or any other person from unlawful violence, provided that the person inflicting it observes the following rules as to avoiding its infliction and inflicts no greater injury in any case than he in good faith, and on reasonable grounds, believes to be necessary when he inflicts it :—

(a.) ⁴ If a person is assaulted in such a manner as to put him in immediate and obvious danger of instant death or grievous bodily harm, he may defend himself on the spot, and may kill or wound the person by whom he is assaulted ;

¹ [Coke, 3rd Inst. 55 ; 1 Hale, P. C. 499 ; 1 Hawk. P. C. 81 ; 1 East P. C. 298-302. It must be observed that this Article is confined to the intentional infliction of death or bodily injury. If the death or injury is not an intended or probable consequence of the act the case is provided for under Articles 256, 278.]

² S. D. Art. 200.

³ [See Draft Code, ss. 55-65.]

⁴ Coke, 3rd Inst. 55 ; 1 Hale, P. C. 482 ; 1 Hawk. P. C. 82 ; Foster, 273-5 ; 1 Russ. Cr. 849. This case is so nearly co-extensive with the first case mentioned in the last Article that East does not notice them separately. Cases, however, may be imagined in which a sudden and violent assault would be no crime, and yet might be resisted by killing the assailant : see Illustration (1).]

- [(b.) ¹ If a person is unlawfully assaulted,
 (i.) in his own house;
 (ii.) ² in the execution of a duty imposed upon him by law ;
 (iii.) ² by way of resistance to the exercise of force which he has by law a right to employ against the person of another ;

he may defend himself on the spot, and may use a degree of force for that purpose proportioned to the violence of the assault, and sufficient (in case iii.) to enable him not only to repel the attack made upon him, but to effect his original purpose ; but a person using force in the execution of a duty imposed upon him by law, or in order to effect a purpose which he may by law effect in that manner, and not being assaulted, is not entitled to strike or hurt the person against whom he employs such force, merely because he is unable otherwise to execute such duty or fulfil such purpose, except in the cases provided for in Article 255.

- (c.) ³ If a person is unlawfully assaulted by another

¹ Staundforde, 14a ; Coko, 3rd Inst. 56 ; 1 Hale, P. C. 476, &c. ; 1 Hawk. P. C. 37 ; Foster, 275-6 ; 1 East P. C. 279-80.

² [In addition to the authorities in the last note, see 1 East, P. C. 287, 307 ; 1 Hale, P. C. 486.]

³ See the authorities quoted for clauses (a.), (b.) and (c.), and especially 1 Hale, P. C. 481. The qualification at the end of this rule is founded on the doctrine that any one may lawfully prevent or suppress by force a breach of the peace or affray (1 Hawk. P. C. 489 ; *R. v. Omer*, 5 East, 308), from which it would seem to follow that a man who is himself assaulted may arrest his assailant, and on the doctrine that *son assault demesse* is a good defence to an indictment for assault (1 Hawk. P. C. 110). If this were not the law it would follow that any ruffian who choose to assault a quiet person in the street might impose upon him the legal duty of running away, even if he were the stronger man of the two. The passage of Hale appears to me to be applicable only to cases where deadly weapons are produced by way of bravado or intimidation, a case which no doubt often occurred when people habitually carried arms and used them on very slight provocation. In such a case it might reasonably be regarded as the duty of the person assaulted to retreat rather than draw his own sword, but I cannot think that Hale meant to say that a man who in such a case closed with his assailant and took his sword from him would be acting illegally, or that if in doing so the assailant were thrown down and accidentally killed by the fall the person causing his death would be guilty of felony. The minuteness of the law contained in the authorities on which this Article is founded is a curious relic of a time when police was lax and brawls frequent, and when every gentleman wore arms and was supposed to be familiar with the use of them. It might, I think, be simplified in the present day with advantage.]

[without any fault of his own, and otherwise than in the cases provided for in clauses (a.) and (b.), but with a deadly weapon, it is his duty to abstain from the intentional infliction of death or grievous bodily harm on the person assaulting, until he (the person assaulted) has retreated as far as he can with safety to himself.

But any person unlawfully assaulted may defend himself on the spot by any force short of the intentional infliction of death or grievous bodily harm; and if the assault upon him is notwithstanding continued, he is in the position of a person assaulted in the employment of lawful force against the person of another.

(d.) ¹ If two persons quarrel and fight neither is regarded as defending himself against the other until he has in good faith fled from the fight as far as he can, but if either party does in good faith flee from the fight as far as he can, and if, when he is prevented, either by a natural obstacle or any other cause of the same nature, from flying farther, the other party to the fight follows and again assaults him, the person who has so fled may defend himself, and may use a degree of violence for that purpose proportioned to the violence employed against him.

Illustrations.

(1.) ² A, a madman, violently attacks B in such a manner as to cause instant danger to B's life. B may kill A, though A is not committing any crime.

(2.) ³ A, an officer, has a warrant to arrest B on civil process. B flies. A overtakes him, and B assaults A. A may use any degree of violence to B necessary to repel his assault and to arrest him.

(3.) ⁴ A, a trespasser, enters B's house and refuses to leave it. B has a right to remove A by force, but not to strike him even if he cannot otherwise get him out of the house. If on the application of such force A assaults B, B may use any degree of force necessary to defend himself and to remove A from the house.

¹ [See the authorities for clause (b).]

² This seems to follow directly from the authorities cited. So, if A were under a mistake of fact which B had no time to explain.

³ 1 East, P. C. 807.

⁴ 1 Hale, P. C. 486.]

¹ ARTICLE 257.

LAWFUL FORCE.

² [It is not a crime to inflict bodily harm by way of lawful correction, or by any lawful application of force (other than those hereinbefore mentioned) to the person of another; but if the harm inflicted on such an occasion is excessive the act which inflicts it is unlawful, and, even if there is no excess, it is the duty of every person applying the force to take reasonable precautions against the infliction of other or greater harm than the occasion requires.]

Illustrations.

- (1.) ³ A, a schoolmaster, beats B, a scholar, for two hours with a thick stick. Such a beating is unlawful.
 (2.) ⁴ A kicks B, a trespasser, out of his house, in order to force him to leave it. B is killed. The kick is an unlawful act.
 (3.) (SUBMITTED.) ⁵ A, the governor of a gaol, flogs B, a criminal, under the sentence of a court. It is A's duty to cause the surgeon of the gaol to be in attendance to see that no unintended injury is inflicted on B.

⁶ ARTICLE 258.

SUPERIOR ORDERS TO EMPLOY FORCE.

In all cases in which force is used against the person of another, both the person who orders such force to be used and the person using that force is responsible for its use, and neither of them is justified by the circumstance that

¹ S. D. Art. 201.

² [It would be inconsistent with the plan of this work to try to enumerate all the cases in which force may be lawfully applied to the person of another. In 1 Russ. Cr. 737-73, cases will be found as to excessive violence in executing legal process: *R. v. Huggins*, Str. 882, p. 872. Pressing for the sea service (p. 768). Captains in the merchant service: *R. v. Leggett*, 8 C. & P. 121 (p. 773). Correction of children and servants (773-7). See Draft Code, s. 65.] *Mitchell v. Defries*, 2 U. C. Q. B. 430; *Belch v. Arnott*, 9 U. C. C. P. 68; *The Bridgewater*, 6 Q. L. R. 290; *R. v. Faneuf*, 5 L. C. J. 167; *R. v. Stowe*, 2 G. & O. 121.

³ [*R. v. Hopley*, 1 Russ. Cr. 776; 2 F. & F. 202.]

⁴ *Wild's Case*, 1 Russ. Cr. (5th ed.) 687; 2 Lewin, 214.]

⁵ See Art. 11.

⁶ S. D. Art. 202.

[he acts in obedience to orders given him by a civil or military superior, but the fact that he did so act, and the fact that the order was apparently lawful, are in all cases relevant to the question whether he believed, in good faith and on reasonable grounds, in the existence of a state of facts which would have justified what he did apart from such orders,¹ or which might justify his superior officer in giving such orders.

Illustrations.

(1.)² A, a marine, is ordered by his superior officer on board a man-of-war to prevent boats from approaching the ship, and has ammunition given him for that purpose. Boats persisting after repeated warnings in approaching the ship, A fires at one and kills B. This is murder in A although he fired under the impression that it was his duty to do so, as the act was not necessary for the preservation of the ship (though desirable for the maintenance of discipline).

(2.)³ A, the driver of an engine, orders B, the stoker (whose duty it is to obey his orders), not to stop the engine. The train runs into another in consequence, and C is killed. B is justified by A's order.

(3.)⁴ (SCHEFFER). A, a civil magistrate, directs B, a military officer, to order his men to fire into a mob. B gives the order. It is obeyed, and C, a common soldier, shoots D dead. The question whether A, B, and C respectively committed any offence depends on the question whether each of them respectively had reasonable grounds to believe, and did in fact

¹ [As to this see 1 Hist. Cr. Law, 205.

² *R. v. Thomas*, 1 Russ. Cr. 732; 4 M. & S. 441.

³ *R. v. Trainor*, 4 F. & F. 105; 1 Russ. Cr. (5th ed.) 837, 838. The language of Willes, J., in this case seems to be a little too wide, unless it is taken in connection with the particular facts.

⁴ Whether C would commit a military offence if he refused to obey B's order because he rightly thought it unreasonable, is a question which would have to be decided by a court martial. I should suppose that cases might be imagined in which even a court martial would hold that a military inferior might and ought to disobey orders on the ground of their illegality. An officer, *e.g.*, who commanded his men to fire a volley down Fleet Street when there was no appearance of a disturbance, or to shoot a child of four years old running away during a riot, or to desert to the enemy, or to shoot a superior officer, ought to be disobeyed, and I suppose that a soldier who obeyed such an order might be punished by a court martial. That such acts as shooting peaceable people wantonly, or a child of four years old intentionally, even in a riot, would be murder as well in the soldier as in the officer cannot be doubted. If so, it seems impossible to suggest any other principle as to the effect of superior orders than the one mentioned in the text. It is indeed essential to the maintenance of the supremacy of the common law over military force.]

[believe in good faith, either that what they did was necessary to suppress a dangerous riot, or in the case of B, that A, or in the case of C, that B, had reasonable grounds to believe, and did believe, that the order given was necessary to suppress a dangerous riot. A's direction to B, and B's order to C, would not necessarily justify B or C in what they did, but would be facts relevant to the question whether they believed upon reasonable grounds as aforesaid.

¹ ARTICLE 259.

CONSENT TO BODILY INJURY.

The consent of a person killed or maimed to the infliction of death or bodily harm, affects the criminality of such infliction to the extent defined in Articles 260-265, both inclusive. In each of these Articles the word "Consent" means a consent freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which he consents.

Consent is said to be given freely when it is not procured by force, fraud, or threats of whatever nature.

² ARTICLE 260.

RIGHT TO CONSENT TO BODILY INJURY FOR SURGICAL PURPOSES.

Every one has a right to consent to the infliction of any bodily injury in the nature of a surgical operation upon himself or upon any child under his care, and too young to exercise a reasonable discretion in such a matter, but such consent does not discharge the person performing the operation from the duties hereinafter defined in relation thereto.

¹ S. D. Art. 203.

² S. D. Art. 204.

³[I know of no authority for these propositions, but I apprehend they require none. The existence of surgery as a profession assumes their truth.]

¹ ARTICLE 261.

SURGICAL OPERATION ON PERSON INCAPABLE OF ASSENT.

[(SUBMITTED.)² If a person is in such circumstances as to be incapable of giving consent to a surgical operation, or to the infliction of other bodily harm of a similar nature and for similar objects, it is not a crime to perform such operation or to inflict such bodily harm upon him without his consent or in spite of his resistance.

Illustrations.

(1.) A is rendered insensible by an accident which renders it necessary to amputate one of his limbs before he recovers his senses. The amputation of his limb without his consent is not an offence.

(2.) If the accident made him mad, the amputation in spite of his resistance would be no offence.

(3.) B is drowning and insensible. A, in order to save his life, pulls B out of the water with a hook which injures him. This is no offence.

³ ARTICLE 262.

RIGHT TO CONSENT TO BODILY INJURY SHORT OF MAIM.

⁴ Every one has a right to consent to the infliction upon himself of bodily harm not amounting to a maim. A maim is bodily harm whereby a man is deprived of the use of any member of his body or of any sense which he can use in fighting, or by the loss of which he is generally and permanently weakened, but a bodily injury is not a maim merely because it is a disfigurement.

Illustration.

(1.) It is a maim to strike out a front tooth. It is not a maim to cut off a man's nose. Castration is a maim.

¹ S. D. Art. 205.

² [Draft Code, s. 67.]

³ S. D. Art. 206.

⁴ [The positive part of this Article is proved thus:—Injuries short of maims are not criminal at common law unless they are assaults, but an assault is inconsistent with consent. As to the definition of a maim, see 1 Hawk. P. C. 107. He expressly mentions castration.]

¹ ARTICLE 263.

NO RIGHT TO CONSENT TO INFLICTION OF DEATH.

² [No one has a right to consent to the infliction upon himself of death, or of an injury likely to cause death, in any case (other than those mentioned in Article 260), or to consent to the infliction upon himself of bodily harm amounting to a maim, for any purpose injurious to the public.]

Illustrations.

(1.) ³ A and B agree to fight a duel together with deadly weapons. If either is killed or wounded his consent is immaterial.

(2.) ⁴ A gets B to cut off A's right hand, in order that A may avoid labor and be enabled to beg. Both A and B commit an offence.

⁵ ARTICLE 264.

NO RIGHT TO CONSENT TO INJURY CONSTITUTING A BREACH OF THE PEACE.

⁶ No one has a right to consent to the infliction of bodily harm upon himself in such a manner as to amount to a breach of the peace, or in a prize fight or other exhibition calculated to collect together disorderly persons.

¹ S. D. Art. 267.

² [Draft Code, s. 69.]

³ *R. v. Barronet*, Dear. 51. The law has never, I believe, been disputed. It is also immaterial whether the duel is or is not what is called fair. See, too, authorities as to suicide, Article 283.

⁴ 1 Inst. 107 a, b. I think the qualification in the Article, "for any purpose injurious to the public," must be supplied. It seems absurd to say that if A gets a dentist to pull out a front tooth of A's because it is unsightly, though not diseased, A and the dentist both commit a misdemeanour. When it was an essential part of a common soldier's drill to bite cartridges I believe that it was not an uncommon military offence to get the front teeth pulled out, and this would, I presume, be an offence at common law also.]

⁵ S. D. Art. 208.

⁶ [Foster, 260; 1 East P. C. 270; *R. v. Billingham*, 2 C. & P. 234; *R. v. Perkins*, 4 C. & P. 537; *R. v. Coney*, L. R. 8 Q. B. D. 534.]

¹ ARTICLE 265.

CONSENT TO BE PUT IN DANGER.

² [It is uncertain to what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another.]

Illustration.

(1.) A, with B's consent, wheels B in a barrow along a tight rope at a great height from the ground. C hires A and B to do so, D, E, and F pay money to C to see the performance. B is killed.

Quere, are A, C, D, E, and F, or any and which of them, guilty of manslaughter?

³ ARTICLE 266.

ACCIDENTAL INFLICTION OF BODILY INJURY BY LAWFUL ACT—WHAT ACTS ARE LAWFUL.

⁴ It is not a crime to cause death or bodily harm accidentally by an act which is not unlawful, unless such act is accompanied by an omission, amounting to culpable negligence as defined in Article 267, to perform a legal duty imposed either by law or by contract on the person who does the act.

An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it.

¹ S. D. Art. 209.

² [There is, so far as I know, no authority on this point, but the principle on which prize fights have been held to be illegal might include such a case. Such an exhibition might also under circumstances be a public nuisance. To collect a large number of people to see a man put his life in jeopardy is a less coarse and boisterous proceeding than a prizefight, but is it less immoral?]

³ S. D. Art. 210.

⁴ [1 Hale, 471, &c.; Foster, 258; 1 East, P. C. 260; 1 Russ. Cr. (5th ed.) 844. I cannot give any precise authority as to acts involving penalties.]

[The words "unlawful act" include—

- (i.) acts punishable as crimes [or involving penalties];
- (ii.)¹ acts constituting actionable wrongs;
- (iii.)² acts contrary to public policy or morality, or injurious to the public.

Other acts are not unlawful within the meaning of this Article, though they may involve private immorality.

Illustrations.

(1.)³ A, a schoolmaster, corrects a scholar in a manner not intended or likely to injure him, using due care. The scholar dies. Such a death is accidental.

(2.)⁴ A turns B, a trespasser, out of his house, using no more force than is necessary for that purpose. B resists, but without striking A. They fall in a struggle and B is killed. Such a death is accidental.

(3.)⁴ A, a workman, throws snow from a roof, giving proper warning. A passer-by is nevertheless killed. Such a death is accidental.

(4.)⁵ A takes up a gun, not knowing whether it is loaded or not, points it in sport at B and pulls the trigger. B is shot dead. Such a death is not accidental. If A had had reason to believe that the gun was not loaded, the death would have been accidental, although he had not used every possible precaution to ascertain whether the gun was loaded or not.

(5.)⁶ A seduces B, who dies in her confinement. The seduction, though an immoral, is not an unlawful act, within the meaning of this Article.]

¹ [1 Russ. Cr. 812-21, for cases; see especially the summing up of Tindal, C. J., in 1 *Lew.* 179; 1 Russ. Cr. 817. Hale, East, and Foster make a distinction between *mala in se* and *mala prohibita*, which I think can no longer be regarded as law.

² See authorities for Article 254.

³ 1 Hale, 473. The same law of course applies to all cases of lawful correction. It would also, I think, apply to Illustration (2), and to all other cases in which force is lawfully applied by one person to the person of another. It is, of course, impossible in a work like this to attempt an enumeration of those cases.

⁴ Founded on Foster, 262.

⁵ Founded on Foster, 263. In one of the cases referred to in Foster, the prisoner was convicted of manslaughter, although he had tried the pistol with the rammer. Foster, with reason, thinks this "an extremely hard case." *Dixon v. Bell*, 5 M. & S. 198, may be taken as illustrating the line between negligence, for which a man is civilly, and negligence for which he is criminally, responsible. A in this case had caused the priming to be taken from a loaded gun, and left it in a place where a little girl playing with it shot a little boy. The boy recovered damages against A, but if he had died I do not think A would have been guilty of felony. The case is just on the line.

⁶ No one ever suggested that this would be manslaughter, but it exactly marks the distinction between illegality and immorality.]

CHAPTER XXIII.

OF CULPABLE NEGLIGENCE AND OF DUTIES TENDING TO
THE PRESERVATION OF LIFE.¹ ARTICLE 267.DEATH OR BODILY INJURY CAUSED BY OMISSION TO
DISCHARGE A LEGAL DUTY.

² [EVERY one upon whom the law imposes any duty,³ or who has by contract⁴ or by any wrongful act taken upon himself any duty, tending to the preservation of life, and who neglects to perform that duty, and thereby causes the death of any person, commits the same offence as if he had caused the same effect by an act done in the state of mind, as to intent or otherwise, which accompanied the neglect of duty.

Provided, that no one is deemed to have committed a crime only because he has caused the death of or bodily injury to another by negligence which is not culpable. What amount of negligence can be called culpable is a

¹ S. D. Art. 211.

² [The first part of this Article is illustrated by all the Illustrations of the other Articles in the chapter. The whole subject is treated at great length in Wharton on Homicide, chapter iv. s. 72, p. 166. Dr. Wharton classifies negligent homicide under the following heads (generalities apart):

- | | |
|--|------------------------------|
| 1. Use of dangerous things. | 6. The care of children, &c. |
| 2. Dropping things on roads. | 7. The care of medical men. |
| 3. Management of railroads and steamers. | 8. Dangerous machinery. |
| 4. Riding and driving. | 9. Athletic sports. |
| 5. The care of dangerous animals. | 10. Conclusion. |

I have carefully gone through the whole chapter, and I think the whole of it is only a set of illustrations of the principles stated in this and in the concluding Articles of the preceding chapter. It should be observed that the word "negligence" excludes intention. The very slightest omission of caution in order to cause death, would constitute malice aforethought, if death were caused thereby.

³ Draft Code, s. 164.]

⁴ A mere promise, it appears, is not sufficient: *ex parte Brydges*, 18 L. C. J. 141.

[question of degree for the jury, depending on the circumstances of each particular case.

Provided, also, that no one is deemed to have committed a crime by reason of the negligence of any servant or agent employed by him.

¹ Provided, also, that it must be shewn that death not only follows but is also caused by the neglect of duty.

Illustrations.

(1.) ² It is A's duty, by contract, as the banksman of a colliery shaft, to put a stage on the mouth of the shaft in order to prevent loaded trucks from falling down it. A omits to do so either carelessly or intentionally. A truck falls down the shaft and kills B. A is in the same position as if he had pushed the truck down the shaft carelessly or intentionally.

(2.) ³ A slings a cask in a manner which is reasonably sufficient for public safety. The cask slips and kills B. A is not criminally responsible merely because he omitted to take further precautions.

(3.) ⁴ A leaves an unloaded gun leaning against a wall in a friend's room. In his absence B loads it and leaves it loaded where he found it. A points it in sport at C and pulls the trigger. The gun goes off and kills C. A is not criminally responsible merely because he did not examine the gun before he pulled the trigger.

(4.) ⁵ A, the captain of a steamer, sets B to keep a look out. B fails to do so, whereby the steamer runs down a smack and drowns C. A is not criminally responsible for B's omission to look out.

(5.) ⁶ A, acting as a surgeon, physician, or midwife, causes the death of a patient by improper treatment, arising from ignorance or inattention. A is not criminally responsible, unless his ignorance, or inattention, or rashness is of such a nature that the jury regard it as culpable under all the circumstances of the case. It makes no difference whether A is or is not a properly qualified practitioner.

(6.) ⁷ A, by his servants, makes fireworks in his house contrary to the provisions of an Act of Parliament. The servants by culpable negligence cause an explosion which kills B. A is not criminally responsible for B's death.

¹ [Illustration (7).]

² *R. v. Hughes*, D. & B. 248.

³ *Rigmaid's Case*, 1 Lew. 180. Probably in such a case there would be a civil liability; see *Byrne v. Boadle*, 2 H. & C. 722.

⁴ *Poster*, 265.

⁵ *R. v. Allen*, 7 C. & P. 153; *R. v. Green*, 7 C. & P. 156.

⁶ *R. v. Van Butchell*, 3 C. & P. 623; *R. v. St. John Long* (1st case), 4 C. & P. 398; (2d case) 4 C. & P. 423; *R. v. Williamson*, 3 C. & P. 635.

⁷ *Bennett's Case*, Bell, C. C. 1.]

[(7.) ¹ A being under a legal duty to supply medical aid for his son B, who has confluent small-pox, refuses to do so from religious motives, and B dies. It must be shewn that B's life would probably have been prolonged if medical aid had been provided, before A can be convicted of manslaughter.

² ARTICLE 268.

CAUSING DEATH BY OMISSIONS OTHER THAN THOSE
MENTIONED IN ARTICLE 267.

³ It is not a crime to cause death or bodily injury, even intentionally, by any omission other than those referred to in the last Article.

Illustration.

(1.) A sees B drowning and is able to save him by holding out his hand. A abstains from doing so in order that B may be drowned, and B is drowned. A has committed no offence.

⁴ ARTICLE 269.

DUTY TO PROVIDE NECESSARIES OF LIFE.

⁵ Every person under a legal duty, whether by contract or by law, or by the act of taking charge, wrongfully or otherwise, of another person, to provide the necessaries of life for such other person, is criminally responsible if death is caused by the neglect of that duty, and if the person to whom the duty is owing, is, from age, health, insanity, or any other cause, unable to withdraw himself from the control of the person from whom it is due, but not otherwise.

Some of the duties of parents towards children and of masters towards apprentices are defined in Articles 307, 338, 339.

¹ [R. v. Morby, L. R. 8 Q. B. D. 571.]

² S. D. Art. 212.

³ [R. v. Smith, 2 C. & P. 449. This subject is discussed in a striking manner by Lord Macaulay in his notes on the Indian Penal Code: see, too, Wharton on Homicide, § 72.]

⁴ S. D. Art. 213.

⁵ [See cases in Illustrations. Some duties of this sort are imposed by statute. See Articles 307, 338, 339. Draft Code, ss. 159-61.]

Illustrations.

[(5.) ¹ A neglects to provide proper food and lodging for her servant, B, (who is of weak mind, but twenty-three years old). B's life is shortened by such neglect. A is criminally responsible if B was in such an enfeebled state of body and mind as to be helpless and unable to take care of herself, or was under the dominion and restraint of A, and unable to withdraw herself from A's control; otherwise not.

(2.) ² B, a girl of eighteen, comes from service to the house of her mother, A, and is there confined of a bastard child. A does not provide a midwife, in consequence of which B dies. A is not criminally responsible for this omission.

(3.) ³ A persuades B, an aged and infirm woman, to live in his house, and causes her death by neglecting to supply her properly with food and fire, she being incapable of providing for herself from age and infirmity. A is criminally responsible for his neglect.

⁴ ARTICLE 270.

DELEGATION OF DUTY DEFINED IN ARTICLE 269.

If a person delegates the discharge of the duty mentioned in the last Article to his wife or to a servant, and supplies such wife or servant with the means of discharging the duties so delegated, it is the legal duty of such wife or servant to discharge such duties, and it is the legal duty of the man who delegates them to use ordinary care to see that they are properly discharged.

Illustration.

⁵ A, the sister of B's deceased wife, acts as B's housekeeper, and neglects to give to B's infant child food duly provided by B, and so causes its death. A is criminally responsible for this neglect. If B knew of A's neglect, and permitted her to continue it, he also is responsible, but not otherwise.

¹ [*R. v. Charlotte Smith*, L. & C. 607.

² *R. v. Shepherd*, L. & C. 147.

³ *R. v. Marriott*, 8 C. & P. 425.]

⁴ S. D. Art. 214.

⁵ [*R. v. Bubb*, 4 Cox, C. C. 457, 1 Russ. Cr. 657; *R. v. Hook*, 4 Cox, 457; 1 Russ. Cr. 658.]

¹ ARTICLE 271.

WHEN DIRECT PERFORMANCE OF DUTY IMPOSSIBLE.

² [It is the legal duty of a person who is unable to provide for any person necessaries which he is legally bound to provide for him to make application to the proper authorities for parochial relief in cases in which such authorities are legally bound to furnish such relief.

³ ARTICLE 272.

DUTY OF CARE IN DOING DANGEROUS ACTS.

⁴ It is the legal duty of every one who does any act which without ordinary precautions is, or may be, dangerous to human life, to employ those precautions in doing it.

Illustrations.

- (1.) ⁵ It is the duty of persons having charge of dangerous things, animals or machinery, to take care of them.
- (2.) ⁶ Workmen are employed to throw snow off the roof of a house. It is their duty to see whether people are passing, and to give warning before they throw it down.
- (3.) ⁷ It is the duty of people riding, driving, or sailing, to be careful.
- (4.) ⁸ A turns out a vicious horse to graze on a common on which people are likely to pass. It is his duty to take proper precautions against its injuring passers-by.
- (5.) ⁹ A, B, and C went to practice with a rifle which carried a mile. A

¹ S. D. Art. 215.

² [*R. v. Malbett*, 5 Cox. C. C. 339; 1 Russ. Cr. 653.]

³ S. D. Art. 216.

⁴ [How far can it be said to be a legal duty to abstain from doing such acts wantonly even with precautions? Suppose a man, merely for his own amusement or from caprice, took a dangerous wild beast into a public street, using all proper precautions, and suppose the wild beast notwithstanding broke loose and killed some one, would this be manslaughter? I know of no authority on the subject. See Draft Code, s. 162.

⁵ Cases collected in Wharton on Homicide, §§ 87-93, 99, 125, 107-24; and see 1 Russ. Cr. 323-4.

⁶ *R. v. Dant*, L. & C. 567.

⁷ *R. v. Salmon & Others*, L. R. 6 Q. B. D. 79. My judgment was nearly in the terms of Article 272, and the other judgments were to the same effect.]

[handed a board to B, who in C's presence fixed it in a tree, and they all fired at it at a distance of 100 yards, taking no precautions to prevent mischief to persons in the neighborhood. One of the shots killed a boy in a tree about 200 yards behind the target. All were held guilty of manslaughter.

¹ ARTICLE 273.

DUTY OF PERSONS DOING ACTS REQUIRING SPECIAL SKILL
OR KNOWLEDGE.

² It is the legal duty of every person who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act of a dangerous character, and which requires special knowledge, skill, attention, or caution, to employ in doing it a common amount of such knowledge, skill, attention and caution.]

¹ S. D. Art. 217.

² [*R. v. St. John Long*, 4 C. & P. 404. (Per Garrow, B.) As to caution see *R. v. St. John Long*, 2nd case, 4 C. & P. 440; see other cases collected in 1 Russ. Cr. (5th ed.) 664-73. Draft Code, s. 162.]

CHAPTER XXIV.

HOMICIDE.

¹ ARTICLE 274.

HOMICIDE DEFINED—WHEN A CHILD BECOMES A HUMAN BEING.

² [HOMICIDE is the killing of a human being by a human being.

³ A child becomes a human being within the meaning of this definition, when it has completely proceeded in a living state from the body of its mother, ⁴ whether it has or has not breathed, ⁵ and whether the navel string has or has not been divided, ⁶ and the killing of such a child is homicide, whether it is killed by injuries inflicted before, during, or after birth.

⁷ A living child in its mother's womb, or a child in the act of birth, even though such child may have breathed, is not a human being within the meaning of this definition, and the killing of such a child is not homicide.

⁸ ARTICLE 275.

KILLING DEFINED.

⁹ Killing is causing the death of a person by an act or

¹ S. D. Art. 218.

² [Draft Code, ss. 165, 166,

³ *R. v. Poulton*, 5 C. & P. 329.

⁴ *R. v. Brain*, 6 C. & P. 349.

⁵ *R. v. Trilloe*, Car. & Mar. 650.

⁶ Authorities collected, 1 Russ. Cr. (5th ed.) 646.

⁷ *R. v. Enoch*, 5 C. & P. 539, and see note to the case; *R. v. Wright*, 9 C. & P. 751; *R. v. Sellis*, 7 C. & P. 850.]

⁸ S. D. Art. 218.

⁹ [See Draft Code, ss. 167-173. Dr. Wharton's work on Homicide contains an interesting and elaborate chapter (ch. xii. §§ 358-389), entitled "Casual Connection," into which some]

[omission, but for which the person killed would not have died when he did, and which is directly and immediately connected with his death. The question whether a given act or omission is directly and immediately connected with the death of any person is a question of degree dependent upon the circumstances of each particular case.

(SUBMITTED.) But the conduct of one person is not deemed for the purposes of this Article to be the cause of the conduct of another, if it affects such conduct only by way of supplying a motive for it, and not so as to make the first person an accessory before the fact to the act of the other.

This Article is subject to the provisions contained in the next two Articles.

[Discussion is introduced on the distinction between causes and conditions: a distinction of which Dr. Wharton maintains, and of which Mr. Mill (see his Logic, vol. i. p. 398, &c.) denies, the solidity. For practical purposes, I think the Article in the text is sufficient, and if this were the proper place, I should be disposed to discuss some of Dr. Wharton's positions. The latter part of the Article and the Illustration (6) intended to explain it, must, I think, be law; but I know of no direct authority on the subject. The maxim "*In jure non remota causa sed proxima spectatur*" has no doubt a bearing on the subject (see Bacon's Maxims, 35-9, and Broom's Maxims, 218-30), but it is very vague. Lord Bacon says it does not apply to "criminal acts except they have a full interruption." His illustration is,—A fires a pistol at B, and misses him, and runs away. B pursues A. A stabs B with a dagger. "If the law should consider the last impulsive cause, it should say it was in his own defence, but the law is otherwise, for it is but a pursuance and execution of the first murderous intent." Surely in this case the stab is the immediate cause of B's death; A's state of mind is another matter, and is to be inferred from facts. The law as to accessories and incitement appears to show the limit to which participation in a crime can be carried. Unless the line is drawn there it is impossible to say how far it would extend. Illustration (6) is a prosaic version of Othello. Iago, however, in Act iv. sc. 1, says when asked to give poison, "Do it not with poison, strangle her in her bed." This would clearly make him an accessory. To take a humbler instance, the catastrophe of Oliver Twist might, perhaps, fall within Illustration (6). In ch. xlvii. of that work, Fagin, after getting Sikes to say he would murder any one who should betray him, wakes up Noah Claypole and makes him tell Sikes that the girl Nancy had betrayed him, and, as Sikes rushes out in a passion, says, "You won't be too violent, Bill; I mean not too violent for safety." I think that the whole conversation taken together would be evidence to go to a jury, that Fagin did "counsel" or "procure" the murder committed by Sikes, which would make him an accessory before the fact, but if he had confined himself to merely telling Sikes what Claypole said he had heard, it would not have been enough. After all there was only the uncorroborated testimony of an accomplice to prove what he said, and Claypole does not seem to have been by when the most damaging words were spoken.]

Illustrations.

(1.) ¹ A substitutes poison for medicine, which is to be administered to C by B. B innocently administers the poison to C, who dies of it. A has killed C.

(2.) ² A gives a poisoned apple to his wife B, intending to poison her. B, in A's presence, and with his knowledge, gives the apple to C, their child, whom B did not intend to poison. A not interfering, C eats the apple and dies. A has killed C.

(3.) ³ A, an ironfounder, ordered to melt down a saluting cannon which had burst, repairs it with lead in a dangerous manner. Being fired with an ordinary charge, it bursts and kills B. A has killed B.

(4.) ⁴ A, B, and C, road trustees under an Act of Parliament, and as such under an obligation to make contracts for the repairs of the road, neglect to make any such contract, whereby the road gets out of repair, and D passing along it is killed. A, B, and C have not killed D.

(5.) ⁵ A by his servants makes fireworks in a house in London contrary to the provisions of an Act of Parliament (9 & 10 Will. 3 c. 77). Through the negligence of his servants, and without any act of his, a rocket explodes and sets fire to another house whereby B is killed. A has not killed B.

(6.) A tells B facts about C in the hope that the knowledge of those facts will induce B to murder C, and in order that C may be murdered; but A does not advise B to murder C; B murders C accordingly. A has not caused C's death within the meaning of this Article.

ARTICLE 276.

WHEN AN ACT IS THE REMOTE CAUSE OF DEATH OR ONE OF SEVERAL CAUSES.

A person is deemed to have committed homicide, although his act is not the immediate or not the sole cause of death in the following cases—

(a.) ⁷ If he inflicts a bodily injury on another which causes surgical or medical treatment, which causes death. In this case it is immaterial whether the treatment was

¹ [Donellan's Case. See my Gen. View, Cr. L. 338.]

² Saunders' Case, 1 Hale, P. C. 436.

³ R. v. Carr, 8 C. & P. 163.

⁴ R. v. Pocock, 17 Q. B. 34.

⁵ R. v. Bennett, Bell, C. C. 1.]

⁶ S. D. Art. 220.

⁷ [Hale, 428; Illustrations (1), (2). Draft Code, s. 173.]

[proper or mistaken, if it was employed in good faith, and with common knowledge and skill, but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith, or was so employed without common knowledge or skill.

(b.) ¹ If he inflicts a bodily injury on another, which would not have caused death if the injured person had submitted to proper surgical or medical treatment, or had observed proper precautions as to his mode of living.

(c.) ² If by actual violence or threats of violence he causes a person to do some act which causes his own death, such act being a mode of avoiding such violence or threats, which under the circumstances would appear natural to the person injured.

(d.) ³ If by any act he hastens the death of a person suffering under any disease or injury which apart from such act would have caused death.

(e.) ⁴ If his act or omission would not have caused death unless it had been accompanied by the acts or omissions of the person killed or of other persons.

Illustrations.

(1.) ⁵ A wounds B in a duel. Competent surgeons perform an operation which they in good faith regard as necessary. B dies of the operation, and it appears that the surgeons were mistaken as to the necessity for the operation. A has killed B.

¹ [Illustration (3). Draft Code, s. 172.

² Illustration (4). Draft Code, s. 167.

³ 1 Hale, 428; Illustration (5). Draft Code, s. 171.] A, a practising physician, who kept a hospital for the sick, on three successive days forced the person of B, a patient then under his control in such hospital, she being in a condition of health that rendered sexual intercourse dangerous even with her consent. B died on the sixth day after the last occasion on which she had been ravished, and her death if not caused was hastened thereby. Held sufficient evidence of murder to justify A's surrender under the Ashburton Treaty; *In re Weir*, 14 O. R. 389.

⁴ [See Illustrations (6) and (7). See also *R. v. Longbottom*, 1 Russ. Cr. (5th ed.) 830; 3 Cox, 439. *R. v. Ledger*, 1 Russ. Cr. (5th ed.) 835, 6; and Mr. Greaves' note. This case is a very peculiar one.

⁵ *R. v. Fynn*, 1 Cox C. C. 339; 1 Russ. Cr. 702.]

[(2.) ¹ A gives B a wound. C, a surgeon, applies poison to the wound, either from bad faith or by negligence. B dies of the poison. C and not A has killed B.

(3.) ² A injures B's finger. B is advised by a surgeon to allow it to be amputated, refuses to do so, and dies of lockjaw. A has killed B.

(4.) ³ A violently beats and kicks B, his wife, on the edge of a pond. She, to avoid his violence, throws herself into the pond and is drowned. A has killed B.

(5.) ⁴ A strikes B, who is at the time so ill that she could not possibly have lived more than six weeks if she had not been struck. B dies earlier than she would otherwise have died in consequence. A has killed B.

(6.) ⁵ A and B, the drivers of two carts, race along a high road. C is lying drunk in the middle of the road. One or other or both of the carts run over C and kill him. In either case both A and B have killed C.

(7.) ⁶ It is the duty of A to put up air-headings in a colliery where they are required. It is the duty of B to give A notice where an air-heading is required. But A has means, apart from B's report, of knowing whether such air headings are required or not. A omits to put up an air-heading, B omits to give A notice that one is wanted. An explosion follows, and C is killed. Both A and B have killed C.

⁷ ARTICLE 277.

WHEN CAUSING DEATH DOES NOT AMOUNT TO HOMICIDE.

A person is not deemed to have committed homicide, although his conduct may have caused death, in the following cases :

(a.) ⁸ When the death takes place more than a year and a day after the injury causing it. In computing the period, the day on which the injury is inflicted is to be counted as the first day ;

(b.) (It is said) ⁹ When the death is caused without any

¹ [Founded on 1 Hale, 428.

² *R. v. Holland*, 2 Moo. and Rob. 351.

³ *R. v. Evans*, 1 Russ. Cr. (5th ed.) 651; *R. v. Wager*, tried at Derby Summer Assizes, 1884, was precisely similar. See, upon this subject, Wharton on Homicide, §§ 374-5. If the intention was to escape further ill usage by suicide, the case would be altered.

⁴ *R. v. Fletcher*, 1 Russ. Cr. 793.

⁵ *R. v. Swindall*, 2 C. & K. 290.

⁶ *R. v. Haines*, 2 C. & K. 368.]

⁷ S. D. Art. 221.

⁸ [1 East, P. C. 843, 4; 1 Russ. Cr. (5th ed.) 673, 4; Draft Code, s. 169.]

⁹ 1 Hale, 429. Lord Hale's reason is that "secret things belong to God; and hence it was that before 1 Ja. 1, c. 12, witchcraft or fascination was not felony, because it wanted]

[definite bodily injury to the person killed, but this does not extend to the case of a person whose death is caused not by any one bodily injury, but by repeated acts affecting the body, which collectively cause death, though no one of them by itself would have caused death ;

(c.) (It seems) ¹ When death is caused by false testimony given in a court of justice.

Illustrations.

(1.) ² A by a long series of acts of ill-treatment, no one of which by itself would cause death, causes the death of B. A has killed B.

[a trial" (i.e. I suppose because of the difficulty of proof). I suspect that the fear of encouraging prosecutions for witchcraft was the real reason of this rule. Dr. Wharton rationalizes the rule thus: "Death from nervous causes does not involve penal consequences." This appears to me to substitute an arbitrary quasi scientific rule for a bad rule founded on ignorance now dispelled. Suppose a man were intentionally killed by being kept awake till the nervous irritation of sleeplessness killed him, might not this be murder? Suppose a man kills a sick person intentionally, by making a loud noise which wakes him when sleep gives him a chance of life; or suppose knowing that a man has aneurism of the heart, his heir rushes into his room, and roars in his ear, "Your wife is dead!" intending to kill and killing him, why are not these acts murder? They are no more "secret things belonging to God" than the operation of arsenic. As to the fear that by admitting that such acts are murder, people might be rendered liable to prosecution for breaking the hearts of their fathers or wives by bad conduct, the answer is that such an event could never be proved. A long course of conduct, gradually "breaking a man's heart," could never be the "direct or immediate" cause of death. If it was, and it was intended to have that effect, why should it not be murder? In *R. v. Pavers*, 12 Cox C. C. 530, a man was convicted before Denman, J., of manslaughter, for frightening a child to death (see Wharton on Homicide, § 372, on this case.) In *R. v. Dugal*, 4 Q. L. R. 350, evidence of death from syncope caused by menaces of personal violence and assault though without battery was held sufficient to support a conviction for manslaughter.

[Lord Hale doubts whether voluntarily and maliciously infecting a person of the plague, and so causing his death, would be murder (i. 432). It is hard to see why. He says that "infection is God's arrow." A different view was taken in the analogous case of *R. v. Greenwood*, 1 Russ. Cr. 673; 7 Cox, C. C. 404. As to the proviso, see Illustration (1).

¹ Illustration (1.) Draft Code, s. 168.

² *R. v. Self*, 1 East, P. C. 226, 227, and 1 Russ. Cr. 652; *R. v. Squire*, 1 Russ. Cr. 653.] The immediate cause of the woman's death was acute inflammation of the liver that might have been occasioned by a blow or a fall against a hard substance. There was evidence that about three weeks before her death, the prisoner, her husband, knocked her down with a bottle, that she fell against a door and remained insensible for some time; and that she was confined to her bed soon after and never recovered. There was also evidence of frequent acts of violence within a year on his part by knocking her down and kicking her in the side. Held sufficient to sustain a conviction for manslaughter: *R. v. Theal*, 21 N. B. R. 449; *Theal v. R.* 7 Can. S. C. 397.

[(2.)¹ A and B, in order to get a reward, offered for the conviction of highway robbers, conspire together to bring a false accusation of highway robbery against C, whereby C is convicted and executed. A and B do not kill C.

² ARTICLE 278.

WHEN HOMICIDE IS UNLAWFUL.

³ Homicide is unlawful,

(a.) When death is caused by an act done with the intention to cause death or bodily harm, or which is commonly known to be likely to cause death or bodily harm, and when such act is neither justified nor excused by the provisions contained in Chapter IV. or Chapter XXII. ;

(b.) When death is caused by an omission, amounting to culpable negligence, to discharge a duty tending to the preservation of life, whether such omission is or is not accompanied by an intention to cause death or bodily harm ;

(c.) When death is caused accidentally by an unlawful act.]

¹ [*R. v. MacDaniel and Others*, 19 St. Tr. 746, and see particularly the notes 810-14, and Foster, 131, 132.]

² S. D. Art. 222.

³ [This Article sums up the result of the preceding chapter. See Appendix Note VII. Draft Code, s. 167.]

CHAPTER XXV.

MURDER—MANSLAUGHTER—ATTEMPTS TO COMMIT MURDER
—CONCEALMENT OF BIRTH.

ARTICLE 279.

MANSLAUGHTER AND MURDER DEFINED.

¹ [MANSLAUGHTER is unlawful homicide without malice aforethought.

Murder is unlawful homicide with malice aforethought.

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

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

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

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

² S. D. Art. 223. See Appendix Note VIII.

³ For the authorities for this Article see Appendix Note VIII. Draft Code, s. 174-177.

⁴ Coke's first case of implied malice is malice implied from the want of provocation. A man who wantonly or on a slight cause intentionally and violently kills another, shows by that act, not indeed the existence of hatred of long standing, but the existence of deadly hatred instantly conceived and executed, which is at least as bad if not worse. This in the strict sense of the words is malice aforethought. As Hobbes well observes: "it is malice forethought, though not long forethought." (Dialogue of the Common Laws, "Works," vi. 85.) And it is not by law necessary that it should be long. If a slight provocation does not reduce murder to manslaughter, *a fortiori*, the total absence of all provocation, and the mere rapidity with which the execution of a cruel and wicked design follows on its conception cannot have that effect. For cases of slight provocation, see 1 Russ. Cr. 680-2, and cases there collected.]

[is caused or not, or by a wish that it may not be caused ;

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

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

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

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

This Article is subject to the provisions contained in Articles 280-282, both inclusive, as to the effect of provocation.

Illustrations.

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

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

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

¹ [I know of no direct authority for these illustrations, but they follow directly from the principles stated in the note.] A, profiting by B's weakness, encourages him to drink intoxicating liquors in such quantities as to cause death. A commits murder if he intended to cause death, and manslaughter if the liquor was given not out of good fellowship but with the intention of making B ill or drunk; *R. v. Lortie*, 9 Q. L. R. 352.

² [*Errington's Case*, 2 Lewin, 217.]

(4.) ¹ A waylays B, intending to beat, but not intending to kill him or do him grievous bodily harm. A beats B and does kill him. This is manslaughter at least, and may be murder if the beating were so violent as to be likely, according to common knowledge, to cause death.

(5.) ² A strikes at B with a small stick, not intending either to kill or to do him grievous bodily harm. The blow kills B. A commits manslaughter.

(6.) ³ A, recently delivered of a child, lays it naked by the side of the road and wholly conceals its birth. It dies of cold. This is murder or manslaughter, according as A had or had not reasonable ground for believing that the child would be preserved.

(7.) ⁴ It is A's duty to put a stage at the mouth of the shaft of a colliery. He omits to do so. A truck falls down the shaft in consequence and kills B. If by omitting to erect the stage A intended that B's death should be caused, A is guilty of murder. If the omission was caused only by the culpable negligence of A, and without any intention to kill or injure B, or a reckless disregard to the chance of his being killed, A is guilty of manslaughter.

(8.) ⁵ A, for the purpose of rescuing a prisoner, explodes a barrel of gunpowder in a crowded street and kills a number of persons, intending to explode the barrel of powder in a crowded street. A commits murder, although he may have no intention at all about the people in the street, or may hope that they will escape injury.

¹ [Fost. 250.]

² *Rowley's Case*, Fost. 284, remarking on earlier reporters; and see 1 Russ. Cr. 685, where some other cases are given.

³ *R. v. Walters*, C. & M. 164, and 1 Russ. Cr. 675. This case appears to me to illustrate the true doctrine on the subject better than the old and often quoted case of the woman who left her child in a place where it was struck by a kite and killed. The point of that case I take to be that the striking by a kite was an occurrence sufficiently likely to impose upon the mother the duty of guarding against it. Kites having been almost exterminated in England their habits are forgotten. But to lay a child on the ground in Calcutta would be to expose it to almost certain and speedy death from kites and other birds of prey. I have myself been struck by a kite which had just struck at one of my children.] *R. v. Fenney* 3 All. 132. See also Art. 380.

⁴ [*R. v. Hughes*, D. & B. 248.]

⁵ *R. v. Desmond, Barrett and Others*. In this case Lord Chief Justice Cockburn said, "If a man did an act, more especially if that were an illegal act, although its immediate purpose might not be to take life, yet if it were such that life was necessarily endangered by it—if a man did such an act, not with the purpose of taking life, but with the knowledge or belief that life was likely to be sacrificed by it," that was murder; *Times Report*, Apr. 28, 1868. It is singular that this case is noticed in Cox's Reports only for the sake of a point about evidence not the least worth reporting: see 11 Cox, C. C. 146. The case of *R. v. Allen and Others*, the Fenians executed after the Manchester Special Commission in 1867, is not, so far as I know, reported, except in 17 L. T. (N.S.) 223, which reprints the letters printed in Appendix Note IX.

[(9.) ¹ A shoots at a domestic fowl, intending to steal it, and accidentally kills B. A commits murder.

(10.) ² A, from wanton mischief, throws stones down a coal pit and knocks away a scaffolding. The absence of the scaffolding causes an accident by which B is killed. A commits manslaughter.

(11.) ³ A, a thief, pursued by B, a policeman, who wishes to arrest A, trips up B, who is accidentally killed. A commits murder.

(12.) ⁴ A, having words with his wife, B, strikes her on the head with a pestle, and kills her. A commits murder, though the act was not premeditated.

(13.) ⁵ A, being called names by B, a woman, throws a broomstick at her, which happens to kill her. A commits manslaughter.

(14.) ⁶ A shoots at B, intending to kill him, and kills C. A commits murder.

⁷ ARTICLE 280.

EFFECT AND DEFINITION OF PROVOCATION.

⁸ Homicide, which would otherwise be murder, is not murder, but manslaughter, if the act by which death is caused is done in the heat of passion, caused by provocation, as hereinafter defined, unless the provocation was sought or voluntarily provoked by the offender as an excuse for killing or doing bodily harm.

¹ [Fost. 258-9, and see note. This dictum (which is supported by many other authorities) was followed by Lord Chief Justice Cockburn in *Barrett's Case*. He said, "If a person seeking to commit a felony should in the prosecution of that purpose cause, although it might be unintentionally, the death of another, that, by the law of England, was murder. There were persons who thought and maintained that where death thus occurred, not being the immediate purpose of the person causing the death, it was a harsh law which made the act murder. But the Court and jury were sitting there to administer law, not to make or mould it, and the law was what he told them." *Times*, April 28, 1868.] In *R. v. Serré* 16 Cox C. C. 313, Stephen, J., suggests that instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life and likely in itself to cause death, done for the purpose of committing a felony and which causes death, is murder.

² [*R. v. Fenton*, 1 Lewin, 179; 1 Russ. Cr. 817.

³ 1 Russ. Cr. 707-12 for a large collection of cases and authorities. See, too, 1 Hale, 456-460; no distinction is taken in any of these cases as to the manner in which death is caused.

⁴ 1 Russ. Cr. 681.

⁵ Founded on 1 Hale, 455-6. The judges doubted whether the case was murder or manslaughter, and no judgment was delivered, but the prisoner was pardoned. This would no doubt be held to be manslaughter at the present day.

⁶ Fost. 261; 1 Russ. Cr. 708.]

⁷ S. D. Art. 224.

⁸ [Draft Code, s. 176.]

[The following acts may, subject to the provisions contained in Article 231, amount to provocation :—

(a.) ¹ An assault and battery of such a nature as to inflict actual bodily harm, or great insult, is a provocation to the person assaulted.

(b.) ² If two persons quarrel and fight upon equal terms, and upon the spot, whether with deadly weapons or otherwise, each gives provocation to the other, whichever is right in the quarrel, and whichever strikes the first blow.

(c.) ³ An unlawful imprisonment is a provocation to the person imprisoned, but not to the bystanders, though an unlawful imprisonment may amount to such a breach of the peace as to entitle a bystander to prevent it by the use of force sufficient for that purpose. An arrest by officers of justice, whose character as such is known, but who are acting under a warrant so irregular as to make the arrest illegal, is provocation to the person illegally arrested, but not to bystanders.

(d.) ⁴ The sight of the act of adultery committed with his wife is provocation to the husband of the adulteress on the part both of the adulterer and of the adulteress.

(e.) ⁵ The sight of the act of sodomy committed upon a man's son is provocation to the father on the part of the person committing the offence.

(f.) ⁶ Neither words, nor gestures, nor injuries to property, nor breaches of contract, amount to provocation

¹ [1 Russ. Cr. 678.

² *Lord Byron's Case*, 11 St. Tr. 1177; *R. v. Walters*, 12 St. Tr. 114; and 1 Russ. Cr. 695-707 where other cases are cited

³ For the first part of the clause see *Buelner's Case*, 1 Russ. Cr. 680; *R. v. Withers*, *Ibid.* For the latter part compare *Hugget's Case*, *Sir H. Ferrer's Case*, *Toolen's Case*, and *Akey's Case*, with Foster's remarks on *Toolen's Case*; 1 Russ. Cr. 753-7. See also 1 Hawk. P. C. 489; *R. v. Osmer*, 5 East 308. Also Illustration (5), and Appendix Note IX.] A runaway slave who stabs and kills a person attempting to arrest and detain him, such arrest being by the law of the place lawful, commits murder; *In re Anderson*, 20 U. C. Q. B. 124.

⁴ [Cases cited, 1 Russ. Cr. 687. I am not aware that it has ever been decided that adultery by the husband is provocation to the wife.

⁵ *R. v. Fisher*, 8 C. & P. 182.

⁶ 1 East P. C. 232; 1 Russ. Cr. 677-9.]

[within this Article, except (perhaps) words expressing an intention to inflict actual bodily injury, accompanied by some act which shews that such injury is intended; ¹ but words used at the time of an assault—slight in itself—may be taken into account in estimating the degree of provocation given by a blow.

(g.) ² The employment of lawful force against the person of another is not a provocation to the person against whom it is employed.

Illustrations.

(1.) ³ A, a woman, gives B, a soldier, a slap in the face. A has not given B provocation within this Article.

(2.) ⁴ A, a woman, strikes B, a soldier, with a heavy clog violently in the face and wounds him. A has given B provocation within this Article.

(3.) ⁵ A pulls B by the nose. A has given B provocation within the meaning of this Article.

(4.) ⁶ A attempts to arrest B on an irregular warrant and in an irregular way. B shoots A dead. This is manslaughter by reason of the provocation given by B to A.

(5.) ⁷ A arrests B under an irregular warrant and conveys him to gaol. C, D, and others attempt to rescue B. A resists, and one of the party shoots A dead. This is murder in C, D and all their party.

(6.) ⁸ A and B, armed with swords, quarrel, draw their swords, and fight. Each gives the other provocation.

(7.) ⁹ A and B quarrel, and agree together to fight, and do fight, a duel next day. Neither gives the other such provocation as would reduce the offence to manslaughter if either is killed.

¹ [1 Russ. Cr. 677, note n.; *Lord Morley's Case*, 1 Hale, P. C. 455; *R. v. Sherwood*, 1 C. & K. 556, and see *R. v. W. Smith*, 4 F. & F. 1066.]

² Illustration (12).

³ *Stedman's Case*, Fost. 292.

⁴ *Ibid.*

⁵ 1 East, P. C. 233.

⁶ *R. v. Stevenson*, 19 St. Tr. 846. This case must be understood to be subject to the provisions of the next Article.

⁷ This is the case of the Fenians executed at Manchester in 1867, for shooting Brett, a police constable in charge of a police van containing a Fenian prisoner. See Appendix, Note IX.

⁸ *R. v. Walters*, 12 St. Tr. 113; and see *R. v. Lord Byron*, 11 St. Tr. 1177.

⁹ *R. v. Cuddy*, 1 C. & K. 210; *R. v. Barronet*, and *R. v. Bartholomew*, Doars. 51 and 60, are recent cases of duelling.]

[(8.) ¹ A and B quarrel, and upon the spot agree to fight with their fists. A, from the beginning of the fight, uses a knife and kills B. A has not received such provocation from B as reduces his offence to manslaughter.

(9.) ² A and B quarrel and agree to fight with their fists. In the course of the fight A snatches up a knife, which happens to be near, and which he has not previously provided, and kills B. A has not received such provocation from B as reduces his offence to manslaughter.

(10.) ³ A, at a tavern, throws a bottle at B's head and draws his sword. B throws a bottle at A's head. A kills B. A has not received such provocation from B as reduces his offence to manslaughter.

(11.) ⁴ A and B quarrel and fight in a public-house. A leaves the public-house, says he will kill B, conceals a sword under his coat, returns to the public-house, tempts B to strike him with a stick, saying "Stand off, or I'll stab you," and without giving B time to retreat, does stab him mortally. A does not receive from B such provocation as reduces his offence to manslaughter.

(12.) ⁵ A attacks B in such a manner as to endanger B's life. B drives off and pursues A. A in self-defence kills B. This is murder in A.

⁶ ARTICLE 281.

WHEN PROVOCATION DOES NOT EXTENUATE HOMICIDE.

⁷ Provocation does not extenuate the guilt of homicide unless the person provoked is at the time when he does the act deprived of the power of self-control by the provocation which he has received, and in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to shew the state of his mind.

¹ [*R. v. Anderson*, 1 Russ. Cr. 701.

² *Ibid.*

³ *R. v. Mawgridge*, Kel. 128-9; Foster, 295-6.

⁴ *Mason's Case*, Foster, 132.

⁵ Bacon's Maxims, 37, 38. [I suppose B is trying to arrest A.]

⁶ S. D. Art. 225. See Appendix Note IX.

⁷ [See the cases quoted in the Illustrations, and *R. v. Lynch*, 5 C. & P. 324. Draft Code, s. 176.] *R. v. McDowell*, 25 U. C. Q. B. 108.

Illustrations.

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

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

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

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

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

⁶ ARTICLE 282.

PROVOCATION TO THIRD PERSON.

⁷ Provocation to a person by an actual assault or by a

¹ [*R. v. Oneby*, 2 Str. 786; 1 Russ. Cr. 699-700.]

² Per Parke, B. in *R. v. Thomas*, 7 C. & P. 817.

³ *R. v. Kirkham*, 8 C. & P. 115.

⁴ *R. v. Hayward*, 6 C. & P. 157.

⁵ This is the case of *R. v. Allen and Others*, the Fenians, who murdered Brett, the policeman. See Appendix Note IX.]

⁶ S. D. Art. 226.

⁷ [1 Russ. Cr. (5th ed.), 704-5. The passage referred to is taken from Hawkins. See *Cary's Case* (p. 705), which is this: "A and B were fighting in a field in a quarrel. C, A's]

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

¹ ARTICLE 283.

SUICIDE—ABETTING SUICIDE.

² A person who kills himself in a manner which in the case of another person would amount to murder is guilty of murder, and every person who aids and abets any person in so killing himself is an accessory before the fact, or a principal in the second degree in such murder.

³ ARTICLE 284.

MANSLAUGHTER ON ONESELF.

⁴ A person cannot commit manslaughter on himself.

⁵ ARTICLE 285.

ACCESSORIES BEFORE THE FACT IN MANSLAUGHTER.

It seems that there may be accessories before the fact in manslaughter if the act or omission by which death is

[kinsman, casually riding by and seeing them in fight and his kinsman one of them, rode in, drew his sword, thrust B through and killed him. Coke, C.J., and the rest of the Court agreed that this is clearly but manslaughter in him (i. e. C) and murder in the other for the one may have malice and the other not." I should have said C's offence was infinitely worse than A's, and I do not think this case would be followed in the present day.]

¹ S. D. Art. 227.

² [1 Hale, P. C. 411-419. See *R. v. Fretwell*, L. & C. 161; *R. v. Russell*, 1 Moody 356. Draft Code, s. 183.] If two persons enter into an agreement to commit suicide together, and the means employed to produce death prove fatal to one only, the survivor is guilty of murder; *R. v. Jessop*, 15 Cox, C. C. 204.

³ S. D. Art. 228.

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

⁵ S. D. Art. 229.

[caused is not such an act or omission as, but for provocation received by the offender, would have been murder.

Illustration.

¹ A advises B to give C a strong dose of medicine to make him feel sick and uncomfortable. B does so and C dies. B is guilty of manslaughter, and A is accessory before the fact to manslaughter.

² ARTICLE 286.

PRESUMPTION THAT KILLING IS MURDER.

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

The burden of proving circumstances of excuse, justification, or extenuation is upon the person who is shewn to have killed another.]

⁴ ARTICLE 287.

PUNISHMENT OF MURDER.

⁵ Every one who commits murder is guilty of felony, and must on conviction thereof be sentenced to death.

⁶ ARTICLE 288.

PUNISHMENT OF MANSLAUGHTER.

⁷ Every one who commits manslaughter is guilty of

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

² S. D. Art. 230.

³ [1 Russ. Cr. 642; *R. v. Greenacre*, 8 C. & P. 35.]

⁴ S. D. Art. 231.

⁵ R. S. C. c. 162, s. 2; c. 181, s. 6; 24 & 25 Vict. c. 100, s. 1. Draft Code, s. 178.

⁶ S. D. Art. 232. [3 Hist. Cr. Law, 78-9. Draft Code, s. 132.]

⁷ R. S. C. c. 162, s. 5; 24 & 25 Vict. c. 100, s. 5.

felony and liable to imprisonment for life or to a fine or to both.

¹ ARTICLE 289.

² ATTEMPTS TO COMMIT MURDER.

³ Every one is guilty of felony, and is liable to imprisonment for life who does any of the following things with intent to commit murder; that is to say—

(a.) ⁴ administers any poison or other destructive thing to any person, or causes any such poisonous thing to be so administered or taken, or attempts to administer it, or attempts to cause it to be so administered or taken;

(b.) ⁵ by any means whatever wounds or causes any grievous bodily harm to any person;

(c.) ⁶ shoots at any person, or, by drawing a trigger or in any other manner, attempts to discharge at any person any kind of loaded arms; ⁷

¹ S. D. Art. 233.

² [For the history of the provisions see 3 Hist. Cr. Law, ch. xxvii. pp. 108-120. Draft Code, s. 179.]

³ R. S. C. c. 162, ss. 8-12; 24 & 25 Vict. c. 100, ss. 11-15.

⁴ R. S. C. c. 162, ss. 8, 11; 24 & 25 Vict. c. 100, ss. 11, 14.

⁵ R. S. C. c. 162, s. 8; [24 & 25 Vict. c. 100, s. 11. In *R. v. Gray*, D. & B. 303, it was held that to cause congestion of the lungs by exposing a child in a field was not causing "a bodily injury dangerous to life" within 7 Will. 4 & 1 Vict. c. 85, s. 2, but such a case would now fall under clause (h.), s. 15. See remarks of Cockburn, C.J., p. 306.]

⁶ R. S. C. c. 162, s. 11; 24 & 25 Vict. c. 100, s. 14. [The words "any other manner" mean any other manner like drawing a trigger, e.g. applying a lighted match to a matchlock, or striking a percussion cap with a hammer; see *R. v. St. George*, 9 C. & P. 483, and *R. v. Lewis*, 9 C. & P. 523. These cases have been doubted by the Court for Crown Cases Reserved; see *R. v. Brown*, L. R. 10 Q. B. D. 381. In this case a man was tried for attempting to commit murder by drawing a pistol from his pocket for the purpose of committing murder with it, but his hand was seized. I held this to be an attempt to commit murder by means other than those specified in clauses (a.)-(g.); but, on the authority of *R. v. St. George*, that it did not constitute an offence under clause (h.), the Court held that clause (h.), s. 15, applied only to cases other than those specified in clauses (a.)-(g.), s. 14, but *ejusdem generis* as for instance trying to push a man off a cliff or under a railway train; but that it did not apply to extend s. 14. I agreed in this view. The Court thought that *R. v. St. George* ought to be reconsidered, and inclined to the view that if I had held otherwise in *R. v. Brown* my ruling would have been upheld.]

⁷ "Loaded arms" means arms loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, or charged with compressed air and having ball, shot, slug or other destructive material in the barrel, although the attempt to discharge the same may fail; R. S. C. c. 162, s. 1; 24 & 25 Vict. c. 100, s. 13.

- (d.) ¹ attempts to drown, suffocate, or strangle any person ;
- (e.) ² destroys or damages any building by the explosion of gunpowder or other explosive substance ;
- (f.) ³ sets fire to any ship or vessel or any part thereof, or any part of the tackle, apparel, or furniture thereof, or to any goods or chattels being therein ;
- (g.) ⁴ casts away or destroys any vessel ;
- .) ⁵ or who attempts to commit murder by any means other than those specified in clauses (a.)-(g.), both inclusive.

⁵ ARTICLE 290.

ACCESSORY AFTER THE FACT TO MURDER.

⁶ Every accessory after the fact to murder is liable to imprisonment for life.

⁷ ARTICLE 291.

THREATS AND CONSPIRACIES TO MURDER.

Every one is guilty of felony and liable to ten years' imprisonment who,

- (a.) ⁸ maliciously sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person ; or
- (b.) ⁹ conspires, confederates or agrees with any person

¹ R. S. C. c. 162, s. 11 ; 24 & 25 Vict. c. 100, s. 14.

² R. S. C. c. 162, s. 9 ; 24 & 25 Vict. c. 100, s. 12. *R. v. St. George*, 9 C. & P. 483 ; 1 Russ. Cr. 353.

³ R. S. C. c. 162, s. 10 ; 24 & 25 Vict. c. 100, s. 13.

⁴ R. S. C. c. 162, s. 12 ; 24 & 25 Vict. c. 100, s. 15. [This does not apply to attempts to commit suicide ; *R. v. Burgess*, L. & C. 253.]

⁵ S. D. Art. 233 (1.)

⁶ R. S. C. c. 162, s. 4 ; 24 & 25 Vict. c. 100, s. 67.

⁷ S. D. Art. 234.

⁸ R. S. C. c. 173, s. 7 ; 24 & 25 Vict. c. 100, s. 16.

⁹ R. S. C. c. 162, s. 3 ; 24 & 25 Vict. c. 100, s. 4.

to murder any other person, whether the person intended to be murdered is a subject of Her Majesty or not, or is within the Queen's dominions or not ; or

(c.) solicits, encourages, persuades, endeavors to persuade or proposes to any person to murder any other person, whether the person whose murder is solicited, encouraged or attempted to be procured is a subject of Her Majesty or not, or within the Queen's dominions or not,—

[¹ And whether the solicitation, encouragement, persuasion, or endeavor to persuade, is addressed to any specific person or not, or relates to the murder of any specific person or not.]

² ARTICLE 292.

³ CONCEALING THE BIRTH OF CHILDREN.

⁴ Every person is guilty of a misdemeanor and liable to two years' imprisonment who, by any secret disposition of the dead body of any child of which any woman is delivered, endeavors to conceal the birth thereof, whether such child died before or after the birth thereof.

⁵ [The expression "delivered of a child" does not include delivery of a fœtus which has not reached the period at which it might have been born alive.

⁶ The words "secret disposition of the body" include cases in which the body is placed in a situation where it

¹ [*R. v. Most*, L. R. 7 Q. B. D. 244.]

² S. D. Art. 235.

³ [3 Hist. Cr. Law, 118. Draft Code, ss. 185-7.]

⁴ R. S. C. c. 162, s. 49; 24 & 25 Vict. c. 100, s. 60. A placed the dead body of a child of which she had been delivered between a trunk and the wall of a room in which she lived alone. Being charged with having had a child she at first denied it, but being pressed she pointed out where the body was. Held, that she might be convicted of concealing the birth of the child; *R. v. Piché*, 36 U. C. C. P. 409.

⁵ [*R. v. Berriman*, 6 Cox, C. C. 388.]

⁶ *R. v. Brown*, L. R. 1 C. C. R. 244. The Act seems to be defective in punishing only the secret disposition of the body, and not the disposing of the body in such a way as to conceal the fact that it was born of its mother. If a woman were to leave a child's body by night in the middle of a street, or to drop it by day in a crowd of people, there would be an effectual concealment of the birth, but would there be a "secret disposition" of

[is not likely to be found except by accident, or upon search, although the body is in no way concealed from any one who happens to go to that place.]

[the body? Under the old Act, 9 Geo. 4 c. 31, s. 14, it was held that a temporary concealment of the body with intent to remove it afterwards to some other place was within the words "secret burying or otherwise disposing": *R. v. Perry*, Dear. 471. This would seem to be so *à fortiori* under the present law.]

CHAPTER XXVI.

BODILY INJURIES, AND ACTS AND OMISSIONS CAUSING
DANGER TO THE PERSON.¹ ARTICLE 293.

WOUNDING WITH INTENT.

² EVERY one is guilty of felony, and liable to imprisonment for life, who

³ with intent to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person,

unlawfully and maliciously, by any means whatsoever, wounds ⁴ or causes any grievous bodily harm to any person, or shoots at any person, or, by drawing a trigger,⁵ or in any other manner, attempts to discharge any kind of loaded arms ⁶ at any person.

⁷ ARTICLE 294.

WOUNDING.

⁸ Every one is guilty of a misdemeanor, and liable to

¹ S. D. Art. 236 (a).

² R. S. C. c. 162, s. 13; 24 & 25 Vict. c. 100, s. 18.

³ The intent may be inferred from the act; *R. v. Le Dante*, 2 G. & O. 401.

⁴ [To wound means to divide the surface of the body whether it be an internal or external surface, *e.g.* the inside of the mouth; *R. v. Leonard Smith*, 8 C. & P. 173; and see other cases in 1 Russ. Cr. 921.

⁵ But not by attempting to draw a trigger; *R. v. St. George*, 9 C. & P. 483. See however *R. v. Brown*, L. R. 10 Q. B. D. 381.]

⁶ See Art. 289, note (7), for definition of loaded arms.

⁷ S. D. Art. 239 (a).

⁸ R. S. C. c. 162, s. 14; 24 & 25 Vict. c. 100, s. 20. [“Maliciously” in this section covers all cases in which a person wilfully and without lawful excuse does that which he knows to be likely to injure another; *R. v. Martin*, L. R. 8 Q. B. D. 54. It applies to cases in which a man strikes at one person maliciously and wounds another accidentally; *R. v.*]

three years' imprisonment, who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument.

¹ ARTICLE 295.

SHOOTING AT HER MAJESTY'S VESSELS—WOUNDING
CUSTOMS OR INLAND REVENUE OFFICERS.

Every one is guilty of felony and liable in cases (a) and (b) to imprisonment for life,² and in case (c) to imprisonment for any term not exceeding five years and not less than six months³ who wilfully or maliciously

(a.)⁴ shoots at any vessel belonging to Her Majesty or in the service of Canada ; or

(b.)⁴ maims or wounds any officer of the Army, Navy, Marine, or Customs, or any person acting in aid or assistance of such officer while duly employed for the prevention of smuggling and in execution of his duty ; or

(c.)⁵ shoots at, maims or wounds any officer of the Inland Revenue, or any person acting in his aid or assistance while employed for the prevention of illicit distillation, brewing, malting, or manufacturing, and in execution of his duty, or the protection or care of any article or place seized for any violation or supposed violation of *The Inland Revenue Act*.

[*Latimer*, L. R. 17 Q. B. D. 359; *R. v. Hunt*, 1 Moody C. C. 93.] A husband, who, knowing that he is suffering from gonorrhœa, has connection with his wife, who is ignorant of the fact, and who would not have submitted to the intercourse if she had been aware of his condition, does not commit an offence under either s. 20 or s. 47 of 24 & 25 Vict. c. 190; *R. v. Clarence*, L. R. 22 Q. B. D. 23.

¹ S. D. Art. 236 (b), (c).

² Art. 17.

³ "Unless a greater penalty is otherwise provided by law."

⁴ R. S. C. c. 32, s. 213; 39 & 40 Vict. c. 36, s. 193.

⁵ R. S. C. c. 34, s. 99.

¹ ARTICLE 296.

DISABLING OR ADMINISTERING DRUGS WITH INTENT TO
COMMIT AN INDICTABLE OFFENCE.

² Every one is guilty of felony and liable to imprisonment for life and to be whipped, who, with intent thereby to enable himself or any other person to commit, or with intent thereby to assist any other person in committing any indictable offence,

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

(b.) unlawfully applies or administers to, or causes to be taken by, or attempts to apply or administer to, or attempts or causes to be administered to or taken by, any person, any chloroform, laudanum or other stupefying or overpowering drug, matter or thing.

³ ARTICLE 297.

ADMINISTERING POISON SO AS TO ENDANGER LIFE.

⁴ Every one is guilty of felony, and liable to ten years' imprisonment, who unlawfully and maliciously administers to, or causes to be administered to or taken by, any other person, any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm.

¹ S. D. Art. 236 (d).

² R. S. C. c. 162, ss. 15, 16 ; 24 & 25 Vict. c. 100, ss. 21, 22.

³ S. D. Art. 288.

⁴ R. S. C. c. 162, s. 17 ; 24 & 25 Vict. c. 100, s. 23.

¹ ARTICLE 298.

ADMINISTERING POISON WITH INTENT TO INJURE.

² Every one is guilty of a misdemeanor, and liable to three years' imprisonment, who unlawfully and maliciously administers to, or causes to be administered to or taken by, any other person, any poison or other destructive or noxious thing, with intent to injure, aggrieve or annoy such person.

³ ARTICLE 299.

CAUSING BODILY INJURIES BY EXPLOSIVES.

⁴ Every one is guilty of felony, and liable to imprisonment for life, who unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burns, maims, disfigures, disables or does any grievous bodily harm to any person.

⁵ ARTICLE 300.

ATTEMPTING TO CAUSE BODILY INJURIES BY EXPLOSIVES.

Every one is guilty of felony, and liable in case (a.) to

¹ S. D. Art. 239 (b).

² R. S. C. c. 162, s. 18; 24 & 25 Vict. c. 100, s. 24. [An intent to excite sexual passion is within this provision; *R. v. Wilkins, L. & C. 89.*]

³ S. D. Art. 238 (e).

⁴ R. S. C. c. 162, s. 21; 24 & 25 Vict. c. 100, s. 28. As to causing explosions endangering life or property, see Arts. 92, 93, 300; destroying buildings by explosives with intent to murder, Art. 229 (c); and as to offences committed by explosives involving, or with intent to do, injury to property, see Art. 570.

Every one commits a misdemeanor who encloses in any letter or other mailable matter any explosive substance, or thing likely to injure any officer of the post office (R. S. C. c. 35, s. 92); and every one incurs a penalty of five hundred dollars who sends or carries by any railway (R. S. C. c. 38, s. 61; 51 Vict. (D.) c. 29, s. 253) or ship registered in Canada (R. S. C. c. 77, s. 14) any gunpowder, dynamite, nitro-glycerine, aquafortis, oil of vitriol, or other dangerous goods, without marking their nature on the package, and giving notice to the officer or person with whom they are left or to the master or owner of the ship.

⁵ S. D. Art. 238 (f) and Art. 237.

imprisonment for life, and in case (b.) to fourteen years' imprisonment, who unlawfully and maliciously.

(a.) ¹ with intent to burn, maim, disfigure or disable any person, or to do some grievous bodily harm to any person,

(i.) causes any gunpowder or other explosive substance to explode; or

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

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

and whether any bodily harm is effected or not; or

² (b.) places or throws in, into, upon, against or near any building, ship or vessel, any gunpowder or other explosive substance, with intent to do any bodily injury to any person, whether or not any explosion takes place, and whether or not any bodily injury is effected.

³ ARTICLE 301.

SETTING SPRING-GUNS AND MAN-TRAPS.

⁴ Every one is guilty of a misdemeanor and liable to three years' imprisonment who sets or places, or causes to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy, or inflict grievous bodily harm upon, any trespasser or other person coming in contact therewith.

Every one who knowingly and wilfully permits any such spring-gun, man-trap or other engine which has been set or placed by some other person, in any place which is

¹ R. S. C. c. 162, s. 22; 24 & 25 Vict. c. 100, s. 29.

² R. S. C. c. 162, s. 23; 24 & 25 Vict. c. 100, s. 30.

³ S. D. Art. 239 (e).

⁴ R. S. C. c. 162, s. 24; 24 & 25 Vict. c. 100, s. 31.

in, or afterwards comes into, his possession or occupation, to continue so set or placed, shall be deemed to have set or placed such gun, trap or engine, with such intent as aforesaid.

This Article does not extend to any gin or trap usually set or placed with the intent of destroying vermin.

¹ ARTICLE 302.

INTENTIONALLY ENDANGERING THE SAFETY OF PERSONS
ON RAILWAYS.

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

² (a.) with intent to injure or to endanger the safety of any person travelling or being upon any railway,

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

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

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

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

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

³ (b.) throws, or causes to fall or strike at, against, into or upon any engine, tender, carriage or truck used upon any railway, any wood, stone or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage or truck, or in or upon any other engine, tender, carriage or truck

¹ S. D. Art. 236 (g) (h).

² R. S. C. c. 162, s. 25; 24 & 25 Vict. c. 100, s. 32.

³ R. S. C. c. 162, s. 26; 24 & 25 Vict. c. 100, s. 33.

of any train, of which such first mentioned engine, tender, carriage or truck forms part.

¹ ARTICLE 303.

NEGLIGENTLY ENDANGERING THE SAFETY OF PERSONS ON RAILWAYS.

² Every one is guilty of a misdemeanor, and liable to imprisonment for any term less than two years, who, by any unlawful act, or by any wilful omission or neglect of duty, endangers or causes to be endangered the safety of any person conveyed or being in or upon a railway, or aids or assists therein.

³ ARTICLE 304.

INJURING PERSONS BY FURIOUS DRIVING.

⁴ Every one is guilty of a misdemeanor, and liable to imprisonment for any term less than two years, who, having the charge of any carriage or vehicle, by wanton or furious driving, or racing or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person whomsoever.

⁵ ARTICLE 305.

PREVENTING THE SAVING OF THE LIFE OF ANY PERSON SHIPWRECKED.

⁶ Every one is guilty of felony, and liable to seven years'

¹ S. D. Art. 240 (a).

² R. S. C. c. 162, s. 27; 24 & 25 Vict. c. 100, s. 34. There must be a duty to do the thing omitted to be done. A promise given to do it without anything more is not sufficient; *Ex parte Brydges*, 18 L. C. J. 141. Every officer or servant of a railway commits a misdemeanor who directs or knowingly permits any baggage, freight, merchandise or lumber car to be placed in rear of the passenger cars (R. S. C. c. 58, s. 57; 51 Vict. (D.) c. 29, s. 291); or who is intoxicated while in charge of a locomotive engine, or acting as conductor of a car or train of cars (R. S. C. c. 38, s. 58; 51 Vict. (D.) c. 29, s. 292). As to the violation by railway officers of railway regulations, see Art. 153, note (2).

³ S. D. Art. 240 (b).

⁴ R. S. C. c. 162, s. 28; 24 & 25 Vict. c. 100, s. 35.

⁵ S. D. Art. 236 (i).

⁶ R. S. C. c. 81, s. 36; 24 & 25 Vict. c. 100, s. 17.

imprisonment, who prevents or impedes, or endeavors to prevent or impede,

(a.) any shipwrecked person¹ in his endeavor to save his life; or

(b.) any person in his endeavor to save the life of any shipwrecked person.

ARTICLE 306.

LEAVING HOLES IN THE ICE AND EXCAVATIONS UNGUARDED.

Every one is guilty of a misdemeanor, and liable on summary conviction to a fine or imprisonment (or both)², who

³(a.) cuts or makes, or causes to be cut or made for the purpose of harvesting or obtaining ice for sale or use, any hole, opening, aperture or place, of sufficient size or area to endanger human life, through the ice on any navigable or other water open to or frequented by the public, and leaves such hole, opening, aperture or place, while it is in a state dangerous to human life, whether the same is frozen over or not, unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking, skating or falling therein; or

⁴(b.) being the owner, manager or superintendent of any abandoned or unused mine or quarry or property upon or in which any excavation in search of mines or quarries has been or is hereafter made of a sufficient area and depth to endanger human life, leaves the same unguarded and uninclosed by a guard or fence of sufficient

¹ By s. 2 (h) "shipwrecked person" is defined to include any person belonging to or on board of any British or foreign vessel wrecked, stranded, or in distress at any place in Canada. The words of the Act of the United Kingdom are: "Any person being on board of or having quitted any ship or vessel," etc.

²The words "or both" are not in s. 29, clause(a).

³R. S. C. c. 162, s. 29.

⁴R. S. C. c. 162, s. 80.

height and strength to prevent any person from accidentally riding, driving, walking or falling therein ; or

¹ (c.) omits within five days after conviction of any such offence to construct around or over such exposed opening or excavation a guard or fence of such height and strength.

² Every one whose duty it is so to guard such hole, opening, aperture or place is guilty of manslaughter if any person loses his life by accidentally falling³ therein while the same is unguarded.

⁴ ARTICLE 307.

NEGLECTING WHEN LIABLE TO PROVIDE FOOD—CAUSING BODILY HARM TO APPRENTICES AND SERVANTS.

⁵ Every one is guilty of a misdemeanor, and liable to three years' imprisonment, who,

(a.) being legally liable, either as a (husband, parent, guardian, or committee,) master or mistress (nurse or otherwise), to provide for any person as (wife, child, ward, lunatic or idiot), apprentice or servant (infant or otherwise), necessary food, clothing, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same ; or

(b.) unlawfully or maliciously does, or causes to be done, any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant is endangered, or the health of such apprentice or servant has been, or is likely to be, permanently injured.

¹ R. S. C. c. 162, s. 31.

² R. S. C. c. 162, s. 32.

³ " Riding, driving, walking, skating or falling."

⁴ S. D. Art. 239 (d).

⁵ R. S. C. c. 162, s. 19 ; 21 & 25 Vict. c. 100, s. 26. The words in parentheses are not in the statute of the United Kingdom. On an indictment against a husband for wilfully neglecting to provide necessary food, etc., for his wife, it must be shewn that the wife was in want and that the husband had the ability to provide for her ; *R. v. Nasmith*, 42 U. C. Q. B. 242. It is not necessary to show that the life of the wife is endangered or that her health has been or is likely to be permanently injured ; *R. v. Scott*, 4 Dor. Q. B. 50 ; 28 L. C. J. 264. See also *R. v. Smith*, 23 L. C. J. 247 ; *R. v. Maher*, 7 L. N. 82.

ARTICLE 308.

NEGLIGENTLY CAUSING BODILY INJURY TO ANY PERSON.

'Every one is guilty of a misdemeanor, and liable to imprisonment for any term less than two years, who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person.

^a R. S. C. c. 162, s. 33.