THE

CRIMINAL LAW CONSOLIDATION

AND

AMENDMENT ACTS

OF

1869, 32-33 VICT.

FOR THE

DOMINION OF CANADA,

AS AMENDED AND IN FORCE

ON THE 1ST DAY OF NOVEMBER, 1874, IN THE PROVINCES OF ONTARIO, QUEBEC, NOVA SCOTIA, NEW BRUNSWICK, MANITOBA, AND, ON THE 1ST DAY OF JANUARY, 1875, IN BRITISH COLUMBIA,

WITH

Notes, Commentaries, Precedents of Indictments, &c., &c., &c.

BY

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VOL. I.

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PREFACE.

The following pages are hardly anything else but a compilation. They may, nevertheless, perhaps prove useful.

They will be found to contain the full text of the Criminal Statutes Consolidation Acts of 1869, with a synopsis, under each clause, of the law and the rules of pleading, practice and evidence applicable to it.

It will be found that no reference is made, except in very few instances, to the Criminal Statutory Law in force, in each of the Provinces, before Confederation. This has been thought the best mode to ensure, for the work, an equal usefulness throughout the whole of the Dominion. For the same object, no citations of cases decided and reported in each of the Provinces will generally be met with. With Mr. Clarke's valuable book, this would, moreover, have been superfluous.

However, it has not been forgotten that,

> Longum iter est per præcepta,
> Breve et efficax per exempla,—*Seneca.*

and the reported English Crown cases down to July last will be found numerously cited and largely made use of: it cannot be denied that the weight of their authority and their practical importance, for the Dominion of Canada, have been largely increased by the enactment of the Criminal Law Consolidation Acts of 1869, based as these are on the Imperial Criminal Law Consolidation Acts of 1861, and taken almost textually from them.

At the end of each clause will be found cited the corresponding clause of the Imperial Statute, and any material difference between both mentioned.

The annotations made by the learned Mr. Greaves, Q.C., on the "Lord Campbell's Acts," of 1851, and the Consolidated Acts of 1861, have been compiled and inserted, when thought of practical utility to the Canadian practitioner: these annotations are rendered the more valuable by the fact that these Statutes were drawn and framed by Mr. Greaves.

Not a few errors, some of a very grave nature, have crept into our said Statutes of 1869: they will be found noticed, under each clause, as they have been observed. By a glance at the following sections, where *some* of such errors are met with, the necessity of a complete revision of these Acts will be amply demonstrated: sections 12, 20, 29, 32 and 45, of the Forgery Act: sections 19, 31 and 41 of the offences against the Person Act: sections 12, 15, 43, 54, 56, 57, 60, and 61 of the Malicious Injuries to property Act: sections 72 and 73 of 31 Vict. ch. 68, and sections 67 and 68 of 31 Vict. ch. 12, in conjunction with sections 31, 32 and 33 of the Offences against the Person Act: section 74 of 31 Vict. ch. 68, *page* 213, &c., &c., &c.

In other parts, are found provisions which seem to cover matters left entirely, by the *British North America Act*, under the control and legislative powers of the provincial legislatures, and therefore, *ultra vires* of the Parliament and unconstitutional: attention has been called to the sections

containing these enactments, as well as to others, which seem to contain a legislation entirely new, based on doctrines at all times repudiated by the Criminal Law of England, unknown, before Confederation, in each and every one of the Provinces now constituting this Dominion of Canada, and rejected by perhaps all the modern Codes of the world. An enactment of this kind may be seen in section 110 of the Larceny Act.

To this Volume, so as to make it complete by itself, have been joined a list of the cases cited, a table of contents, a table of Statutes, and a copious index: in fact, no pains have been spared to enhance its usefulness to the practitioner.

The second Volume will consist of the Procedure Act of 1869, with annotations, the general Repeal Act of 1869, and the Acts extending the Criminal Consolidation Statutes to Manitoba, (34 Vict. ch. 14) British Columbia, (37 Vict. ch. 42) and Prince Edward Island, if this last one is then enacted. But a condition, which must be admitted to be a fair one, is attached to the publication of the second Volume: it is, that the expenses incurred in the publication of the first be reimbursed. The experience of others teaches that, in this Country, one would be greatly mistaken if he expected a pecuniary reward for a law publication, but it would not be just to ask the addition of a pecuniary sacrifice to the no small amount of labour necessarily bestowed on these pages.

Fraserville, River du Loup, en bas, P.Q.

2nd November, 1874.

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The following are the Editions of the books most frequently cited in these pages, besides the Reports of cases, and the Criminal Law Commissioners' Reports:

Archbold.....17th.
Burn's Justice.....30th.
Stephen's Commentaries..... 7th.
Russell, Crimes and Misdemeanors, by Greaves..... 4th.
Broom's Commentaries..... 4th.
Taylor, on Evidence..... 6th.
Hale, Pleas of the Crown.....1st American.
Hawkins, Pleas of the Crown..... 8th.
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Sir J. Kelyng's Crown cases.....Stevens and Haynes' reprint, 1873.
Roscoe, Crim. Evidence..... 6th.
Wharton's Law Lexicon..... 5th.
Greaves' Consol. Crim. Acts..... 2nd.
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TABLE OF CASES CITED.

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THE

CRIMINAL LAW

Consolidation and Amendment Acts of 1869,

FOR THE

DOMINION OF CANADA.

AN ACT RESPECTING OFFENCES RELATING TO THE COIN.

32-33 VICT. CHAP. 18.

IMPERIAL ACT, 24–25 VICT. CHAP. 99.

WHEREAS it is expedient to assimilate, amend and consolidate the statute law of the several provinces of Quebec, Ontario, Nova Scotia and New Brunswick, respecting offences relating to the coin, and to extend the same, as so consolidated, to all Canada: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sect. 1. In the interpretation of and for the purpose of this Act, the expression "current gold or silver coin"

shall include any gold or silver coined in any of Her Majesty's mints, or gold or silver coin of any foreign prince, or state or country or other coin lawfully current, by virtue of any proclamation or otherwise, in Canada, or any other part of Her Majesty's dominions, and the expression "current copper coin" shall include any copper coin, and any coin of bronze or mixed metal coined in any of Her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in Canada, or any other part of Her Majesty's dominions; and the expression "false or counterfeit coin resembling or apparently intended to resemble or pass for current gold or silver coin" or other similar expression, shall include any of the current coin, which has been gilt, silvered, washed, coloured or cased over, or in any manner altered, so as to resemble or be apparently intended to resemble or pass for any of the current coin of a higher denomination; and the expression "current coin" shall include any coin coined in any of Her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in Canada, or any other part of Her Majesty's dominions, and whether made of gold, silver, copper, bronze or mixed metal;—and where the having any matter in the custody or possession of any person is mentioned in this Act, it shall include not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it, in any dwelling house or other building, lodging, apartment, field or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter is so had for his own use or benefit, or for that of any other person. Sect. 1, Imperial Act.

The Imperial Act applies only to the "Queen's current gold and silver coin" coined in any of Her Majesty's mints, or lawfully current in any part of Her Majesty's dominions in or out of the United Kingdom. The Canadian Act includes gold or silver coin of any foreign prince, state or country current in Canada, or in any other part of Her Majesty's dominions. But the clause is so framed, in the English Act, as to include all such coin, though the words "of any foreign prince, state or country" are not inserted. The part of the clause, declaring what shall be the having in possession mentioned in the Act, is to cover questions which came up in Reg. vs. Rogers, 2 Mood, 45; Reg. vs. Gerrish, 2 M. & Rob, 219, and Reg. vs. Williams, 1 C. & M. 259.—Greaves, Consol. Acts, 318.

COUNTERFEITING CURRENT GOLD OR SILVER COIN.

Sect. 2.—Whosoever falsely makes or counterfeits any coin resembling or apparently intended to resemble or pass for any current gold or silver coin is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.— Sect. 2, Imp. Act.

Sect. 34. Whenever any person is convicted of any indictable misdemeanor punishable under this Act, the Court may, if it thinks fit in addition to or in lieu of any of the punishments by this Act authorized, fine the offender and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour; and in case of any

felony punishable under this Act, the Court may, if it thinks fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishments by this Act authorized: Provided that no person shall be imprisoned under this section for not finding sureties, for any period exceeding one year. Sect. 38, Imp. Act.

Indictment. The Jurors for Our Lady the Queen upon their oath present, that J. S., on the first day of June, in the year of ten pieces of false and counterfeit coin, each piece thereof resembling and apparently intended to resemble and pass for a piece of current gold coin, called a sovereign, falsely and feloniously did make and counterfeit, against the form..... Archbold, 744.

It is rarely the case that the counterfeiting can be proved directly by positive evidence: it is usually made out by circumstantial evidence, such as finding the necessary coining tools in the defendant's house, together with some pieces of the counterfeit money in a finished, some in an unfinished state, or such other circumstances as may fairly warrant the jury in presuming that the defendant either counterfeited or caused to be counterfeited, or was present aiding and abetting in counterfeiting the coin in question. Before the modern statutes which reduced the offence of coining from treason to felony, if several conspired to counterfeit the Queen's coin, and one of them actually did so in pursuance of the conspiracy, it was treason in all, and they might all have been indicted for counterfeiting the Queen's coin generally, 1 Hale, 214; but now, only the party who actually counterfeits would be the principal felon, and the others, accessories before the fact, although triable as principals.—31 Vict ch. 72.

A variance between the indictment and the evidence in the number of the pieces of coin alleged to be counterfeited, is immaterial; but a variance as to the denomination of such coin, as guineas, sovereigns, shillings, would be fatal, unless amended. By the old law the counterfeit coin produced in evidence must have appeared to have that degree of resemblance to the real coin that it would be likely to be received as the coin for which it was intended to pass by persons using the caution customary in taking money. In R. vs. Varley, 1 East. P. C. 164, the defendant had counterfeited the resemblance of a half-guinea upon a piece of gold previously hammered, but it was not round, nor would it pass in the condition in which it then was, and the judges held that the offence was incomplete. So, in R. vs. Morris, 1 Leach 165, where the defendants were taken in the very act of coining shillings, but the shillings coined by them were taken in an imperfect state, it being requisite that they should undergo another process, namely inmersion in diluted *aqua fortis*, before they could pass as shillings, the judges held that the offence was incomplete; but now by sect. 32, of the Coin Act of 1869, the offence of counterfeiting shall be deemed complete although the coin made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected.

Any credible witness may prove the coin to be counterfeit, and it is not necessary for this purpose to produce any moneyer or other officer from the mint. Sect. 30, *infra*. If it become a question whether the coin, which the counterfeit money was intended to imitate be current coin, it is not necessary to produce the Proclamation to prove its legitimation: it is a mere question of fact to be

left to the jury upon evidence of usage, reputation, &c. —Hale, 196, 212, 213. It is not necessary to prove that the counterfeit coin was uttered or attempted to be uttered. 1 East, P. C. 165; Archbold, 744; Reg. vs. Robinson, 10 Cox, 107; Reg. vs. Connell, 1 C. and K. 190; Reg. vs. Byrne, 6 Cox, 475.

By sect. 49, 32-33 Vict., ch. 29, if, upon the trial for any felony, it appears that the defendant did not complete the offence charged, but was only guilty of an attempt to commit the same, a verdict may be given of guilty of the attempt.

As to solitary confinement, see sect. 94, 32-33 Vict., ch. 29.

COLOURING, &C., COIN.

Sect. 3. Whosoever gilds or silvers, or with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means whatsoever washes, cases over, or colours any coin whatsoever resembling or apparently intended to resemble or pass for any current gold or silver coin, or gilds or silvers or with any wash or materials capable of producing the colour or appearance of gold or of silver, or by any means whatsoever, washes, cases over or colours any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined, into false and counterfeit coin resembling or apparently intended to resemble or pass for any current gold or silver coin, or gilds or with any wash or materials capable of producing the colour and appearance of gold, or by any means whatsoever, washes,

cases over or colours any current silver coin. or files or in any manner alters such coin, with intent to make the same resemble or pass for any current gold coin, or gilds or silvers, or with any wash or materials capable of producing the colour or appearance of gold or silver, or by any means whatsoever, washes, cases over or colours any current copper coin, or files, or in any manner alters, such coin with intent to make the same resemble or pass for any current gold or silver coin, is guilty of felony, and shall be liable to be imprisoned in the penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—Sect. 3, Imp. Act.

Indictment for colouring coin..... falsely, deceitfully and feloniously did gild a certain false and counterfeit coin resembling a certain piece of current gold coin, called a sovereign, against the form ..... Archbold, 746.

Prove the gilding, &c. or colouring as stated in the indictment. Where the defendant was apprehended in the act of making counterfeit shillings, by steeping round blanks, composed of brass and silver in *aqua fortis*, none of which were finished, but exhibited the appearance of lead, though by rubbing they readily acquired the appearance of silver, and would pass current, it was doubted whether this was within the late Act, but the judges held the conviction to be right.—R. vs. Case, 1 Leach, 145. In another case a doubt was expressed whether an immersion of a mixture, composed of silver and base metal, into *aqua fortis*, which draws the silver to the surface, was a colouring within the repealed statutes, and whether they were not intended to apply only to a colouring produced by a

superficial application. R. vs. Lavey, 1 Leach, 153. But the words "capable of producing" seem to have been introduced into the recent Statute for the purpose of obviating the doubt. Moreover, the present Statute adds the general words "or by any means whatsoever." Where a wash or material is alleged to have been used by the defendant, it must be shown either from the application by the defendant, or from an examination of their properties, that they are capable of producing the colour of gold or silver. But an indictment charging the use of such material will be supported by proof of a colouring with gold itself. R. vs. Turner, 2 Mood. 41. Archbold, 746. Where direct evidence of the act of colouring cannot be obtained, circumstances may be shown from which the act may be presumed, as that the prisoner was in possession of false coin, and that blanks coloured and materials for colouring were found in his house.—1 Burn's Justice, 806.

Indictment for colouring metal, &c......falsely, deceitfully and feloniously did gild ten pieces of silver, each piece thereof being respectively of a fit size and figure to be coined, and with intent that each of the said pieces of silver respectively should be coined into false and counterfeit coin resembling a piece of current gold coin, called a sovereign, against the form..... Archbold, 747.

An indictment charging the gilding of sixpences "with materials capable of producing the colour of gold" is good, and is supported by proof of colouring sixpences with gold.—R. vs. Turner, 2 Mood., 41.

IMPAIRING, &C., GOLD AND SILVER COIN.

Sect. 4.—Whosoever impairs, diminishes, or lightens any current gold or silver coin, with intent that the

coin so impaired, diminished or lightened may pass for current gold or silver coin, is guilty of felony and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—Sect. 4, Imp. Act.

Sect. 5.—Whosoever unlawfully has in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution or otherwise, which have been produced or obtained by impairing, diminishing, or lightening any current gold or silver coin, knowing the same to have been so produced or obtained, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labor, and with or without solitary confinement. Sect. 5, Imp. Act.

Indictment.—....ten pieces of current gold coin, called sovereigns, falsely, deceitfully and feloniously did impair with intent that each of the ten pieces so impaired might pass for a piece of current gold coin, called a sovereign, against the form..... Archbold, 748.

The act of impairing must be shown, either by direct evidence of persons who saw the prisoner engaged in it, or by presumptive evidence, such as the possession of filings and of impaired coin, or of instruments for filing, &c. The intent to pass off the impaired coin must then appear. This may be done by showing that the prisoner attempted to pass the coin so impaired, or that he carried it about his person, which would raise a presumption that he intended to pass it. And if the coin were not so defaced by the process by impairing, as apparently to affect its currency, it would, under the circumstances, without further evidence, be a question for the jury, whether the diminished coin was intended to be passed.—Roscoe, on Coining, 19. As to sect. 5, Greaves remarks, p. 321: "This clause is new. It has frequently happened that filings and clippings, and gold dust have been found under such circumstances as to leave no doubt that they were produced by impairing coin, but there has been no evidence to prove that any particular coin had been impaired. This clause is intended to meet such cases."

As to solitary confinement, see 32–33 Vict., ch. 29, s. 94. As to requiring the offender to enter into recognizances and find sureties for keeping the peace, see sect. 34, *ante*, with sect. 2.

BUYING OR SELLING COUNTERFEIT COIN AT A LOWER VALUE.

Sect. 6.—Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, buys, sells, receives, pays or puts off, or offers to buy, sell, receive, pay or put off, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any current gold or silver coin, at or for a lower rate or value than the same imports or was apparently intended to import, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than

two years, with or without hard labour, and with or without solitary confinement; and in any indictment for any such offence as in this section aforesaid, it shall be sufficient to allege that the party accused did buy, sell, receive, pay or put off, or did offer to buy, sell, receive, pay or put off the false or counterfeit coin, at or for a lower rate of value than the same imports, or was apparently intended to import, without alleging at or for what rate, price or value, the same was bought, sold, received, paid or put off, or offered to be bought, sold, received, paid or put off.—Sect. 6, Imp. Act.

Indictment—...ten pieces of false and counterfeit coin, each piece thereof resembling a piece of the current gold coin, called a sovereign, falsely, deceitfully and feloniously, and without lawful authority or excuse did put off to one J. N. at and for a lower rate and value than the same did then import; against the....Archbold, 750.

Prove that the defendant put off the counterfeit coin as mentioned in the indictment. In R. vs Woolridge, 1 Leach, 307, it was holden that the putting off must be complete and accepted. But the words offer to buy, sell, &c. in the above clause would now make the acceptation immaterial.

The last part of the clause refers to the indictment: by it, the cases of R. vs. Joyce, and R. vs. Hedges, 3 C. & P. 410 would not now apply.—Archbold, 751. If the names of the persons to whom the money was put off can be ascertained, they ought to be mentioned and laid severally in the indictment; but if they cannot be ascertained the same rule will apply which prevails in the case of stealing the property of persons unknown.— 1 Russell, 135.

As to requiring the offender to enter into recognizances, and find sureties for keeping the peace, see sect. 34, *ante*, under sect. 2. As to solitary confinement, see sect. 94, 32-33 Vict., ch. 29.

IMPORTING COUNTERFEIT COIN.

SECT. 7.—Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, imports or receives into Canada any false or counterfeit coin, resembling or apparently intended to resemble or pass for any current gold or silver coin, knowing the same to be false or counterfeit, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.— Sect. 7, Imp. Act.

Indictment.—.....ten thousand pieces of false and counterfeit coin, each piece thereof resembling a piece of the current silver coin called a shilling, falsely, deceitfully and feloniously, and without lawful authority or excuse, did import into Canada,—he the said J. S. at the said time, when he so imported the said pieces of false and counterfeit coin, well knowing the same to be false and counterfeit; against the form .....Archbold, 751; 1 Russell, 108; 1 Burn's Justice, 867.

The guilty knowledge of the defendant must be averred in the indictment and proved.

As to sureties and solitary confinement, as, *ante*, under sect. 2.

EXPORTING COUNTERFEIT COIN.

SECT. 8.—Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, exports or puts on board any ship, vessel or boat, *or on any railway or carriage or vehicle of any description whatsoever*, for the purpose of being exported from Canada, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any current coin, *or for any foreign coin of any prince, country or state*, knowing the same to be false or counterfeit, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement other than a Penitentiary, for any term less than two years, with or without hard labour, and with or without solitary confinement.—Sect. 8, Imp. Act.

The words in *Italics* are not in the English Statute.

Indictment.....One hundred pieces of false and counterfeit coin, each piece thereof resembling a piece of the current coin called a sovereign, falsely, deceitfully and knowingly, and without lawful authority did export from Canada,—he the said C. D. at the time when he so exported the said pieces of false and counterfeit coin, then well knowing the same to be false and counterfeit; against.....1 Burn's Justice, 825. See observations on last preceding clause.

UTTERING COUNTERFEIT GOLD OR SILVER COIN.

SECT. 9.—Whosoever tenders, utters or puts off any false or counterfeit coin resembling or apparently intended to resemble or pass for any current gold or silver coin, knowing the same to be false or counterfeit, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen

years, and not less than two years, or to be imprisoned in any other gaol or place of confinement, for any term less than two years, with or without hard labour, and with or without solitary confinement.—Sect. 9, Imp. Act.

SECT. 10.—Whosoever tenders, utters or puts off as being current, any gold or silver coin of less than its lawful weight, knowing such coin to have been impaired, diminished or lightened, otherwise than by lawful wear, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement other than a Penitentiary, for a period not exceeding one year, with or without hard labour, and with or without solitary confinement. (This clause is not in the English Act, whose Sect. 10 is different.)

SECT. 11.—Whosoever has in his custody or possession any false or counterfeit coin, resembling or apparently intended to resemble or pass for any current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off any such false or counterfeit coin, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years, nor less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement. (Sect. 11 of the English Act is for having three or more pieces of counterfeit coin.)

Indictment for uttering counterfeit coin..... one piece of false and counterfeit coin resembling a piece of the current gold coin, called a sovereign, unlawfully, falsely and deceitfully did utter to one J. N., —he the said (defendant) at the time he so uttered the

said piece of false and counterfeit coin, well knowing the same to be false and counterfeit; against the form.....Archbold, 753.

Prove the tendering, uttering or putting off the sovereign in question, and prove it to be a base and counterfeit sovereign. Where a good shilling was given to a Jew boy for fruit, and he put it into his mouth under pretence of trying whether it were good, and then taking a bad shilling out of his mouth instead of it, returned it to the prosecutor, saying that it was not good; this (which is called *ringing the changes*) was holden to be an uttering, indictable as such.—R. vs. Franks, 2 Leach, 644; Archbold, 753. The giving of a piece of counterfeit money in charity is not an uttering, although the person may know it to be counterfeit; as in cases of this kind, there must be some intention to defraud.—Reg. vs. Page, 8 C. and P. 122. But this case has been overruled. —Reg. vs. Ion, 2 Den, 484; 1 Russell, 126. (See sect. 14 of the Forgery Act, and remarks thereon.)

A prisoner went into a shop, asked for some coffee and sugar, and in payment put down on the counter a counterfeit shilling: the prosecutor said that the shilling was a bad one; whereupon the prisoner quitted the shop, leaving the shilling and also the coffee and sugar: held that this was an uttering and putting off within the statute.—Reg. vs. Welch, 2 Den. 78; 4 Cox, 430. The prisoner and J. were indicted for a misdemeanor in uttering counterfeit coin. The uttering was effected by J. in the absence of the prisoner, but the jury found that they were both engaged on the evening on which the uttering took place, in the common purpose of uttering counterfeit shillings, and that in pursuance of that common purpose, J. uttered the coin in question: held, that the prisoner was rightly convicted as a principal, there being no accessories in a misdemeanor.—Reg. vs. Greenwood, 2 Den. 453; 5 Cox, 521. If two jointly prepare counterfeit coin, and utter it in different shops apart from each other but in concert, intending to share the proceeds, the utterings of each are the joint utterings of both, and they may be convicted jointly.—Reg. vs. Hurse, 2 M. and Rob. 360.

R. vs. Else, R. & R. 142; Reg. vs. Manners, 7 C. & P. 801; R. vs. Page, 9 C. & P. 756; 2 Mood, 219; R. vs. Jones, 2 Mood, 85, are not law.— Archbold, 754. Husband and wife were jointly indicted for uttering counterfeit coin: held, that the wife was entitled to an acquittal, as it appeared that she uttered the money in the presence of her husband.—R. vs. Price, 8 C. & P. 19. A wife went from house to house uttering base coin: her husband accompanied her but remained outside: held, that the wife acted under her husband 's compulsion.—Conolley's case, 2 Lewin, 229. Sarah McGinnes was indicted for uttering counterfeit coin. It appeared that at the time of the commission of the offence, she was in company with a man who went by the same name, and who was convicted of the offence at the last assizes. When the prisoners were taken into custody the police constable addressed the female prisoner as the male prisoner's wife. The male prisoner denied the fact, (of her being his wife) in the hearing and presence of the woman. Sarah McGinnes since her committal had been confined of a child: *held*, per Byles, J., that, under the circumstances, although the woman had not pleaded her coverture, and even although she had not asserted she was married to the male prisoner, when he stated she was not his wife, it was a question for the jury whether, taking the birth of the

child and the whole circumstances, there was not evidence of the marriage, and the jury thought there was, and acquitted her, as being under the influence of her husband, when she uttered the coin.—Reg. v. McGinnes, 11 Cox, 391.

Proof of the guilty knowledge by the defendant must be given. This of course must be done by circumstantial evidence. If, for instance, it be proved that he uttered, either on the same day or at other times, whether before or after the uttering charged, base money, either of the same or of a different denomination, to the same or to a different person, or had other pieces of base money about him when he uttered the counterfeit money in question; this will be evidence from which the jury, may presume a guilty knowledge.— Archbold, 754; 1 Russell, 127.

Indictment for having in possession counterfeit gold or silver coin with intent, &c., &c., &c...... unlawfully, falsely and deceitfully had in his custody and possession *four* pieces of false and counterfeit coin, resembling the current *silver* coin called.....with intent to utter the said pieces of false and counterfeit coin, he the said J. S. then well knowing the said pieces of false and counterfeit coin to be false and counterfeit; against..... Archbold, 757.—See remarks under sections 9 and 10. As to what constitutes the having in possession, see sect. 1, interpretation clause. As to fining the offender and require him to give sureties, in any cases of misdemeanor under this act, see *ante*, sect. 34, under sect. 2.

As to solitary confinement, 32–33 Vict., ch. 29, s. 94.

UTTERING, &C., AFTER A PREVIOUS CONVICTION SHALL BE FELONY.

Sect. 12.—Whosoever having been convicted, either before or after the passing of this Act, of any such misdemeanor as in any of the last three preceding sections mentioned, or of any misdemeanor or felony against this or any former Act heretofore in force in Canada, or in any of the Provinces thereof, relating to the coin, afterwards commits any of the misdemeanors in any of the said sections mentioned, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—Sect. 12, Imp. Act.

In the English Statute, the mode of proceeding on a subsequent offence, after a previous conviction, under the Coin Act, is given by sect. 37 of this Act. In Canada, we have the same clause, applying to all trials, generally, of a subsequent offence, after a previous conviction, and for which a greater punishment may be inflicted on that account, viz.: sect. 26, 32–33 Vict., ch. 29, (Procedure Act, 1869.) It is exactly in the same terms as the corresponding clause of the English Statute, on offences relating to the coin. The English Larceny Act, sect. 116, re-enacts it. See Greaves' observations on this last clause; also Archbold, 364, 755. More observations on the question will be found in the Annotations on sect. 26 of the Procedure Act of 1869.

Upon the trial of an indictment for the felony of having committed a misdemeanor, within either of sections 9, 10, or 11 of 24–25 Vict., ch. 99, relating to the unlaw-

ful possession and uttering of counterfeit coin after a previous conviction for a misdemeanor within those sections, the prisoner must be arraigned upon, and evidence respecting the subsequent offence must first be submitted to the jury, and the previous conviction must not be inquired into until after the verdict on the charge of the subsequent offence.—Regina vs. Martin, 11 Cox, 343 ; R. vs. Goodwin, 10 Cox, 534, overruled. In Reg. vs. Martin, Lush, J., admitted that he was in error, in the case mentioned at p. 757 of Archbold, Cr. Pl.

UTTERING FOREIGN COIN, MEDALS, &C., WITH INTENT TO DEFRAUD.

Sect. 13.—Whosoever, with intent to defraud, tenders, utters, or puts off, as or for any current gold or silver coin, any coin not being such current gold or silver coin, or any medal or piece of metal or mixed metals, resembling in size, figure and colour the current coin, as or for which the same is so tendered, uttered, or put off, such coin, medal or piece of metal or mixed metals so tendered, uttered or put off, being of less value than the current coin as or for which the same is so tendered, uttered or put off, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement, other than a penitentiary, for any term not exceeding one year, with or without hard labour, and with or without solitary confinement.—Sect. 13 Imp. Act.

An indictment for the offences against this section may be readily framed from the preceding forms.—See observations under sect. 2, for fine, sureties and solitary confinement.

A person was convicted, under the above section, of putting off, as and for a half sovereign, a medal of the

same size and colour, which had on the obverse side a head similar to that of the Queen, but surrounded by the inscription "Victoria, Queen of Great Britain," instead of "Victoria Dei Gratia" and a round guerling, and not square. And no evidence was given as to the appearance of the reverse side, nor was the coin produced to the jury; and it was held that there was sufficient evidence that the medal resembled, in figure, as well as size and colour, a half sovereign.—Reg. vs. Robinson, L. & C., 604 : the medal was produced, but, in the course of his evidence, one of the witnesses accidentally dropped it, and it rolled on the floor ; strict search was made for it for more than half an hour, but it could not be found.

COUNTERFEITING COPPER COIN.

Sect. 14.—Whosoever falsely makes or counterfeits any coin resembling or apparently intended to resemble or pass for any current copper coin; and whosoever without lawful authority or excuse (the proof of which shall lie on the party accused) knowingly makes or mends, or begins, or proceeds to make or mend, or buy or sell, or have in his custody or possession any instrument, tool or engine adapted and intended for the counterfeiting any current copper coin, or buys, sells, receives, pays or puts off, or offers to buy, sell, receive, pay or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any current copper coin, at or for a lower rate of value than the same imports, or was apparently intended to import, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than

two years with or without hard labour, and with or without solitary confinement.—Sect. 14, Imp. Act.

UTTERING BASE COPPER COIN.

SECT. 15.—Whosoever tenders, utters or puts off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any current copper coin, knowing the same to be false or counterfeit, or has in his custody or possession three or more pieces of false or counterfeit coin, resembling or apparently intended to resemble or pass for any current copper coin, knowing the same to be false or counterfeit, with an intent to utter or put off the same or any of them, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement, other than a Penitentiary, for any term not exceeding one year, with or without hard labour, "*or*" with or without solitary confinement. —Sect. 15, Imp. Act.

The evidence on the prosecution relating to the copper coin, will in general be the same as on prosecutions relating to the counterfeiting of the gold or silver coin. See remarks as to proof of intent, &c., under the preceding sections, and sect. 1, Interpretation Clause, as to what is having in custody or possession, under this clause.

DEFACING COIN, TENDER OF DEFACED COIN.

SECT. 16.—Whosoever defaces any current gold, silver or copper coin, by stamping thereon any names or words, whether such coin is or is not thereby diminished or lightened, and afterwards tenders the same, is guilty of a misdemeanor, and shall be liable to be imprisoned in

any gaol or place of confinement other than the Penitentiary, for any term not exceeding one year, with or without hard labour.—Sect. 16, Imp. Act.

Sec. 17.—No tender of payment in money made in any gold, silver or copper coin so defaced by stamping, as in the last preceding section mentioned, shall be allowed to be a legal tender; and whosoever tenders, utters or puts off any coin so defaced shall on conviction before two justices of the peace be liable to forfeit and pay any sum not exceeding ten dollars, provided that it shall not be lawful for any person to proceed for any such last mentioned penalty without the consent of the Attorney General for the province in which such offence is alleged to have been committed.—Sect. 17, Imp. Act.

Indictment for defacing Coin. one piece of the current silver coin, called a half crown, unlawfully and wilfully did deface, by then stamping thereon certain names and words ..... against the form ..... Archbold 748.

Prove that the defendant defaced the coin in question, by stamping on it any names or words, or both. It is not necessary to prove that the coin was thereby diminished or lightened. There must be defacing and tendering, to bring the offence within section 16. Legal tender is within the attributions of the Parliament of Canada, and clause 17 is not, therefore, unconstitutional. British N. A. Act, sect. 91, par. 20. By sect. 35, of ch. 18, 32–33 Vict., every offence under this Act made punishable on summary conviction may be prosecuted as directed by ch. 31, 32 33 Vict.

As to fining the offender, and requiring him to give sureties for the peace, see sect. 34, *ante*, under sect. 2.

COUNTERFEITING FOREIGN GOLD AND SILVER COIN, NOT CURRENT IN CANADA.

SECT. 18.—Whosoever makes or counterfeits any kind of coin not being current gold or silver coin, but resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state or country, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement, for any term less than two years, with or without hard labour, and with or without solitary confinement.—Sect. 18, Imp. Act.

BRINGING SUCH COUNTERFEIT COIN IN CANADA.

SECT. 19.—Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, brings or receives into Canada any such false or counterfeit coin, resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state or country, not being current coin, knowing the same to be false or counterfeit, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary, for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement, for any term less than two years, with or without hard labour, and with or without solitary confinement.—Sect. 19, Imp. Act.

UTTERING FOREIGN COUNTERFEIT COIN.

SECT. 20.—Whosoever tenders, utters or puts off any such false or counterfeit coin, resembling or apparently

intended to resemble or pass for any gold or silver coin of any foreign prince, state or country, not being current coin, knowing the same to be false or counterfeit, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement, other than a Penitentiary, for any term not exceeding six months, with or without hard labour.—Sect. 20, Imp. Act.

SUBSEQUENT OFFENCES.

SECT. 21.—Whosoever, having been so convicted as in the last preceding section mentioned, afterwards commits the like offence of tendering, uttering or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement, other than a Penitentiary, for any term less than two years; and whosoever, having been so convicted of a second offence, afterwards commits the like offence of tendering, uttering or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary, for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement, for any term less than two years, with or without hard labour, and with or without solitary confinement.—Sect. 21, Imp. Act.

HAVING FOREIGN GOLD OR SILVER COIN, FALSE OR COUNTERFEIT, IN POSSESSION.

SECT. 22.—Whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused)

has in his possession or custody any *forged*, false or counterfeited piece or coin, counterfeited to resemble any foreign gold or silver coin described in the four next preceding sections of this Act mentioned, knowing the same to be false or counterfeit, with intent to put off any such false or counterfeit coin, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years, nor less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.

Sect. 23, Imp. Act, applies to the having in possession *five* pieces or more of foreign counterfeit coin, gold, silver *or any other metal.* The Canadian corresponding enactment, it will be perceived, applies only to gold or silver coin, and to any number of them; the word *forged* is not in the English clause.

SECT. 23.—Whosoever falsely makes, or counterfeits any kind of coin, not being current coin but resembling or apparently intended to resemble or pass for any copper coin, or any other coin made of any metal or mixed metals, of less value than the silver coin, of any foreign prince, state or country, is guilty of a misdemeanor, and shall be liable, for the first offence, to be imprisoned in any gaol or place of confinement, other than the Penitentiary, for any term not exceeding one year; and for the second offence, to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.

Sect. 22, Imp. Act, is the corresponding clause. So that sect. 22 of the Canadian Act is sect. 23 of the English Act, and *vice versa*: in consequence, having in possession counterfeit foreign coin *other than gold* or silver, which in England, is an offence, is not provided for by our said Statute. (See 31 Vict., ch. 47:) the enactment upon subsequent offences contained in sect. 23 of the Canadian Statute, is not to be found in sect. 22 of the English Statute.

The remarks under the first part of the Act are all applicable here, the enactments in those sections being the same, and repeated, to apply to foreign coin *not current here*.

MAKING, &C., COINING TOOLS.

Sect. 24.—Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, knowingly makes or mends, or begins or proceeds to make or mend, or buy or sell, or have in his custody or possession any puncheon, counter puncheon, matrix, stamp, die, pattern, or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be intended and adapted to make or impress the figure, stamp or apparent resemblance of both or either of the sides of any current gold or silver coin, or of any coin of any foreign prince, state or country, or any part or parts of both or either of such sides; or makes, or mends, or begins or proceeds to make or mend, or buys or sells or has in his custody or possession any edger, edging or other tool, collar, instrument or engine, adapted and intended for the marking of coin round the edges with letters, grainings or other marks or figures, apparently resembling those on the edges of any such

coin as in this section aforesaid, knowing the same to be so intended and adapted as aforesaid,—or makes, or mends, or begins or proceeds to make or mend, or buys or sells, or has in his custody or possession any press for coinage or any cutting engine for cutting by force of a screw or of any other contrivance, round blanks out of gold, silver, or other metal or mixture of metals, or any other machine, knowing such press to be a press for coinage, or knowing such engine or machine to have been used or to be intended to be used for or in order to the false making or counterfeiting of any such coin as in this section aforesaid, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.— Sect. 24, Imp. Act.

Indictment for making a puncheon for coining. —..... one puncheon, in and upon which there was then made and impressed the figure of one of the sides, that is to say, the head side of a piece of the current silver coin, commonly called a shilling, knowingly, falsely, deceitfully and feloniously and without lawful authority or excuse, did make; against the form..... Archbold 759.

Prove that the defendant made a puncheon, as stated in the indictment; and prove that the instrument in question is a puncheon included in the Statute. The words in the Statute "upon which there shall be made or impressed" apply to the puncheon which being convex bears upon it the figure of the coin; and the word "which will make or impress" apply to the counterpun

cheon, which being concave will make and impress. However, although it is more accurate to describe the instruments according to their actual use, they may be described either way.—R. vs. Lennard, 1 Leach, 85. It is not necessary that the instrument should be capable of making an impression of the whole of one side of the coin, for the words "or any part or parts" are introduced into this Statute, and consequently the difficulty in R. vs. Sutton, 2 Str. 1074, where the instrument was capable of making the sceptre only cannot now occur.

And on an indictment for making a mould "intended to make and impress the figure and apparent resemblance of the obverse side" of a shilling, it is sufficient to prove that the prisoner made the mould and a part of the impression, though he had not completed the entire impression.—R. vs. Foster, 7 C. and P. 495. It is not necessary to prove under this branch of the Statute the *intent* of the defendant: the mere similitude is treated by the Legislature as evidence of the intent; neither is it essential to show that money was actually made with the instrument in question.—R. vs. Ridgely, 1 East P. C. 171. The proof of lawful authority or excuse, if any, lies on the defendant. Where the defendant employed a die-sinker to make, for a pretended innocent purpose, a die calculated to make shillings: and the die-sinker, suspecting fraud, informed the authorities at the mint, and under their directions made the die for the purpose of detecting prisoner; it was held that the die-sinker was an innocent agent and the defendant was rightly convicted as a principal.—R. vs. Bannon, 2 Mood. 309.

The *making* and *procuring* dies and other materials, with intent to use them in coining Peruvian half-dollars in England, not in order to utter them here, but by way of

trying whether the apparatus would answer, before sending it out to Peru, to be there used in making the counterfeit coin for circulation in that country, was held to be an indictable misdemeanor at common law.—R. vs. Roberts, Dearsl. 539; Archbold, 760; 1 Burn, 814; 1 Russell, 100. A galvanic battery is a machine within this section. —Reg. vs. Grover, 9 Cox, 282.

Indictment for having a puncheon in possession.—..... .....one puncheon in and upon which there was then made and impressed the figure of one of thesides, that is to say the head side of a piece of the current silver coin commonly called a shilling, knowingly, falsely, deceitfully and feloniously, and without lawful authority or excuse, had in his custody and possession, against the form.....Archbold 760.

An indictment which charged that the defendant feloniously had in his possession a mould "upon which said mould was made and impressed the figure and apparent resemblance" of the obverse side of a sixpence, was held bad on demurrer, as not sufficiently showing that the impression was on the mould at the time when he had it in his possession.—R. vs. Richmond, 1 C. & K. 240.

As to evidence of possession, see sect. 1, Interpretation Clause, *ante*.—R. vs. Rogers, 2 Mood., 758.—The prisoner had occupied a house for about a month before the police entered it, and found two men and two women there, one of whom was the wife of the prisoner. The men attacked the police, and the women threw something into the fire. The police succeeded, however, in preserving part of what the women threw away, which proved to be fragments of a plaster-of-Paris mould of a half crown. The prisoner came in shortly afterwards,

and, on searching the house, a quantity of plaster-of-Paris was found up-stairs. An iron ladle and some fragments of plaster-of-Paris moulds were also found. It was proved that the prisoner, thirteen days before the day in question, had passed a bad half-crown, but there was no evidence that it had been made in the mould found by the police. He was afterwards tried and convicted for uttering the base half-crown. It was held that there was sufficient evidence to justify the conviction, and that, on a trial for felony, other substantive felonies which have a tendency to establish the scienter of the defendant may be proved for that purpose.—Reg. vs. Weeks, L. & C., 18. In Reg. vs. Harvey, 11 Cox., 662, it was held: 1. That an indictment under this section is sufficient if it charges possession without lawful excuse, as excuse would include authority; 2. That the words "the proof whereof shall lie on the accused" only shift the burden of proof, and do not alter the character of the offence; 3. That the fact that the Mint authorities, upon information forwarded to them, gave authority to the die maker to make the die, and that the police gave permission to him to give the die to the prisoner, who ordered him to make it, did not constitute lawful authority or excuse for prisoner's possession of the die; 4. That, to complete the offence, a felonious intent is not necessary; and, upon a case reserved, the conviction was affirmed.

Indictment for making a collar.—.....one collar adapted and intended for the marking of coin round the edges with grainings apparently resembling those on the edges of a piece of the current gold coin called a sovereign, falsely, deceitfully and feloniously, and without lawful authority or excuse, did make,—he the said

J. S. then well knowing the same to be so adapted and intended as aforesaid, against the form..... Archbold, 761.

It must be proved, upon this indictment that the defendant knew the instrument to be adapted and intended for the making of coin round the edges.

It must be remarked that the present Statute expressly applies to tools for making foreign coin, as well as current coin.

As to sureties for keeping the peace, and solitary confinement, see the preceding sections.

CONVEYING COINING TOOLS OR COIN OUT OF THE MINT INTO CANADA.

Sect 25.—Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, knowingly conveys out of any of Her Majesty's mints *into Canada*, any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging, or other tool, collar, instrument, press or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal or mixture of metals, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—Sect. 25, Imp. Act.

The words *into Canada* make the offence very different with that mentioned in the English enactment, and one not often likely to be brought before our courts.

COIN SUSPECTED MAY BE CUT.

Sect. 26.—Where any coin is tendered as current gold or silver coin to any person who suspects the same to be diminished otherwise than by reasonable wearing, or to be counterfeit, it shall be lawful for such person to cut, break, bend or deface such coin, and if any coin so cut broken, bent or defaced, appears to be diminished otherwise than by reasonable wearing, or to be counterfeit, the person tendering the same shall bear the loss thereof; but if the same is of due weight and appears to be lawful coin, the person cutting, breaking, bending or defacing the same shall be bound to receive the same at the rate it was coined for, and if any dispute arises whether the coin so cut, broken, bent or defaced is diminished in manner aforesaid, or counterfeit, it shall be heard and finally determined in a summary manner by any Justice of the Peace, who is hereby empowered to examine upon oath, as well the parties as any other person, in order to the decision of such dispute, *and if he entertains any doubt in that behalf, he may summon three persons the decision of a majority of whom shall be final;* and the receivers of every branch of Her Majesty's revenue in Canada are hereby required to cut, break or deface, or cause to be cut, broken or defaced, every piece of counterfeit or unlawfully diminished gold or silver coin which shall be tendered to them in payment of any part of Her Majesty's revenue in Canada.—Sect. 26, Imp. Act.

The words in *italics* are not to be found in the English Act. The clause, taken altogether, is the most crude, ill-digested, impracticable piece of legislation to be found in our Statute book. The words introduced in it by our Parliament, are no improvement on the English clause. It has moreover, with us, also, a tinge of unconstitutionality.

SEIZURE AND DISPOSAL OF COUNTERFEIT COIN AND COINING TOOLS.

Sect. 27.—If any person finds or discovers in any place whatever, or in the custody or possession of any person having the same without lawful authority or excuse, any false or counterfeit coin resembling or apparently intended to resemble, or pass for any current gold, silver or copper coin, or any coin of any foreign prince, state or country, or any instrument, tool or engine whatsoever, adapted and intended for the counterfeiting of any such coin, or any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution or otherwise, which has been produced or obtained by diminishing or lightening any current gold or silver coin, the person so finding or discovering may, and he is hereby required to seize the same and to carry the same forthwith before some Justice of the Peace; and in case it is proved on the oath of a credible witness, before any Justice of the Peace, that there is reasonable cause to suspect that any person has been concerned in counterfeiting current gold, silver or copper coin, or any such foreign or other coin as is in this Act before mentioned, or has in his custody or possession any such false or counterfeit coin, or any instrument, tool or engine whatsoever, adapted and intended for the making or counterfeiting of any such coin, or any other machine used or intended to be used for making or counterfeiting any such coin, or any such filings, clippings or bullion, or any such gold or silver in dust, solution, or otherwise as aforesaid, any Justice of the Peace may, by warrant under his hand, cause any place whatsoever belonging to or in the occupation or under the control of such suspected person to be searched, either in the day or in the night, and if any

such false or counterfeit coin, or any such instrument, tool or engine, or any such machine, or any such filings, clippings or bullion, or any such gold or silver, in dust, solution or otherwise as aforesaid, is found in any place so searched, to cause the same to be seized and carried forthwith before some Justice of the Peace; and whenever any such false or counterfeit coin, or any such instrument, tool or engine, or any such machine or any such filings, clippings or bullion, or any such gold or silver, in dust, solution or otherwise as aforesaid, is in any case whatsoever seized and carried before a Justice of the Peace, he shall, if necessary, cause the same to be secured, for the purpose of being produced in evidence against any person who may be prosecuted for an offence against this Act, and all such false and counterfeit coin, and all instruments, tools and engines, adapted and intended for the making or counterfeiting of coin, and all such machines, and all such filings, clippings and bullion and all such gold and silver in dust, solution, or otherwise as aforesaid, after they have been produced in evidence, or when they have been seized and are not required to be produced in evidence, shall forthwith by *the order of the Court be defaced or otherwise disposed of as the Court may direct.*—Sect. 27, Imp. Act.

The words in *Italics* are in lieu of "the officers of Her Majesty's mint, &c,. &c., &c.," in the English Act.

Disposal of such coin produced in Court.

Sect. 28.—If any false or counterfeit coin be produced in any Court of law, the Court shall order the same to be cut in pieces in open Court, or in the presence of a Justice of the Peace, and then delivered to or for the lawful owner thereof, if such owner claims the same.

This clause is not to be found in the English Act.

VENUE.

Sect. 29.—Where any person tenders, utters or puts off any false or counterfeit coin in any one province of Canada or in any one district, county or jurisdiction therein, and also tenders, utters or puts off any other false or counterfeit coin, in any other province, district, county or jurisdiction, either on the day of such first mentioned tendering, uttering or putting off, or within the space of ten days next ensuing, or where two or more persons, acting in concert in different provinces, or in different districts, counties or jurisdictions therein, commit any offence against this Act, every such offender may be dealt with, indicted, tried and punished, and the offence laid and charged to have been committed, in any one of the said provinces, or districts, counties or jurisdictions, in the same manner in all respects, as if the offence had been actually and wholly committed within one province, district, county or jurisdiction.—Sect. 28, Imp. Act.

Greaves says on this clause: "The first part is introduced to remove a doubt which had arisen, whether a person tendering, &c., &c., coin in one jurisdiction and afterwards tendering, &c., &., coin in another jurisdiction, within sect. 10, could be tried in either. As the offence created by that section is only a misdemeanor, probably there was no substantial ground for that doubt, but it was thought better to set the matter at rest." Now, sect. 10 of the English Act is not reproduced in the Canadian Act: Sect. 29 was, then, not necessary.

WHAT SHALL BE SUFFICIENT PROOF OF COIN BEING COUNTERFEIT.

Sect. 30.—Where, upon the trial of any person charged with any offence against this Act, it becomes necessary

to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit, by the evidence of any moneyer or other officer of Her Majesty's mint, *or other person employed, in producing the lawful coin in Her Majesty's dominions, or elsewhere, whether the coin counterfeited be current coin, or the coin of any foreign prince, state or country not current in Canada*, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness.—Sect. 29, Imp. Act.

The words in *Italics* are not in the English Act.

The usual practice is to call as a witness, a silversmith of the town where the trial takes place, who examines the coin in Court, in the presence of the Jury—Davis's Cr. L., 235.

PROOF IN CERTAIN CASES.

Sect. 31.—Upon the trial of any person accused of any offence alleged to have been committed against the form of any Statute of Canada, or of any of the Provinces, passed or to be passed, respecting the currency or coin, or against the provisions of this Act, no difference in the date or year, or in any legend marked upon the lawful coin described in the indictment, and the date or year or legend marked upon the false coin counterfeited to resemble or pass for such lawful coin, or upon any die, plate, press, tool or instrument used, constructed, devised, adapted or designed, for the purpose of counterfeiting or imitating any such lawful coin, shall be considered a just or lawful cause or reason for acquitting any such person of such offence; and it shall in any case be sufficient to prove such general resemblance to the lawful coin as will

show an intention that the counterfeit should pass for it.

Not in the English Act.

Sect. 32—Every offence of falsely making or counterfeiting any coin, or of buying, selling, receiving, paying, tendering, uttering or putting off, or of offering to buy, sell, receive, pay, utter or put off any false or counterfeit coin, against the provisions of this Act, shall be deemed to be complete, although the coin so made or counterfeited, or bought, sold, received, paid, tendered, uttered or put off, or offered to be bought, sold, received, paid, *tendered*, uttered or put off, was not in a fit state to be uttered, or the counterfeiting thereof was not finished or perfected.—Sect. 30, Imp. Act.—

The word in *Italics* is not in the English Act.

Sect. 33.—It shall be lawful for any person whatsoever to apprehend any person who is found committing any indictable offence against this Act, and to convey or deliver him to some peace officer, constable or officer of police, in order to his being conveyed, as soon as reasonably may be, before a Justice of the Peace or some other proper officer, to be dealt with according to law.—Sect. 31, Imp. Act.

On this clause, Greaves remarks: "this clause is new, and clearly, unnecessary, as far as it relates to any felony or indictable misdemeanor, for there is no doubt whatever that any person in the act of committing any such offence is liable by the common law to be apprehended by any person, but it was introduced at the instigation of the solicitors of the Treasury, as it has been found that there was great unwillingness to apprehend in such cases, in consequence of doubts that prevailed among the public as to the right to do so."

Sect. 34.—Vide *ante*, under sect. 2.

Sect. 35.—Enacts that every offence by this Act made punishable on summary conviction may be prosecuted in the manner directed by 32-33 Vict., ch. 31.

Sect. 36.—Repeals Imperial Act, 16-17 Vict. ch. 48, as regards Canada, and the Act of Parliament therein cited and amended. The Imperial Act 16-17 Vict., ch. 48, extended the Coin Act, 2 Will. 4, ch. 34, to the colonies. The 2 Will. 4, ch. 34, had been repealed, only as to the United Kingdom by 24-25 Vict., ch. 95, sects. 1 and 2, Imperial Repeal Act; it stands now repealed for Canada by the above clause. The Imperial Act, 16-17 Vict., ch. 102, repealed as to the United Kingdom by 24-25 Vict., ch. 95, appears to be in force as regards Canada. Judge Day, in Warner vs. Fyson, 2 Low. Can. Jurist, 106, ruled it to be law here, but its provisions are re-enacted in our Coin Act so that its non-repeal is of no consequence.

A special Statute concerning the copper coin has been passed since Confederation.

It is the 31 Vict., ch. 47, *an Act respecting the manufacture or importation of copper coins or tokens.* The offences against it are all punishable on summary conviction.

Sect. 37.—This Act shall commence and take effect on the first day of January, one thousand eight hundred and seventy.

FORGERY.

GENERAL REMARKS.

"To forge is metaphorically taken from the smith who beateth upon his anvil, and forgeth what fashion and shape he will: the offence is called *crimen falsi*, and the offender *falsarius*, and the Latin word, to forge, is *falsare* or *fabricare*."—Coke, 3rd. Inst. 169.

"Forgery is the fraudulent making or alteration of a writing, to the prejudice of another's right."—4. Blackst. 247.

In Coogan's case (1. Leach, 448), Buller, J., said "it is the making of a false instrument with intent to deceive," and Eyre, B., in Taylor's case, defined it to be "a false signature made with intent to deceive." In the word "deceive" must doubtless be intended to be included an intent to "defraud,"[?]—and so it was defined by Grose, J., in delivering the opinion of the judges in the case of Parkes and Brown, viz.: "the false making a note or other instrument with intent to defraud." Again Eyre, B., in the case of Jones and Palmer, defined it to be "the false making an instrument, which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud any person or persons."—(1 Leach, 367.) 2 East, P. C. 853. And East himself, 2 P. C. 852, says "forgery at common law denotes a false making, which includes every alteration of or addition to a true instrument, a making *malo animo*, of any written instrument for the purpose of fraud and deceit."

"Forgery is the false making of an instrument with intent to prejudice any public or private right." 3rd Rep. Crim., Law Comm., 10th June, 1847, p. 34.

"Forgery is the fraudulent making of a false writing, which, if genuine, would be apparently of some legal efficacy."—Bishop, 2. Cr. L. 523.

"The characteristic of the crime of forgery is the false making of some written or other instrument for the purpose of obtaining credit by deception. The relation this offence bears to the general system may be thus briefly established. In most affairs of importance, the intentions, assurances, or directions, of men are notified and authenticated by means of written instruments. Upon the authenticity of such instruments the security of many civil rights, especially the right of property, frequently depends; it is, therefore, of the highest importance to society to exclude the numerous frauds and injuries which may obviously be perpetrated by procuring a false and counterfeited written instrument, to be taken and acted on as genuine. In reference to frauds of this description, it is by no means essential that punishment should be confined to cases of actually accomplished fraud; the very act of falsely making and constructing such an instrument with the intention to defraud is sufficient, according to the acknowledged principles of criminal jurisprudence, to constitute a crime,—being in itself part of the endeavour to defraud, and the existence of the criminal intent is clearly manifested by an act done in furtherance and in part execution of that intention. The limits of the offence are immediately deducible from the general principle already adverted to. As regards the subject matter, the offence extends to every writing used for the purpose of authentication.....

.....The crime is not confined to the falsification of mere writings; it plainly extends to seals, stamps, and all other visible marks of distinction by which the truth

of any fact is authenticated, or the quality or genuineness of any article is warranted; and, consequently, where a party may be deceived and defrauded, from having been by false signs induced to give credit where none was due. With respect to the false making of any such instrument, the offence extends to every instance where the instrument is, under the circumstances, so constructed as to induce a party to give credit to it as genuine and authentic in a point where it is false and deceptive. And in this respect, a forged instrument differs from one which is merely false and untrue in stating facts which are false. Where the instrument is forged, as where a certificate purporting to be signed by an authorized officer was not, in truth, signed by him, a party to whom it is shown is deceived in being induced to suppose that the fact certified is accredited by the officer whose certificate it purports to be, and he is deceived in that respect, whether the fact certified be true or false. If, on the other hand, such a certificate be in truth signed by the officer whose name it bears, the instrument is not forged, although the fact certified be falsely certified, for here the party receiving the certificate is deceived, not by being falsely induced to believe that the officer had accredited the instrument by his signature, but from the officer having falsely certified the fact. The instrument may, therefore, be forged, although the fact authenticated be true. The instrument may be genuine, although the fact stated be false. Where money or other property is obtained by an instrument of the latter description, that is, where it is false merely, as containing a false statement or representation, the offence belongs to the class of obtaining money or other property by false pretences."—5th Rep. Crim. L. Comm. 22nd of April, 1840.

"Consistently with the principles which govern the offence of forgery, an instrument may be falsely made, although it be signed or executed by the party by whom it purports to be signed or executed. This happens where a party is fraudulently induced to execute a will, a material alteration having been made, without his knowledge, in the writing; for, in such a case, although the signature be genuine, the instrument is false, because it does not truly indicate the testator's intentions, and it is the forgery of him who so fraudulently caused such will to be signed, for he made it to be the false instrument which it really is."—Cr. L. Comm. Rep. loc. cit.

This passage of the Criminal Law Commissioners seems tobe based ona very old case,cited in Noy's Reports,101, Combe's case; but in a more recent case, R. vs. Collins, 2 M. and Rob. 461, it was held that, fraudulently to induce a person to execute an instrument, on a misrepresentation of its contents, is not a forgery; and, in a case of R. vs. Chadwick, 2 M. and Rob. 545, that to procure the signature of a person to a document, the contents of which have been altered without his knowledge,is not a forgery.

The report (loc. cit.) of the criminal law Commissioners continues as follows: "Upon similar grounds, an offender may be guilty of a false making of an instrument, although he sign or execute it in his own name, in case it be false in any material part, and calculated to induce another to give credit to it as genuine and authentic, where it is false and deceptive. This happens where one, having conveyed land, afterwards, for the purpose of fraud, executes an instrument, purporting to be a prior conveyance of the same land; here again, the instrument is designed to obtain credit by deception, as pur-

porting to have been made at a time earlier than the true time of its execution."—5th Report, loc. cit.

This doctrine was approved of in a modern case, in England: Reg. vs. Ritson, 11 Cox, 352, and it was there held, upon a case reserved, that a man may be guilty of forgery by making a false deed in his own name. (See this case, under Sect. 23, *post.*) Kelly, C. B., delivering the judgment of the Court, said:

"I certainly entertained some doubt at one time upon this case, because most of the authorities are of an ancient date, and long before the passing of the Statutes of 11 Geo. 4 & 1 Will. 4, and 24-25 Vict. However, looking at the ancient authorities and the text-books of the highest repute, such as Com. Dig., Bacon's Abr., 3 Co. Inst., and Foster's C. L. 117, they are all uniformly to the effect, not that every instrument containing a false statement is a forgery, but that every instrument which is false in a material part, and which purports to be that which it is not, or to be executed by a person who is not the real person, or which purports to be dated on a day which is not the real day, whereby a false operation is given to it, is forgery."

"Forgery, *at common law*, is an offence in falsely and fraudulently making and altering any matter of record, or any other authentic matter of a public nature, as a parish register or any deed or will, and punishable by fine and imprisonment. But the mischiefs of this kind increasing, it was found necessary to guard against them by more sanguinary laws. Hence we have several Acts of Parliament declaring what offences amount to forgery, and which inflict severer punishment than there were at the common law."—Bacon's Abridg. 3 Vol. 277. Curwood, note, 1 Hawkins, P. C. 263, is of opinion that

this last definition is wholly inapplicable to the crime of forgery *at common law*, as, even at *common law*, it was forgery to make false "*private*" writings.

"The notion of forgery does not seem so much to consist in the counterfeiting a man's hand and seal, which may often be done innocently, but in the endeavouring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another, which he is, no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation, which in truth and justice it ought not to have."—1 Hawk. P. C. 264.

The definitions containing only the words "with intent to defraud" without the words "with intent to deceive" seem defective. In fact, there are many acts held to be forgery, where no intent to defraud, as this expression is commonly understood, exists in the mind of the person committing the act; as, for instance, if the man, forging a note, means to take it up, and even has taken it up, so as not to defraud any one, this is clearly forgery, if he issued it, and got money or credit, or anything upon it: Reg. vs. Hill, 2 Mood 30; Reg. vs. Geach 9, C. and P. 499; or forging a bill payable to the prisoner's own order, and uttering it without indorsement, Rex. vs. Birkett, Russ. and Ry. 86, or if one, while knowingly passing a forged bank note, agrees to receive it again should it prove not to be genuine, or if a creditor executes a forgery of the debtor's name, to get from the proceeds payment of a sum of money due him, Reg. vs. Wilson, 1 Den. 284, or if a party forges a deposition to be used in Court, stating merely what is true, to enforce a just claim: Bishop, 2 Cr. L. 598. All these

acts are forgery; yet where is the intent to defraud, in these cases? It may be said that the law infers it. But why make the law infer the existence of what does not exist? Why not say that "forgery is the false making of an instrument with intent to defraud or *deceive*." The word "*deceive*" would cover all the cases above cited: in each of these cases, the intent of the forger, is that the instrument forged should be used as good, should be taken and received as signed and made, by the person whose name is forged, in consequence, to deceive *quoad hoc*, and for this, though he did not intend to defraud, though no one could possibly be defrauded by his act, he is in law, guilty of forgery. See 2 Russell, 774. See *post*, under sect. 14 of the Forgery Act.

It is true that the Court of Crown cases reserved, in England, held in a modern case, Reg. vs. Hodgson, 3, Dears. & B. 1856, that, upon an indictment for forgery at common law, it is necessary to prove, not only an intent to defraud, but also an intent to defraud a particular person, though, when this case was decided, the Statute, in England, (14–15 Vict., ch. 100, s. 8.) enacted that it was not necessary in indictments for forgery to allege an intent to defraud any particular person. (This clause, as in England, has been inserted into our Consolidated Statute on Forgery, sect. 51, with the additional words "where it shall be necessary to allege an intent to defraud."—See *post*, sect. 51.) In this, Hodgson's case, the prisoner had forged and uttered a diploma of the College of Surgeons: the jury found that the prisoner forged the document with the general intent to induce the belief that it was genuine, and that he was a member of the College, and that he showed it to certain persons

with intent to induce such belief in them; but that he had no intent, in forging or uttering it, to commit any particular fraud or specific wrong to any individual.....

Though the offence charged in this case was under the common law, it must be remembered that S. 8, of 14–15 Vict., ch. 100, applied to indictments under the common law as well as to indictments under the Statutes, as now also do sect. 44 of the English Forgery Act and sect. 51 of the Canadian Forgery Act.—

Greaves remarks on the decision in this case:—

"As the clause of which this is a re-enactment (44 of the English Act, 51 of the Canadian Act) was considered in Reg. vs. Hodgson, and as that case appears to me to have been erroneously decided, it may be right to notice it here. The prisoner was indicted at common law for forging and uttering a diploma of the College of Surgeons, and the indictment was in the common form. The College of Surgeons has no power of conferring any degree or qualification, but before admitting persons to its membership, it examines them as to their surgical knowledge, and, if satisfied therewith, admits them, and issues a document called a diploma, which states the membership. The prisoner had forged one of these diplomas. He procured one actually issued by the College of Surgeons, erased the name of the person mentioned in it, and substituted his own. He hung it up in his sitting room, and, on being asked by two medical practitioners, whether he was qualified, he said he was, and produced this document to prove his assertion. When a candidate for an appointment as vaccinating officer, he stated he had his qualification, and would show it, if the clerk of the guardians, who were to appoint to the office, would

go to his gig; he did not, however, then produce or show it.

The prisoner was found guilty: the facts to be taken to be, that he forged the document with the general intent to induce a belief that it was genuine, and that he was a member of the College of Surgeons, and that he showed it to two persons with the particular intent to induce such belief in these two persons; but that he had no intent in forging or in altering, to commit any particular fraud, or any specific wrong to any individual. And, upon a case reserved, it was held that the 14 & 15 Vict., ch. 100, s. 8, altered the form of pleading only, and did not alter the character of the offence charged, and that the law as to that is the same as if the Statute had not been passed; and that, in order to make out the offence of forgery at common law, there must have been at the time the instrument was forged, an intention to defraud some particular person. Now, this judgment is clearly erroneous. The 14 & 15 Vict., ch. 100, s. 8, does, in express terms, alter the law as well as the form of indictment, for, it expressly enacts, that "*on the trial* of any of the offences in this section mentioned (forging, uttering, disposing of or putting off any instrument whatsoever) it shall not be necessary to *prove* that the defendant did the act charged with an intent to defraud." The judgment, therefore, and the clause in the Act are directly in contradiction to each other, and, consequently, the former cannot be right. The clause, too, was introduced advisedly for the very purpose of altering the law. See my note to Lord Campbell's Acts, page 13. It is a fallacy to suppose that there must have been an intent to defraud any particular person at the time of forging the document. In Tatlock vs. Harris, 3 T. R. 176, that great lawyer,

Shepherd, said in argument, "it is no answer to a charge of forgery to say that there was no *special* intent to defraud any *particular* person, because a *general intent* to defraud is sufficient to constitute the crime;" and this position was not denied by that great lawyer, Wood, who argued on the other side, and was apparently adopted by the Court. It is cited in 1 Leach, 206, note *a*; 3 Chitty, Cr. L. 1036, and, as far as we are aware, was never doubted before this case. Indeed, in Reg. vs. Tylney, 1 Den. 319, it seems to have been assumed on all hands to be the law. There the prisoners forged a will, but there was no evidence to show that any one existed who could have been defrauded by it, and the judges were equally divided whether a count for forgery with intent to defraud some person unknown, could, under such circumstances, be supported. It is obvious that this assumed that, if there had been evidence that there was any one who might have been defrauded, though there was no evidence that the prisoners even knew of the existence of any such person, the offence would have been forgery. Indeed it would be very startling to suppose that a man who forged a will, intending to defraud the next of kin, whoever they might happen to be, was not guilty of forgery because he had only that general intent.

The point is too obvious to have escaped that able criminal lawyer, Mr. Prendergast, and, as he did not take it, he clearly thought it wholly untenable, and so, also, must the judges who heard the case. See also the observations of Cresswell, J., in Reg. vs. Marcus, 2 C. & K. 356. In Reg. vs. Nash, 2 Den. 493, Maule, J., expressed a very strong opinion that it was not necessary in order to prove an intent to defraud that there should be any

person who could be defrauded, and this opinion was not dissented from by any of the other judges.

It has long been settled that making any instrument, which is the subject of forgery, in the name of a non-existing person, is forgery, and in Wilks' case, 2 East, P. C. 957, all the judges were of opinion that a bill of exchange drawn in fictitious names was a forged bill. Now, every one knows that, at the time when such documents are forged, the forger has no intent to defraud any particular person, but only an intent to defraud any person whom he may afterwards meet with, and induce to cash the bill; and no suggestion has ever been made in any of these cases that that offence was not forgery. The ground of the present judgment seems to have been that formerly the particular person who was intended to be defrauded must have been named in the indictment: no doubt, it is a general rule of criminal pleading that the names of persons should be stated, but this rule is subject to the exception that, wherever the stating the name of any person in an indictment is highly inconvenient or impracticable, the name need not be stated, for *Lex neminem cogit ad vana seu impossibilia*. Therefore, the names of inhabitants of counties, hundreds and parishes need never be stated; so, too, where there is a conspiracy to defraud tradesmen in general, the names need not be stated. So, where there is a conspiracy to raise the funds, it is not necessary to state the names of the persons who shall afterwards become purchasers of stock, "for the defendants could not, except by a spirit of prophecy divine who would be the purchasers on a subsequent day," per Lord Ellenborough, C. J., Rex. vs. de Berenger, 3, M. and S. 67; which reason is equally applicable to the case, where, at the time of forging an

instrument, there is no intent to defraud any particular person. Indeed, it is now clearly settled that, where a conspiracy is to defraud indefinite individuals, it is unnecessary to name any individuals.—R. vs. Peck. 9 A. & E. 686; Reg. vs. King, 7. Q. B. 782. This may be taken to be a general rule of Criminal pleading, and it has long been applied to forgery. In 1771, in R. vs. Birch, 1 Leach 79, the prisoners were convicted of forging a will, and one count alleged the intent to be "to defraud the person or persons who would by law be entitled to the messuages" whereof the testator died seized.—Chitty, Cr. L. 1066. And it has been the regular course in indictments for forging wills, at least ever since that case, to insert counts with intent to defraud *the heir-at-law* and *the next of kin*, generally.—Jerv. Archb. 8th Edit. 370; 3 Chitty Cr. L. 1069. It is true that in general there have also been counts specifying the heir-at-law or the next of kin by name. But in Reg. vs. Tylney, there was no such count. No objection seems ever to have been taken to any such general count. So, also, in any forgery with intent to defraud the inhabitants of a county, hundred or parish, the inhabitants may be generally described. These instances clearly show that it is not necessary in forgery any more than in other cases, to name individuals where there is either great inconvenience or impractibility in doing so. A conviction for conspiracy to negotiate a bill of exchange, the drawers of which were a fictitious firm, and thereby fraudulently to obtain goods from the *King's subjects*, although it did not appear that any particular person to be defrauded was contemplated at the time of the conspiracy, has been held good, R. vs. Hevey, 2 East, P. C. 858, note *a*, and this case bears considerably on the present question. If

a person forged a bill of exchange with intent to defraud any one whom he might afterwards induce to cash it, and he uttered it to A. B., it cannot be doubted that he would be guilty of uttering with intent to defraud A. B., and it would indeed be strange to hold that he was guilty of uttering, but not of forging, the bill. No doubt, the offence of forgery consists in the intent to deceive or defraud; but a general intent to defraud is just as criminal as to defraud any particular individual. In each case, there is a wrongful act done with a criminal intent, which, according to R. vs. Higgins, 2 East R. 5, is sufficient to constitute an indictable offence. In the course of the argument, Erle, J., said: "Would it not have been enough to allege an intent to deceive divers persons to the jurors unknown, to wit, all the patients of his late master?" This approaches very nearly to the correct view, viz. that it would have been enough before the 14 & 15 Vict., ch. 100, s. 8, to have alleged and proved an intent to deceive any persons who should afterwards become his patients. Wightman, J., during the argument said, "The question is, whom did he intend to deceive when the forgery was committed?" And Jervis, C. J., said: "The intent must not be a roving intent, but a specific intent." Now, if these remarks are confined to a count for forging, they are correct; though, in Bolland's case, 1 Leach, 83, the prisoner was executed for forging an indorsement in the name of a non-existing person, with intent to defraud a person whom he does not even seem to have known when he forged the indorsement.

But it cannot be doubted that a man may be guilty of intending to defraud divers persons at different times by the same instrument, as where he tries to utter a

forged note to several persons one after another, in which case he may be convicted of uttering with intent to defraud each of them. Thus much has been said, because it is very important that the law on the subjects discussed in this note should not be left in uncertainty, and it is much to be regretted that Reg. vs. Hodgson was ever decided as it was, as it may encourage ignorant pretenders to fabricate diplomas, and thereby not only to defraud the poor of their money, but to injure their health." Greaves, Consol. Acts, 303.

The case of Tatlock vs. Harris, hereinbefore cited by Greaves, is cited by almost all who have treated this question; 2 Russell, 774; 2 East., P. C., 854, &c. In Reg. vs. Nash, 2 Den. 493, Maule, J., said: "The Recorder seems to have thought, that, in order to prove an intent to defraud there should have been some person defrauded or who might possibly have been defrauded. But I do not think that at all necessary. A man may have an intent to defraud, and yet there may not be any person who could be defrauded by his act. Suppose a person with a good account at his bankers, and a friend, with his knowledge, forges his name to a cheque, either to try his credit, or to imitate his handwriting, there would be no intent to defraud, though there would be parties who might be defrauded. But where another person has no account at his bankers, but a man supposes that he has, and on that supposition forges his name, there would be an intent to defraud in that case, although no person could be defrauded."

And in R. vs. Mazagora, R. & R. 291, it has been holden that the jury ought to infer an intent to defraud the person who would have to pay the instrument if it were genuine, although from the manner of executing

the forgery, or from that person's ordinary caution, it would not be likely to impose upon him, and although the object was general to defraud whoever might take the instrument, and the intention of defrauding, in particular, the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation.—See R. vs. Crooke, 2 Str. 901; R. vs. Goate, 1 Ld. Raymond 737; R. vs. Holden, R. & R. 754. And even, if the party to whom the forged instrument is uttered believes that the defendant did not intend to defraud him, and swears it, this will not repel the presumption of an intention to defraud.—R. vs. Shephard, R. & R. 169. R. vs. Trenfield, 1 F. & F. 43, is wretchedly reported, and cannot be relied upon.—2 Russell, 790, note by Greaves. See also R. vs. Crowther, 5, C. & P. 316, and R. vs. James, 7 C. & P. 153, on the question of the necessary intent to defraud, in forgery; and Reg. vs. Boardman, 2 M. & Rob. 147; Reg. vs. Todd, 1 Cox 57. Though the present Statute, see *post*, sect. 51, has the words "where it shall be necessary to allege an intent to defraud" showing evidently that there are cases where such an averment is not necessary, it has been held, in a recent case, by Mr. Justice Quain, Reg. vs. Powner, 12 Cox 235, that, in all cases, an intent to defraud must be alleged. This doctrine seems to have been since repudiated by Martin, B., in Reg. vs. Asplin, 12 Cox 391; see *post*, under sect. 43.

It should be observed that the offence of forgery may be complete, though there be no publication or uttering of the forged instrument, for the very making with a fraudulent intention, and without lawful authority, of any instrument which, at common law or by Statute is the subject of forgery, is of itself a sufficient completion of

the offence before publication, and though, the publication of the instrument be the medium by which the intent is usually made manifest, yet it may be proved as plainly by other evidence. 2 East, P. C. 855. Thus in a case where the note, which the prisoner was charged with having forged was never published, but was found in his possession at the time he was apprehended, the prisoner was found guilty, and no one even thought of raising the objection that the note had never been published. Rex. vs. Elliot, 1 Leach, 175. At the present time, most of the Statutes which relate to forgery make the publication of the forged instrument, with knowledge of the fact, a substantive felony.—2 Russell, 709.

Not only the fabrication and false making of the whole of a written instrument, but a fraudulent insertion, alteration, or erasure, even of a letter, in *any material part* of a true instrument, and even if it be afterwards executed by another person, he not knowing of the deceit, or the fraudulent application of a true signature to a false instrument, for which it was not intended or *vice versa*, are as much forgeries, as if the whole instrument had been fabricated. As by altering the date of a bill of exchange after acceptance, whereby the payment was accelerated.—2 East, P. C. 855; 2 Russell, 710; Crim. law Comm. reports, cited *supra*; R. vs. Post. R. & R. 101; Reg. vs. Hodgson, Dears. and B. 3.

In addition to Wilks's case, 2 East, 957, cited *supra* by Greaves, as to the principle that the making of any instrument which is the subject of forgery, in the name of a non-existing and fictitious person, is forgery, the following are given in Archbold, 562: R. vs. Lewis, Foster, 116; R. vs. Bolland, 2 East, P. C. 958; R.

vs. Lockett, 1 Leach, 94; R. vs. Parkes, 2 Leach, 773; R. vs. Froud, R. & R. 389; R. vs. Sheppard, 1 Leach, 226; R. vs. Wiley, 2 Leach, 983; R. vs. Francis, R. & R. 209; R. vs. Webb, R. & R. 405; R. vs. Watts, R. & R. 436; R. vs. Mitchell, 1 Den. 282; R. vs. Bontien, R. & R. 260; R. vs. Rogers, 8 C. & P. 629.

Even where a man, upon obtaining discount of a bill, indorsed it in a fictitious name, when he might have obtained the money as readily by indorsing it in his own name, it was holden to be a forgery. R. vs. Taft, 1 Leach, 172; R. vs. Taylor, 1 Leach, 214; R. vs. Marshall. R. & R. 75; R. vs. Wiley, R. & R. 90; R. vs. Francis, R. & R. 209.

It is a forgery for a person having authority to fill up a blank acceptance or a cheque for a certain sum, to fill up the bill or cheque for a larger sum. R. vs. Hart 1 Mood. 486; and the circumstance of the prisoner, alleging a claim on his master for the greater sum, as salary then due, is immaterial, even if true; Reg. vs. Wilson, 1 Den. 284.

In respect of the persons who might formerly be witnesses in cases of forgery, it was an established point that a party by whom the instrument purported to be made was not admitted to prove it forged, if, in case of its being genuine, he would have been liable to be sued upon it, 2 Russell, 817. But now, see *post*, sect. 54 of the Forgery Act, and sect. 63 of the Procedure Act of 1869.—Also, sect. 67 of the Procedure Act of 1869.

A forgery must be of some document or writing: therefore the putting an artist's name in the corner of a picture, in order falsely to pass it off as an original picture by that artist, is not a forgery. R. vs. Close, Dears & B. 460; though it may be a cheat at common law.

The false signature *by a mark* is forgery. R. vs. Dunn, 1 Leach, 57.

When the writing is invalid on its face, it cannot be the subject of forgery, because it has no legal tendency to effect a fraud. It is not indictable, for example, to forge a will attested by a less number of witnesses than the law requires. R. vs. Wall, 2 East. 953; R. vs. Moffatt, 1 Leach, 954; 2 Bishop, Cr. L. 538.

But a man may be indicted for forging an instrument, which, if genuine, could not be made available by reason of some circumstance not appearing upon the face of the instrument, but to be made out by extrinsic evidence. R. vs. McIntosh, 2 Leach, 833.—So, a man may be indicted for forging a deed, though not made in pursuance of the provisions of particular Statutes, requiring it to be in a particular form, R. vs. Lyon, R. & R. 255.

And a man may be convicted of forging an unstamped instrument, though such instrument can have no operation in law.—R. vs. Hawkeswood, 1 Leach, 257; R. vs. Lee, 1 Leach, 258. This question, a few years afterwards, again underwent considerable discussion, and was decided the same way, though, in the meantime, the law, with regard to the procuring of bills and notes to be subsequently stamped, upon which in R. vs. Hawkeswood, the judges appear in some degree to have relied, had been repealed. The prisoner was indicted for knowingly uttering a forged promissory note. Being convicted the case was argued before the judges, and for the prisoner it was urged that the 31 Geo. 3., ch. 25, S. 19, which prohibits the stamps from being afterwards affixed, distinguished the case from R. vs. Hawkeswood. Though two or three of the judges doubted at first the propriety of the latter case if the matter

were *res integra*, yet they all agreed that, being an authority in point, they must be governed by it; and they held that the Statute 31 Geo. 3. made no difference in the question. Most of them maintained the principle in R. vs. Hawkeswood to be well founded, for the Acts of Parliament referred to were mere revenue laws, meant to make no alteration in the crime of forgery, but only to provide that the instrument should not be available for recovering upon it in a court of justice, though it might be evidence for a collateral purpose ; that it was not necessary, to constitute forgery, that the instrument should be available; that the stamp itself might be forged, and it would be a strange defence to admit, in a court of justice, that because the man had forged the stamp, he ought to be excused for having forged the note itself, which would be setting up one fraud in order to protect him from the punishment due to another. R. vs. Morton, 2 East, P. C. 955. The same principle was again recognized in R. vs. Roberts, and R. vs. Davies, 2 East, P. C. 955, and in R. vs. Teague, 2 East, P. C. 979, where it was holden that supposing the instrument forged to be such on the face of it as would be valid, provided it had a proper stamp, the offence was complete. Roscoe, 497, 6th Edit.

As to the uttering.—These words, *utter*, *uttering*, occur frequently in the law of forgery, counterfeiting and the like; meaning, substantially, to offer. If one offers another a thing, as for instance a forged instrument or a piece of counterfeit coin, intending it shall be received as good, he utters it, whether the thing offered be accepted or not. It is said that the offer need not go so far as a tender.—Reg. vs. Welch, 2 Den. 78; Reg. vs. Ion., 2 Den. 475; (See Greaves' remarks on this

case, 2 Russell, 838.) But, to constitute an uttering, there must be a complete attempt to do the particular act the law forbids, though there may be a complete conditional uttering, as well as any other, which will be criminal. The words "pay" or "put off" in a statute are not satisfied by a mere uttering or by a tender; there must be an acceptance also.—Bishop, Stat. Crimes, 306.

The Forgery Act now describes the offence of uttering by the words "offer, utter, dispose of or put off," which include attempts to make use of a forged instrument, as well as the cases where the defendant has actually succeeded in making use of it.—Archbold, 568.

Showing a man an instrument, the uttering of which would be criminal, though with an intent of raising a false idea in him of the party's substance, is not an uttering. Nor will the leaving it, afterwards, sealed up, with the person to whom it was shown, under cover, that he may take charge of it, as being too valuable to be carried about, be an uttering.—R. vs. Shukard, R. & R. 200. But the showing of a forged receipt, to a person with whom the defendant is claiming credit for it, was held to be an offering or uttering, though the defendant refused to part with the possession of it.—R. vs. Radford, 1 Den. 59.

In R. vs. Ion., 2 Den. 475, *supra*, cited by Bishop, the rule laid down by the Court is, that a using of the forged instrument in some way, in order to get money or credit upon it, *or by means of it*, is sufficient to constitute the offence described in the Statute.—Archbold, 569.

Giving a forged note to an innocent agent or an accomplice that he may pass it is a disposing of and put-

ting it away.—R. vs. Giles, 1 Mood. 166. So, if a person knowingly deliver a forged bank note to another, who knowingly utters it accordingly, the prisoner who delivered such note to be put off may be convicted of having disposed of and put away the same.—R. vs. Palmer & Hudson, R. & R. 72; 2 Leach, 978.

On the charge of uttering, the guilty knowledge is a material part of the evidence. *Actus non facit reum, nisi mens sit rea.* If there is no guilty knowledge, if the person who utters a forged instrument, really thinks it genuine, there is no *mens rea* with him: he commits no offence. Therefore, the prosecutor must prove this guilty knowledge by the defendant, to obtain a conviction.—2 Russell, 836.

This is not capable of direct proof. It is nearly in all cases proved by evidence of facts, from which the jury may presume it.—Archbold, 570. And by a laxity of the general rules of evidence, which has long prevailed in the English Courts, the proof of collateral facts is admitted to prove the guilty knowledge of the defendant. Thus, on an indictment for knowingly uttering a forged instrument, or a counterfeit bank note, or counterfeit coin, proof of the possession, or of the prior or *subsequent* utterance, either to the prosecutor himself *or to other persons*, of other false documents or notes, or bad money, *though of a different description*, and though themselves *the subjects of separate indictments*, is admissible as material to the question of *guilty knowledge* or intent. Taylor, Evid., 1 vol., par. 322.—R. vs. Foster, Pearce & D. 456; R. vs. Harris, 7 C. & P. 429; R. vs. Millard, R. & R. 245; R. vs. Sunderland, R. vs. Hodgson, R. vs. Kirkwood and R. vs. Martin, 1 Lew. C. C. 102-104; R. vs. Hough, R. & R. 122; R. vs. Weeks, 8 Cox 455; R. vs. Aston,

2 Russell 841; R. vs. Lewis, 2 Russell 841; R. vs. Oddy, 2 Den. 264. But in these cases, it is essential to prove distinctly that the instruments offered in evidence of guilty knowledge were themselves forged.—Taylor, loc. cit.; R. vs. Whiley and Baines, 2 Leach, 983; R. vs. Ball, R. & R. 132; R. vs. Salt, 3 Fost. & Fin. 834; R. vs. Nisbett, 6 Cox 320; R. vs. Harrison, 2 Lew. C. C. 118; R. vs. Green, 3 C. & K. 209; R. vs. Millard, R. & R. 245.

It seems also, that though the prosecutor may prove the uttering of other forged notes by the prisoner, and his conduct at the time of uttering them, he cannot proceed to show what the prisoner said or did at another time, with respect to such uttering; for these are collateral facts, too remote for any reasonable presumption of guilt to be founded upon them, and such as the prisoner cannot by any possibility be prepared to contradict.—Taylor, loc. cit.; R. vs. Philipps, 1 Lewin C. C. 105; R. vs. Cooke, 8 C. & P. 586. In Philipps' case, the judge said: "That the prosecutor could not give in evidence anything that was said by the prisoner at a time collateral to a former uttering in order to show that what he said at the time of such former uttering was false, because the prisoner could not be prepared to answer or explain evidence of that description: that the prisoner is called upon to answer all the circumstances of a case under consideration, but not the circumstances of a case which is not under consideration: that the prosecutor is at liberty to show other cases of the prisoner having uttered forged notes, and likewise his conduct at the time of uttering them; but that what he said or did *at another time collateral to such other utterings*, could not be given in evidence, as it was impossible that

the prisoner could be prepared to combat it."—See Reg. vs. Browne, 2 F. & F. 259, and Paterson's, J., remarks therein on Reg. vs. Cooke, cited *ante*, and R. vs. Forbes, 7 C. & P. 224. The rule, in such cases, seems to be that you cannot bring collateral evidence of a collateral fact, or that you cannot bring evidence of the collateral circumstances of a collateral fact.

The prosecutor must also prove that the uttering was accompanied by an intent to defraud. As to which, see remarks, *ante*, on the necessity of this intent in forgery, generally. Baron Alderson told the jury, in Reg vs. Hill, 2 Mood, 30, that, if they were satisfied that the prisoner uttered the bill as true, knowing at the time that it was forged, and meaning that the person to whom he offered it should believe it to be genuine, they were bound to infer that he intended to defraud this person, and this ruling was held right by all the judges. And in Reg. vs. Todd, 1 Cox, 57, Coleridge, J., after consulting Cresswell, J., said: "If a person forge another person's name, and utter any bill, note, or other instrument with such signature, knowing it not to be the signature of the person whose signature he represents it to be, but intending it to be taken to be such by the party to whom it is given, the inference, as well in point of fact as of law, is strong enough to establish the intent to defraud, and the party so acting becomes responsible for the legal consequences of his act, whatever may have been his motives. The natural, as well as the legal consequence, is that this money is obtained, for which the party obtaining it profess to give but cannot give a discharge to the party giving up the money on the faith of it. Supposing a person in temporary distress puts another's name to a bill, intending to take it up when it becomes due, but cannot

perform it, the consequence is that he has put another under the legal liability of his own act, supposing the signature to pass for genuine." See R. vs. Vaughan, 8 C. & P 276; R. vs. Cooke, 8 C. & P. 582; R. vs. Geach, 9 C. & P. 499.

A consequence of the judgment for forgery was an incapacity to be a witness until restored to competency by the king's pardon.—2 Russell, 844. But now by sect. 62 of the Procedure Act, of 1869, it is enacted that "no person offered as a witness, shall, by reason of any alleged incapacity from crime or interest, be excluded from giving evidence on the trial of any criminal case, or in any proceeding relating or incidental to such case." And sect. 63, of the same Act enacts that every person shall be admitted and be compellable to give evidence, in criminal cases, notwithstanding that such person has been previously convicted of a crime or offence. (6 and 7 Vict., ch. 85, Imp.)

Indictment. (General form, under Statute.) The jurors for our lady the Queen, upon their oath present, that J. S. on.... feloniously did forge a certain *(here name the instrument)* which said forged is as follows: that is to say *(here set out the instrument verbatim)* (see *post* sections 49 and 50) with intent thereby then to defraud; against the form of the Statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the day and year aforesaid, feloniously did forge a certain other *(state the instrument forged by any name or designation by which it is usually known,)* with intent thereby then to defraud; against the form of the Statute

in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present. that the said J. S., afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of and put off a certain other forged....which said last mentioned forged.....is as follows: that is to say (*here set out the instrument verbatim*) with intent thereby then to defraud, he, the said J. S. at the time he so uttered, offered, disposed of and put off the said last mentioned forged....as aforesaid, well knowing the same to be forged; against the form of the Statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of and put off a certain other forged (*as in the second count*) with intent thereby then to defraud, he, the said J. S., at the time he so uttered, offered, disposed of and put off the said last mentioned forged....as aforesaid, well knowing the same to be forged; against the form of the Statute in such case made and provided, and against the peace of our lady the Queen, her crown and dignity.

This indictment is not intended as a general precedent to serve in all cases of forgery; because the form in each particular case must depend upon the Statute on which the indictment is framed. But, with the assistance of it, and upon an attentive consideration of the operative words in the Statute creating the offence, the pleader can find no difficulty in framing an indictment in any case.—Archbold, 559.

Indictment for forgery at common law.—The jurors for Our Lady the Queen upon their oath present, that J. S. on.....unlawfully, knowingly and falsely did forge and counterfeit a certain writing purporting to be (*describe the instrument*) with intent thereby then to defraud: to the evil example of all others in like case offending, and against the peace of Our Lady the Queen, her Crown and dignity.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, unlawfully, falsely and deceitfully did utter and publish as true a certain other false, forged and counterfeited writing, purporting to be (*describe the instrument*) with intent thereby then to defraud,—he the said J. S., at the said time he so uttered and published the said last mentioned false, forged and counterfeited writing as aforesaid, well knowing the same to be false, forged and counterfeited, to the evil example of all others in the like case offending and against the peace of Our Lady the Queen, her Crown and dignity. —Archbold, 599.

At common law, forgery is a misdemeanor, punishable by fine or imprisonment, or both, at the discretion of the Court.—By section 45 of our Statute on Forgery, see *post*, it is doubtful if there is now, with us, any forgery, at common law.

The Court of Quarter Sessions has no jurisdiction in cases of forgery, 2 Russell 814, and never had: "why?" said Lord Kenyon, "I know not, but having been expressly so adjudged, I will not break through the rules of law."—R. vs. Higgins, 2 East Rep. 18.—See also Reg. vs. Rigby, 8 C. & P. 770.

AN ACT RESPECTING FORGERY.

32-33 Vict. ch. 19.

Whereas it is expedient to assimilate, amend and consolidate the Statute Law of the several Provinces of Quebec, Ontario, Nova Scotia and New Brunswick, respecting indictable offences by forgery, and to extend the same as so consolidated to all Canada. Therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

FORGING THE GREAT SEAL, &c.

Sect. 1—Whosoever forges, or counterfeits, or utters, knowing the same to be forged or counterfeited, the Great Seal of the United Kingdom, or the Great Seal of the Dominion of Canada, or of any one of the late Provinces of Upper Canada, Lower Canada, or Canada, or of any one of the Provinces of Ontario, Quebec, Nova Scotia, or New Brunswick, or of any one of Her Majesty's Colonies or Possessions, Her Majesty's Privy Seal, any Privy Signet of Her Majesty, Her Majesty's Royal Sign Manual, or any of Her Majesty's Seals appointed by the twenty-fourth article of the Union between England and Scotland, to be kept, used and continued in Scotland, the Great Seal of Ireland, or the Privy Seal of Ireland, or the Privy Seal or Seal at Arms of the Governor General of Canada, or of the Lieutenant Governor of either of the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, or of any person who at any time administered the Government of any of the Provinces now constituting Canada, or of the Governor

or Lieutenant Governor of any one of Her Majesty's Colonies or Possessions, or forges or counterfeits the stamp or impression of any of the seals aforesaid, or utters any document or instrument whatsoever, having thereon, or affixed thereto, the stamp or impression of any such forged or counterfeited seal, knowing the same to be the stamp or impression of such forged or counterfeited seal, or any forged or counterfeited stamp or impression made or apparently intended to resemble the stamp or impression of any of the seals aforesaid, knowing the same to be forged or counterfeited, or forges, or alters, or utters, knowing the same to be forged or altered, any document or instrument having any of the said stamps or impressions thereon or affixed thereto, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 98, s. 1. Imp.

See *post*, sect. 58, as to requiring the offender to give sureties for the peace, in felonies under this Act.

See sect. 94 of the Procedure Act of 1869, as to solitary confinement.

Indictment..... that A. B., on.....the Great Seal of the United Kingdom falsely, deceitfully and feloniously did forge and counterfeit, against the form..... And the jurors aforesaid, upon their oath aforesaid, do further present that the said A. B. afterwards, to wit, on the day and year aforesaid, falsely deceitfully and feloniously did utter a certain other false, forged and counterfeited Great Seal as aforesaid, then well knowing the same to be false, forged and counterfeited against the form.....Add counts stating the in-

strument to which the counterfeit seal was appended, or which had thereon or affixed thereto the stamp or impression of such counterfeit seal, &c..—Archbold, 571.

Before the recent Statutes, this offence was treason.—1 Hale 183.—See general remarks on forgery.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.—2 Russell, 857.

FORGING DOCUMENT SIGNED BY GOVERNOR, LIEUTENANT-GOVERNOR, LETTERS-PATENT, PUBLIC REGISTERS, ETC., ETC., ETC.

Sect. 2.—Whosoever forges or fraudulently alters any document bearing or purporting to bear the signature of the Governor of Canada, or of any deputy of the Governor, or of the Lieutenant-Governor of any one of the Provinces of Ontario, Quebec, Nova Scotia and New Brunswick, or of any person who at any time administered the Government of any of the Provinces now constituting Canada, or offers, utters, disposes of or puts off any such forged or fraudulently altered document as aforesaid, knowing the same to be so forged or altered, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.

Sect. 3.— Whosoever forges or alters, or in any way publishes, puts off or utters as true, knowing the

same to be forged or altered, any copy of letters-patent, or of the enrolment or enregistration of letters-patent, or of any certificate thereof made or given, or purporting to be made or given, by virtue of any Statute of Canada, of any one of the late Provinces of Upper Canada, Lower Canada, or Canada, or of the Provinces of Ontario, Quebec, Nova Scotia or New Brunswick, is guilty of felony and shall be liable to be imprisoned in the Penitentiary for any term not more than seven years, nor less than two years, or to be imprisoned in any gaol or place of confinement for any term less than two years, with or without hard labour.

Sect. 4.— Whosoever forges, or counterfeits or alters any public register or book, appointed by law to be made or kept, or any entry therein, or wilfully certifies or utters any writing as and for a true copy of such public register or book, or of any entry therein, knowing such writing to be counterfeit or false, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not more than fourteen years, nor less than two years, or in any gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.

These three clauses are not in the English Act.—Sects. 37, 42 and 43, *post*, also provide for the forgery of certain registers.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.— As to sureties for the peace, in felonies under this Act, see *post* sect. 58.

As to indictment, see *ante*, form under sect. 1, and general remarks on forgery.

Upon the trial of any indictment for any offence

under these sections, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same,

FORGING TRANSFERS OF STOCKS, POWERS OF ATTORNEY, ETC., ETC., ETC.

Sect. 5.— Whosoever forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any transfer of any share or interest of or in any stock, annuity, or other public fund, which now is or hereafter may be transferable in any of the Books of the Dominion of Canada, or of any one of the Provinces of Quebec, Ontario, Nova Scotia or New Brunswick, respectively, or of any Bank at which the same may be transferable, or of or in the capital stock of any body corporate, company or society, which now is or hereafter may be established by charter, or by, under, or by virtue of any Act of Parliament of the United Kingdom or of any of the late Provinces of Upper Canada, Lower Canada or of Canada, or of the Dominion of Canada, or by any Act of the Legislature of either of the Provinces of Ontario, Quebec, Nova Scotia or New Brunswick, or forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, *or any claim for a grant of land from the Crown in Canada or for any scrip or other payment or allowance in lieu of any such grant or land*, or to receive any dividend or money payable in respect of any such share or interest, or demands or endeavours to have any such share or interest transferred, or to receive any dividend or money

payable in respect thereof, *or any such grant of land or scrip or payment or allowance in lieu thereof as aforesaid*, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict. ch. 98, s. 2, Imp.

The words in *Italics* are not in the English Act; they extend the clause to land claims, scrips, &c., &c., &c.

As to sureties for the peace in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94, of the Procedure Act of 1869.

See general remarks on forgery.

Indictment for forging and uttering a transfer of stock. —..... that A. B. on ..... feloniously did forge a transfer of a certain share and interest in certain stock and annuities, to wit ..... which said stock and annuities were then transferable at the Bank of ———, and which said transfer then purported to be made by one J. N. with intent thereby then to defraud, against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.

(2nd Count.)—..... did offer, utter, dispose of, and put off, a certain other forged transfer of a certain share and interest of, and in certain other stock and annuities, to wit .....which said last men-

tioned stock and annuities were then transferable at the Bank of——, and which said last mentioned transfer purported to be made by one J. N., with intent thereby then to defraud, he the said A. B., at the time he so uttered the said last mentioned forged transfer of the said share and annuity, well knowing the same to be forged, against the form.....—Archbold, 590.

Indictment for forging and uttering a power of attorney to sell out stock.—..... That A. B. on..... feloniously did forge a certain power of attorney to transfer a certain share and interest in certain stock and annuities which were then transferable at the Bank of—-—, which said forged power of attorney is as follows, that is to say (*here set it out*) with intent thereby then to defraud, against the form..... (2nd Count.) .....feloniously did offer, utter, dispose of and put off, a certain other forged power of attorney, purporting to be a power of attorney to transfer a certain share and interest of the said J. N. in certain stock and annuities which were then transferable at the Bank of———, to wit,.....with intent thereby then to defraud, he the said A. B. then well knowing the said last mentioned power of attorney to be forged, against the form..... (3rd Count.) .....feloniously did demand and endeavour to have a certain share and interest of the said J. N. in certain stock and annuities, which were then transferable at the Bank of ———, to wit ..... transferred, in the books of the said Bank of———, by virtue of a certain other forged power of attorney, purporting to be a power of attorney, to transfer the said share and interest of the said J. N. in the said stock and annuities so transferable as aforesaid, with intent thereby then to defraud, he the said A. B., at the time he so demanded and endeavoured to have the

said share and interest transferred as aforesaid, well knowing the said last mentioned power of attorney to be forged, against the form.....—Archbold, 590.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.—2 Russell, 865.

PERSONATING OWNER OF STOCK, WITH INTENT, &C.

Sect. 6.—Whosoever falsely and deceitfully personates any owner of any share, or interest of or in any stock, annuity or other public fund, which now is, or hereafter may be transferable in any of the books of the Dominion of Canada, or of any one of the Provinces of Quebec, Ontario, Nova Scotia, or New Brunswick, or of any bank at which the same may be transferable, or any owner of any share, or interest of or in the capital stock of any body corporate, company or society which now is, or hereafter may be established by charter, or by, under, or by virtue of any Act of Parliament of the United Kingdom, or of any of the late Provinces of Upper Canada, Lower Canada, or Canada, or of the Dominion of Canada, or by any Act of the Legislature of any one of the Provinces of Ontario, Quebec, Nova Scotia, or New Brunswick, *or of any claim for a grant of land from the Crown in Canada, or for any scrip or other payment or allowance in lieu of such grant of land,* or any owner of any dividend or money payable in respect of any such share or interest as aforesaid, and thereby transfers or endeavours to transfer any share or interest belonging to any such owner, or thereby receives or endeavours to receive any money due to any such owner, *or to obtain any such grant of land, or such scrip or allowance in lieu there-*

of, as aforesaid, as if such offender were the true and lawful owner, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict. ch. 98, s. 3, Imp.

The words in *Italics* are not in the English Act; they extend the clause to land claims, scrips, &c.

As to sureties for the peace in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment.—..... feloniously did, falsely and deceitfully personate one J. N., the said J. N. then being the owner of a certain share and interest in certain stock and annuities, which were then transferable at the Bank of———, to wit, (*state the amount and nature of the stock*); and that the said A. B. thereby did then transfer the said share and interest of the said J. N. in the said stock annuities, as if he, the said A. B. were then the true and lawful owner thereof, against the form .....—Archbold, 614.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.—2 Russel, 865.

FORGING ATTESTATION TO POWER OF ATTORNEY FOR TRANSFER OF STOCK, &C., &C., &C.

SECT. 7.— Whosoever forges any name, handwriting or signature, purporting to be the name, handwriting or signature of a witness attesting the execution

of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, *or grant of land or scrip, or allowance in lieu thereof,* as in either of the last two preceding sections mentioned, or to receive any dividend or money payable in respect of any such share or interest, or offers, utters, disposes of, or puts off any such power of attorney or other authority, with any such forged name, handwriting or signature thereon, knowing the same to be forged, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 98, s. 4. Imp.

The words in *Italics* are not in the English Act; they correspond with those inserted in the last two preceding sections.

As to sureties for the peace in felonies under this Act, see *post* sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

See general remarks on forgery.

Indictment.—.....feloniously did forge a certain name, handwriting and signature, as and purporting to be the name, handwriting and signature of one....., as and purporting to be a witness attesting the execution of a certain power of attorney to transfer a certain share and interest of one J. N. in certain stock and annuities which were then transferable at the Bank of———,to wit, (*here state the amount and nature of the stock*), against the form..... (2nd Count.) .....did utter,

dispose of and put off a certain other forged power of attorney to transfer a certain share and interest of the said J. N. in certain stock and annuities which were then transferable at the Bank of———, to wit,.... with the name, handwriting and signature of the said ——— forged on the said last mentioned power of attorney, as an attesting witness to the execution thereof, he the said (defendant,) at the time he so offered, uttered, disposed of and put off the same, well knowing the said name and handwriting, purporting to be the name and handwriting of the said ——— thereon, as attesting witness thereof as aforesaid, to be forged, against the form.....—Archbold, 593.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same. — 2 Russell, 865.

MAKING FALSE ENTRIES OF STOCK, ETC., ETC., ETC.

Sect. 8.— Whosoever wilfully makes any false entry in, or wilfully alters any word or figure in any of the books of the account kept by the Government of Canada, or of any one of the Provinces of Ontario, Quebec, Nova Scotia, or New Brunswick, or of any bank at which any of the books of account of the Government of Canada, or of either of the Provinces of Ontario, Quebec, Nova Scotia or New Brunswick are kept, in which books the accounts of the owners of any stock, annuities or other public funds, which now are or hereafter may be transferable in such books, are entered and kept, or in any manner wilfully falsifies any of the accounts of any of such owners in any of the said books, with intent, in any

of the cases aforesaid, to defraud, or wilfully makes any transfer of any share or interest of or in any stock, annuity or other public fund which now is or hereafter may be transferable as aforesaid, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud, is guilty of felony, and shall be liable to imprisonment in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 98, s. 5. Imp.

As to sureties for the peace in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94, of the Procedure Act of 1869.

See general remarks on forgery.

Indictment for making false entries of stock.—..... feloniously did wilfully alter certain words and figures, that is to say (*here set out the words and figures as they were before the alteration*) in a certain book of account kept by ———, in which said book the accounts of the owners of certain stock, annuities and other public funds, to wit, the (*state the stock*) which were then transferable at ——— were then kept and entered, by (*set out the alteration and the state of the account or item when so altered*) with intent thereby then to defraud; against the form....— Archbold, 592.

Indictment for making a transfer of stock in the name of a person not the owner.—....feloniously did wilfully make a transfer of a certain share and interest of and in certain stock and annuities, which were then

transferable at the Bank of ———, to wit, the share and interest of ———, in the ——— (*state the amount and nature of the stock*), in the name of one C. D., he the said C. D., not being then the true and lawful owner of the said share and interest of and in the said stock and annuities, or any part thereof, with intent thereby then to defraud, against the form.....—Archbold, 592.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.—2 Russell, 865.

CLERKS MAKING OUT FALSE DIVIDEND, WARRANTS, ETC.

Sect. 9.—Whosoever being a clerk, officer or servant of, or other person employed or entrusted by the Government of Canada, or of any one of the Provinces of Ontario, Quebec, Nova Scotia, or New Brunswick, or being a clerk, or officer, or servant of, or other person employed or entrusted by any bank in which any of such books and accounts as are mentioned in the next preceding section, are kept, knowingly makes out, or delivers any dividend, warrant, or warrant for payment of any annuity, interest or money payable as aforesaid, for a greater or less amount than the person on whose behalf such warrant is made out is entitled to, with intent to defraud, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict. ch. 98, s. 6, Imp.

As to sureties for the peace in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment.—..... then being a clerk of ———, and employed and entrusted by the said ———, feloniously did knowingly make out and deliver to one J. N. a certain dividend warrant for a greater amount than the said J. N. was then entitled to, to wit, for the sum of five hundred pounds: whereas, in truth and in fact, the said J. N. was then entitled to the sum of one hundred pounds only; with intent thereby then to defraud, against the form.....—Archbold, 594.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.—2 Russel, 865.

FORGING DEBENTURES, STOCK, &C., MAKING PLATES, PAPER, IN IMITATION OF THOSE USED FOR DEBENTURES, ETC., HAVING SUCH PLATE, PAPER, ETC., IN POSSESSION.

Sect. 10.—Whosoever forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any debenture or other security, issued under the authority of any Act of the Legislature of any one of the late Provinces of Upper Canada, Lower Canada, or Canada, or of the Parliament of Canada, or of the Legislature of any one of the Provinces of Quebec, Ontario, Nova Scotia or New Brunswick, or any exchequer bill or exchequer bond, or any Dominion or Provincial note, or any endorsement on, or assignment of, any such debenture, exchequer bill or exchequer bond, or other security,

issued under the authority of any Act of the Legislature of any one of the late Provinces of Upper Canada, Lower Canada, or Canada, or of the Parliament of Canada, or of the Legislature of any one of the Provinces of Quebec, Ontario, Nova Scotia, or New Brunswick, or any coupon, receipt or certificate for interest accruing thereon, *or any scrip in lieu of land as aforesaid,* with intent to defraud, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 98, s. 8, Imp.

The words in *Italics* are not in the English Act.

Sect. 11.—Whosoever, without lawful authority or excuse, (the proof whereof shall lie on the party accused) makes, or causes, or procures to be made, or aids, or assists in making, or knowingly has in his custody or possession, any frame, mould or instrument, having therein any words, letters, figures, marks, lines or devices, peculiar to or appearing in the substance of any paper provided or to be provided and used for any such debentures, exchequer bills or exchequer bonds, Dominion notes or Provincial notes, or other securities as aforesaid, or any machinery for working any threads into the substance of any such paper, or any such thread, and intended to imitate such words, letters, figures, marks, lines, threads or devices, or any plate peculiarly employed for printing such debentures, exchequer bills or exchequer bonds, or such notes or other securities, or any die or seal peculiarly used for preparing any such plate, or for sealing such debentures, exchequer bills or exchequer bonds, notes or other securities, or any plate, die or seal intended

to imitate any such plate, die or seal, as aforesaid, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict. ch. 98, s. 9, Imp.

Sect. 12.—Whosoever, without lawful authority or excuse, (the proof whereof shall lie on the party accused) makes, or causes or procures to be made, or aids, or assists in making any paper in the substance of which appear any words, letters, figures, marks, lines, threads or other devices peculiar to and appearing in the substance of any paper provided or to be provided or used, for such debentures, exchequer bills, or exchequer bonds, notes or other securities aforesaid, or any part of such words, letters, figures, marks, lines, threads or other devices, and intended to imitate the same, or knowingly has in his custody or possession, any paper whatsoever, in the substance whereof appear any such words, letters, figures, marks, lines, threads or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads or other devices, and intended to imitate the same, or causes or assists in causing any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads and other devices, and intended to imitate the same, to appear in the substance of any paper whatever, or takes, or assists in taking, an impression of any such plate, die or seal, as in the last preceding section mentioned, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not

less than two years, or to be imprisoned in any other gaol or place of confinement for any term *not* less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 98, s. 10, Imp.

The word "*not*" making the imprisonment in any gaol, other than the Penitentiary, for a term *not* less than two years, has undoubtedly been inserted here by a typographical error. But the consequences of such errors are grave.

Sect. 13.—Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, purchases, or receives, or knowingly has in his custody or possession, any paper manufactured and provided by or under the directions of the Government of Canada, or of any one of the Provinces of Ontario, Quebec, Nova Scotia or New Brunswick, for the purpose of being used as such debentures, exchequer bills, or exchequer bonds, notes or other securities as aforesaid, before such paper has been duly stamped, signed and issued for public use, or any such plate, die or seal, as in the two last preceding sections mentioned, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement other than a Penitentiary for any term less than two years, with or without hard labour.—24-25 Vict., ch. 98, s. 11, Imp.

As to sureties for the peace in felonies, and fine and sureties for the peace, in misdemeanors under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

See *post*, sect. 52, as to what constitutes a criminal possession under this Act.

Upon the trial of any indictment for any offence under these sections, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same. 2 Russell, 939.

See general remarks on forgery, and general form of indictment.

AS TO FORGING STAMPS.

Sect. 14.—Whosoever forges, counterfeits or imitates, or procures to be forged, counterfeited or imitated any stamp or stamped paper, issued or authorized to be used by any Act of the Parliament of Canada, or of the Legislature of any of the Provinces of Quebec, Ontario, Nova Scotia or New Brunswick, by means whereof any duty thereby imposed may be paid, or any part or portion of any such stamp, or knowingly uses, offers, sells or exposes to sale, any such forged, counterfeited, or imitated stamp, or engraves, cuts, sinks or makes, any plate, die or other thing whereby to make or imitate such stamp or any part or portion thereof, except by permission of any officer or person, who, being duly authorized in that behalf by the Government of Canada or of any of the Provinces aforesaid, may lawfully grant such permission, or has possession of any such plate, die or other thing, without such permission, or, without such permission, uses or has possession of any such plate, die or thing lawfully engraved, cut or made, or tears off or removes from any instrument, on which a duty is payable, any stamp by which such duty has been wholly or in part paid, or removes from any such stamp any writing or mark indicating that it has been used for or towards the payment of any such duty, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for

any term not exceeding twenty-one years, and not less than two years, or in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—32-33 Vict., ch. 49, s. 8, Imp.; 33-34 Vict., ch. 98, Imp. and various Statutes cited in 2 Russell, 878. See 31 Vict., ch. 71, sect. 2, (of Canada).

Also see 31 Vict., ch. 9, sections 13 and 16, as to forgery of stamps for promissory notes, and 31 Vict., ch. 10, sect. 77, par. 8, as to forgery of postage stamps.—As to larceny of stamps, see 35 Vict., ch. 33, *post.*

As to sureties for the peace in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

As to what is a criminal possession under this Act, see *post*, sect. 52.

See R. vs. Collicott, R. & R. 212, and R. vs. Field, 1 Leach, 283.—See general remarks on forgery, and form of indictment under sect. 1.—As under sect. 1, the words "with intent to defraud" are not necessary in the indictment, since the Statute does not contain them. See Reg. vs. Aspin, 12 Cox 391, and remarks under sects. 42 and 36.

It was held, in R. vs. Ogden, 6 C. & P. 631, under a similar Statute, that a fraudulent intent was not necessary, but in a case of Reg. vs. Allday, 8 C. & P. 136, Lord Abinger, ruled the contrary: "The Act of Parliament, he said, does not say that an intent to deceive or defraud is essential to constitute this offence, but it is a serious question whether a person doing this thing innocently, and intending to pay the stamp duty is liable to be transported. I am of opinion, and I hope I shall not be

found to be wrong, that to constitute this offence, there must be a guilty mind. It is a maxim older than the law of England, that a man is not guilty unless his mind be guilty."

This opinion is not everywhere followed. Though Lord Abinger seems to hold to it, as, in another case, Reg. vs. Page, 8 C. & P. 122,—(*see remarks under sect.* 11 *of the Coin Act*),—this learned Judge held, upon the same principle, that giving counterfeit coin in charity, knowing it to be such, is not criminal, though in the Statute there are no words with respect to defrauding. But this is overruled, as stated by Baron Alderson, in Reg. vs. Ion, 2 Den. 484; and Greaves well remarks (on Reg. vs. Page): "As every person is taken to intend the probable consequence of his act, and as the probable consequence of giving a piece of bad money to a beggar is that that beggar will pass it to some one else, and thereby defraud that person, *quære*, whether this case rests upon satisfactory grounds? In any case a party *may* not be defrauded by taking base coin, as he *may* pass it again, but still the probability is that he will be defrauded, and that is sufficient."—1 Russell, 126, note *Z*.

And are there not cases, where a party, receiving a counterfeited coin or a false note, not only *may* not be defrauded, but will *certainly not* be defrauded As for example, suppose that during an election, any one buys an elector's vote, and pays it with a forged bill,—is the uttering of this bill, with guilty knowledge, not criminal? Yet, the whole bargain is a nullity: the seller has no right to sell; the buyer has no right to buy; if he buys, and does not pay, the seller has no legal or equitable claim against him, though *he* may have fulfilled his part of the bargain.

If the buyer does not pay, he *does not* defraud the seller; he *cannot* defraud him, since he does not owe him anything; it, then, cannot be said that he defrauds him in giving him, in payment, a forged note. Why see in this a fraud, and no fraud in giving a counterfeit note, in charity, to a beggar? Nothing is due to this beggar, and he is not defrauded of anything by receiving this forged bill, nor is this elector, who has sold his vote, defrauded of anything, since nothing was due to him: they are both *deceived* but not *defrauded.* In the general remarks, on forgery, *ante*, an opinion was expressed that forgery would be better described as "a false making with the intent to defraud *or deceive*," and such cases as the above seem to demonstrate the necessity of a codification of our criminal laws. And, when the Statute makes no mention of the intention, does it not make the Act prohibited a crime in itself, apart of the intention? Of course, it is a maxim of our law that "*actus non facit reum nisi mens sit rea*" or, as said in other words, by Starkie, 1 Cr., pl. 177, that, "to render a party criminally responsible, a vicious will must concur with a wrongful act." "But," continues Starkie, "though it be universally true, that a man cannot become a criminal unless his mind be in fault, it is not so general a rule that the guilty intention must be averred upon the face of the indictment." And then, for example, does not the man who forges a stamp, or, *scienter*, utters it, do wilfully an unlawful act? Does not the law say that this act, by itself, is criminal? Has Parliament not got the right to say: "The forging, false-making a stamp, or knowingly uttering it, is a felony, by itself, whether the person who does it means wrong, or whether he means right, or whether he means nothing at all?" And this is exactly

what it has said with regard to stamps, the Great Seal, records of the Courts of Justice, &c. It has said of these: "they shall be sacred, inviolable: you shall not deface them, imitate them, falsify, or alter them in any way or manner whatsoever, and if you do, you will be a felon." And to show that, as regards these documents, the intent to defraud was not to be a material element of the offence, it has expressly, in all the other clauses of the Statute, where it *did* require this intent to make the act criminal, inserted the words "with intent to defraud," and left them out in the clause concerning the said stamps, Great Seal, Court records, &c.—And no one, would be prepared to say, that the maxim "*la fin justifie les moyens*," has found its introduction into the English Criminal Law; and that, for instance, a clerk of a Court of justice is not guilty of a criminal act, if he alters a record, provided that the alteration is done with a *good intent*, and to put the record, as *he* thinks, it ought to be, and should, in fact, be.—Is it not better to say that in such cases, the guilty mind, the evil intent, the *mens rea* consist in the wilful disobedience to a positive law, in the rebellious infraction of the enactments of the legislative authority?

Against the preceding remarks, it must be said that Bishop, 1 Cr. L. 345, and 2 Cr. L. 607, cites these two cases, Reg. vs. Allday, and Reg. vs. Page, and apparently approves of the judgments given in them; but Baron Alderson's remarks on Reg. vs. Page, in Reg. vs. Ion, do not appear to have been noticed in Bishop's learned books. At the same time, it may be mentioned that in his 1 Cr. Procedure, after remarking, par. 521, that the adjudged law, on this question, seems to be not quite consistent with the general doctrine, and not quite clear and

uniform in itself, this distinguished author says, in a foot note, to par. 522: "Now, in this complication of things, where also practice has run on without decision, and then decision has proceeded without much reference to the principles adhering in the law, it is not surprising that, on this question of alleging the intent, legal results have been reached, not altogether harmonious with one another, and not uniformly correct in principle. Still, as this is a practical question, the practical good sense of the judges has prevented any great inconvenience attending this condition of things."

See remarks by Greaves, on Reg. vs. Hodgson, under general remarks on forgery, *ante*, page 45.

AS TO FORGING BANK NOTES, ETC., ETC., ETC.

SECT. 15.— Whosoever forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any note or bill of exchange of any body corporate, company, or person, carrying on the business of bankers, commonly called a bank note, a bank bill of exchange, or a bank post bill, or any endorsement on or assignment of any bank note, bank bill of exchange, or bank post bill, with intent to defraud, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 98, s. 12, Imp.

As to sureties for the peace in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment.— ..... feloniously did forge a certain note of the Bank of ——— commonly called a bank-note, for the payment of ten dollars, with intent thereby then to defraud, against the form .....

(2nd Count.) And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of and put off a certain other forged note of the Bank of ——— commonly called a bank-note, for the payment of ten dollars with intent thereby then to defraud, —he the said J. S. at the time he so offered, uttered, disposed of and put off the said last mentioned forged note as aforesaid, then and there well knowing the same to be forged, against the form.....Archbold, 573.

It is unnecessary to set out the forged instrument: it is sufficient to describe it by any name or designation by which it is usually known, or by its purport.— Section 49, *post*, and sect. 24 of the Procedure Act of 1869.

An indictment need not state, in the counts for uttering, to whom the note was disposed of.—Rex. vs. Holden, R. & R. 154; 2 Leach, 1019. The intent to defraud any particular person need not be alleged or proved.— Sect. 51, *post*.

Under the counts for uttering, evidence may be given that the defendant offered or tendered the note in payment, or that he actually passed it, or otherwise disposed of it to another person. Where it appeared that the defendant sold a forged note to an agent employed by the Bank to procure it from him, the judges held this to be within the Act, although it was objected that the prisoner had been solicited to commit the act proved against him, by the Bank themselves, by means of their agents. —R. vs. Holden, *ubi suprà*. So where A. gave B. a forged

note to pass for him, and upon P.'s tendering it in payment of some goods, it was stopped: the majority of the judges held, that A., by giving the note to B. was guilty of disposing of and putting away the note, within the meaning of the Act.—R. vs. Palmer, R. & R. 72; R. vs. Soares, R. & R. 25; R. vs. Stewart, R. & R. 363; and R. vs. Giles, 1 Mood. 166, where it was held, that giving a forged note to an innocent agent, or an accomplice, that he may pass it, is a disposing of, and putting it away, within the meaning of the Statute.

See general remarks on forgery.

Upon the trial of any indictment for any offence against this section, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.—2 Russell, 874.

PURCHASING OR HAVING FORGED BANK NOTES, ETC.

Sect. 16.—Whosoever, without lawful authority or excuse, (the proof whereof shall lie on the party accused) purchases or receives from any other person, or has in his custody or possession any forged bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labor.—24–25 Vict., ch. 98, s. 13, Imp.

As to sureties for the peace in felonies under this Act, see *post*, sect. 58. As to what constitutes a criminal possession under this Act, see *post*, sect. 52.

Indictment.—The jurors for Our Lady the Queen, upon their oath present, that A. B. on.....feloniously and without lawful authority or excuse, had in his custody and possession five forged bank notes for the payment of ten dollars each, the said A. B. then well knowing the said several bank notes and each and every of them respectively to be forged; against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen, her Crown and dignity. —Archbold, 596; 2 Burn's Just. 682.

In R. vs. Rowley, R. & R. 110, it was held, that every uttering included having in custody and possession, and, by some of the judges, that, without actual possession, if the notes had been put in any place under the prisoner's control, and by his direction, it was a sufficient possession within the Statute.—See now, sect. 52, *post*.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.—2 Russell, 874.

AS TO MAKING PAPER AND ENGRAVING PLATES, ETC., ETC., FOR BANK NOTES, ETC.

Sect. 17.—Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, makes or uses or knowingly has in his custody or possession, any frame, mould or instrument, for the making of paper used for Dominion or Provincial notes, or for bank notes with any words used in such notes, or any part of such words intended to resemble or pass for the same, visible in the substance of the paper, or for the making of paper with curved or waving bar lines, or

with the laying wire lines thereof in a waving or curved shape, or with any number, sum or amount expressed in a word or words in letters, visible in the substance of the paper, or with any device or distinction peculiar to and appearing in the substance of the paper used for such notes, respectively, or makes, uses, sells, exposes to sale, utters or disposes of, or knowingly has in his custody or possession any paper whatsoever with any words used in such notes, or any part of such words, intended to resemble and pass for the same, visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape or with any number, sum, or amount expressed in a word or words in letters, appearing visible in the substance of the paper, or with any device or distinction peculiar to and appearing in the substance of the paper used for any such notes respectively, or by any art or contrivance causes any such words or any part of such words, intended to resemble and pass for the same, or any device or distinction peculiar to and appearing in the substance of the paper used for any such notes, respectively, to appear visible in the substance of any paper, or causes the numerical sum or amount of any such note, in a word or words in letters to appear visible in the substance of the paper, whereon the same is written or printed, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour.—24–25 Vict., ch. 98, s. 14, Imp.

Sect. 18.—Nothing in the last preceding section contained shall prevent any person from issuing any bill of

exchange or promissory note having the amount thereof expressed in a numerical figure or figures denoting the amount thereof in pounds or dollars, appearing visible in the substance of the paper upon which the same is written or printed, nor shall prevent any person from making, using or selling any paper having waving or curved lines, or any other devices in the nature of watermarks visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not so contrived as to form the ground work or texture of the paper, or to resemble the waving or curved laying wire lines, or bar lines, or the watermarks of the paper used for Dominion notes or Provincial notes, or bank notes, as aforesaid. -24–25 Vict. ch. 98, s. 15, Imp.

Sect. 19.—Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, engraves, or in anywise makes upon any plate whatsoever, or upon any wood, stone, or other material, any promissory note or part of a promissory note, purporting to be a Dominion or provincial note or bank note, or to be a blank Dominion or provincial note or bank note, or to be a part of any Dominion or provincial note or bank note as aforesaid, or any name, word or character, resembling or apparently intended to resemble any subscription to any such Dominion or provincial note, or bank note, as aforesaid, or uses any such plate, wood, stone, or other material, or any other instrument or device for the making or printing of any such note or part of such note; or knowingly has in his custody or possession any such plate, wood, stone or other material, or any such instrument or device, or knowingly offers, utters, disposes of or puts off, or has in his custody or possession any paper upon which any blank Dominion or provincial note or

bank note, or part of any such note, or any name, word or character resembling or apparently intended to resemble, any such subscription, is made or printed, is guilty of felony and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 98, s. 16, Imp.

Sect. 20—Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, engraves or in anywise makes upon any plate whatsoever, or upon any wood, stone or other material, any word, number, figure, device, character or ornament, the impression taken from which resembles, or is apparently intended to resemble any part of a Dominion or Provincial note or bank note, or uses, or knowingly has in his custody or possession any such plate, wood, stone or other material, or any other instrument or device for the impressing or making upon any paper or other material any word, number, figure, character or ornament, which resembles or is apparently intended to resemble any part of any such note, as aforesaid, or offers, utters, disposes of or puts off, or has in his custody or possession any paper or other material upon which there is an impression of any such matter as aforesaid, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 98, s. 17, Imp.

The word "*knowingly*" before *offers*, &c., has been left out, probably by a typographical error.

Sect. 21.—Whosoever without lawful authority or excuse, the proof whereof shall lie on the party accused, makes or uses any frame, mould or instrument for the manufacture of paper with the name or firm of any bank or body corporate, company or person carrying on the business of bankers appearing visible in the substance of the paper, or knowingly has in his custody or possession any such frame, mould or instrument, or makes, uses, sells or exposes to sale, utters or disposes of, or knowingly has in his custody or possession, any paper in the substance of which the name or firm of any such bank, body corporate, company or person appears visible, or by any art or contrivance causes the name or firm of any such bank, body corporate, company or person to appear visible in the substance of the paper upon which the same is written or printed, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour and with or without solitary confinement.—24–25 Vict., ch. 98, s. 18, Imp.

Sect. 22. *Whosoever forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any bill of exchange, promissory note, undertaking or order for payment of money, in whatever language or languages the same may be expressed, and whether the same is or is not under seal, purporting to be the bill, note, undertaking, or order of any foreign prince, or state, or of any minister or officer in the service of any foreign prince or state, or of any body cor-*

porate or body of the like nature constituted or recognized by any foreign prince or state, or of any person or company or persons resident in any country not under the dominion of Her Majesty, or whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, engraves or in any wise makes upon any plate whatever, or upon any wood, stone or other material, any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of any bill of exchange, promissory note, undertaking or order for payment of money, in whatsoever language the same may be expressed, and whether the same is or is not, or is or is not intended to be, under seal, purporting to be the bill, note, undertaking or order, or part of the bill, note, undertaking or order, of any foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate or body of the like nature, constituted or recognized by any foreign prince or state, or of any person or company of persons resident in any country not under the dominion of Her Majesty, or uses or knowingly has in his custody or possession any plate, stone, wood or other material, upon which any such foreign bill, note, undertaking or order, or any part thereof, is engraved or made, or knowingly offers, utters, disposes of, or puts off, or has in his custody or possession any paper upon which any part of any such foreign bill, note, undertaking or order is made or printed, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement. 24-25 Vict., ch. 98, s. 19, Imp.

The words in *italics* are not in the English Act: they extend the provisions of sections 25 and 26, *post*, to foreign bills, notes, &c.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

As to sureties for the peace, in felonies under this Act, see *post*, sect. 58.

As to what is a criminal possession under this Act, see *post*, sect. 52.

As to description of instruments in indictments for forgery, see *post*, sect. 49, and sect. 24 of the Procedure Act of 1869.

As to description of instruments in indictments for engraving, etc., etc., etc., see *post*, sect. 50.

As to warrants to search for paper or instruments employed or intended for any forgery, illegal engraving or forged instruments, see *post*, sect. 53.

Upon the trial of any indictment for any offence under these sections, the jury may, if the evidence warrants it, under sect. 49, of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.--- 2 Russell, 874.

It was held, in Reg. vs. Brackenridge, 11 Cox. 96, that it is an offence, under sect. 16 of the Imperial Act, (sect. 19 of our Act) feloniously, and without lawful excuse, to engrave upon a plate in England a note of a bank in Scotland, or in the colonies.

In Reg. vs. Keith, Dears 486, a decision was given on what is a part of a bank note, but Greaves, note *a*, 2 Russell 874, questions the legality of the decision.

R. vs. Warshaner, 1 Mood. 466, R. vs. Harris, and R. vs. Ball, 1 Mood, 470, are cases under a clause similar to sect. 22, *ante*, as to foreign bills and notes.

In Reg. vs. Hannon, 2 Mood. 77, the having, in England, in possession, a plate upon which was engraved a note of the Bank of *Upper Canada*, was declared to be within the then existing Statute.

In Reg. vs. Rinaldi, L. and C. 330, it was held, that the taking of a "positive" impression of a note on glass by means of the photographic process is a "making" of a note within 24–25 Vict., ch. 98., s. 19 (sect. 22, *ante*, of our statute) although the impression so taken is evanescent, and although it cannot be printed or engraved from until it has been converted into a "negative." The report of this case gives at full length a copy of the indictment therein.

If several concur in employing another to make a forged instrument, knowing its nature, they are all guilty of the forgery; Reg. vs. Mazeau, 9 C. and P. 676, and 31 Vict., ch. 72, sect. 1, of our Statutes.

AS TO FORGING DEEDS, BONDS, ETC.

Sect. 23.—Whosoever, with intent to defraud, forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any deed or any bond, or writing obligatory, or any assignment at law or in equity, of any such bond or writing obligatory, or forges any name, handwriting or signature purporting to be the name, handwriting or signature, of a witness attesting the execution of any deed, bond or writing obligatory, or offers, utters, disposes of, or puts off, any deed, bond, or writing obligatory, having thereon any such forged name, handwriting or signature, knowing the same to be forged, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other

gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement,—24-25 Vict., ch. 98, s. 20, Imp.

As to sureties for the peace, in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment.—..... a certain bond and writing obligatory feloniously did forge, with intent thereby then to defraud, against the form.....

(2nd Count)..... that the said J. S. afterwards, to wit, on the day and year aforesaid, feloniously did offer, utter, dispose of and put off, a certain other forged bond and writing obligatory, with intent thereby then to defraud,—he the said J. S. at the time he so offered, uttered, disposed of and put off the said last-mentioned forged bond and writing obligatory as aforesaid, well knowing the same to be forged, against the form.....Archbold, 576.

A power of attorney is a deed within the meaning of 2 Geo. 2, ch. 25, and forging a deed is within this Statute, though there may have been subsequent directory provisions by Statute, that instruments for the purpose of such forged deed shall be in a particular form, or shall comply with certain requisites, and the forged deed is not in that form, or does not comply with those requisites. R. vs. Lyons, R. & R. 255. And a power of attorney to transfer government stock was holden to be a deed under the repealed Statutes.—R. vs. Fauntleroy, 1 Mood. 52; but the forging of such a power of attorney is now provided for by sect. 5, *ante*.

R. made an equitable deposit of title deeds with G. for £750, and afterwards assigned all his property to B.

for the benefit of his creditors. R. and his assignee, B. then, for an additional advance, conveyed to G. the freehold of the property to which the deeds deposited related. After this, the prisoner R. executed a deed of assignment to the other prisoner of a large part of the land so conveyed to G. for a long term of years; but this deed was falsely antedated before the conveyance by R. and B. to G., and upon this deed, the prisoners resisted G.'s title to possession of this part of the land. *Held* that this deed so antedated for the purpose of defrauding G. amounted to forgery, and that a man may be guilty of forgery by making a false deed in his own name.—Reg. vs. Ritson, 11 Cox, 352.

Letters of orders issued by a bishop, certifying that so and so has been admitted into the holy orders, is not a deed within this section, and a forgery of such letters is not within this statute, but a misdemeanor at common law.—Reg. vs. Morton, 12 Cox, 456.

Upon any indictment, for any offence under this section, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.

AS TO FORGING WILLS.

Sect. 24.—Whosoever, with intent to defraud, forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any will, testament, codicil, or testamentary instrument, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 98, s. 21, Imp.

As to sureties for the peace in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment. — ..... feloniously did forge a certain will and testament purporting to be the last will and testament of one ..... with intent thereby then to defraud, against the form ..... (2nd Count.) ..... did offer, utter ..... (as in the last precedent.)..... — Archbold, 575.

The judges were equally divided upon the question whether in the absence of the existence of some person who could have been defrauded by the forged will, a count for forging it with intent to defraud a person or persons unknown could be supported.—R. vs. Tylney, 1 Den. 319.

See *post*, sect. 56.

Forgery may be committed by the false making of the will of a living person; or of a non-existing person.—R. vs. Murphy, 2 East P. C. 949; R. vs. Sterling, 1 Leach, 117; R. vs. Coogan, 1 Leach, 449; R. vs. Avery, 8 C. & P. 596. So, though it be signed by the wrong christian name of the person whose will it purports to be.—R. vs. Fitzgerald, 1 Leach, 20.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.

FORGING BILLS OF EXCHANGE OR PROMISSORY NOTES.

Sect. 25.—Whosoever forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any bill of exchange, or any acceptance, in-

dorsement, or assignment of any bill of exchange, or any promissory note for the payment of money, or any indorsement on or assignment of any such promis (*promissory*) note, with intent to defraud, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.— 24-25 Vict., ch. 98, s. 22, Imp.

As to sureties for the peace in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment. — ..... a certain bill of exchange feloniously did forge, with intent thereby then to defraud; against the form ..... (2nd Count.) ..... did offer, utter ..... as form under sect. 23.—*If the acceptance be also forged, add counts for it, as follows.* (3rd Count.) .....that the said J. S. afterwards, to wit, on the day and year last aforesaid, having in his custody and possession a certain other bill of exchange, feloniously did forge on the said last mentioned bill of exchange, an acceptance of the said last mentioned bill of exchange, which said forged acceptance is as follows, that is to say: (set it out *verbatim*) with intent thereby then to defraud, against the form ..... (4th Count.) ..... that the said J. S. afterwards, to wit, on the year and day last aforesaid, having in his custody and possession a certain other bill of exchange, on which said last mentioned bill of exchange was then written a certain forged acceptance of the said last mentioned bill of exchange, which said forged acceptance of the said last mentioned bill of exchange is as follows, that is to say: (set it out *verbatim,*) he, the said J. S. on the day and year last aforesaid, feloniously did offer, utter, dispose of and put off the said forged acceptance of the said last mentioned bill of exchange, with intent thereby then to defraud, he the said J. S. at the time he so offered, uttered, disposed of and put off the said forged acceptance of the said last mentioned bill of exchange well knowing the said acceptance to be forged, against the form ..... *If an indorsement be also forged, add counts for it as follows*: (5th Count.) ..... that the said J. S. afterwards, to wit, on the day and year last aforesaid, having in his custody and possession a certain other bill of exchange, feloniously did forge on the back of the said last mentioned bill of exchange, a certain indorsement of the said bill of exchange, which said forged indorsement is as follows, that is to say: (set it out *verbatim*) with intent thereby then to defraud, against the form ..... (6th Count.) ..... that the said J. S. afterwards, to wit, on the day and year last aforesaid, having in his custody and possession a certain other bill of exchange, on the back of which said last mentioned bill of exchange was then written a certain forged indorsement of the said last mentioned bill of exchange, which said last mentioned forged indorsement is as follows, that is to say: (set it out *verbatim*) he, the said J. S. on the day and year last aforesaid, feloniously did offer, utter, dispose of, and put off the said last mentioned forged indorsement of the said last mentioned bill of exchange, with intent thereby then to defraud,—he the said J. S. at the time he so offered, uttered, disposed of and put off the said last mentioned forged indorsement of the said last mentioned bill of exchange, well knowing the said indorsement to be forged, against the form .....

From the above precedent, an indictment may readily be framed for forging and uttering a promissory note, merely substituting for the words "bill of exchange" the words "promissory note for the payment of money" and omitting, of course, the counts as to the acceptance.—Archbold, 577.

A bill payable ten days after sight, purporting to have been drawn upon the Commissioners of the Navy, by a lieutenant, for the amount of certain pay due to him, has been holden to be a bill of exchange. R. vs. Chisholm. R. & R. 297,—so a note, promising to pay A. & B., "stewardesses" of a certain benefit society, or their "successors" a certain sum of money on demand, has been holden to be a promissory note: within the meaning of the Act, it is not necessary that the note should be negotiable.—R. vs. Box, R. & R. 300. An instrument drawn by A on B, requiring him to pay to the administrators of C a certain sum, at a certain time "without acceptance," is a bill of exchange.—R. vs. Kinnear, 2 M. & Rob. 117. So, though there be no person named as drawee, the defendant may be indicted for uttering a forged acceptance on a bill of exchange.—R. vs. Hawkes, 2 Mood. 60. For the act of putting the acceptance is a sort of estoppel to say it was not a bill of exchange, but, without acceptance, this instrument is not a bill of exchange.—R. vs. Curry, 2 Mood. 218.

In Reg. vs. Mopsey, 11 Cox, 143, the acceptance to what purported to be a bill of exchange was forged, but at the time it was so forged, the document had not been signed by the drawer, and it was held that, in consequence, the document was not a bill of exchange. And a document in the ordinary form of a bill of exchange, but requiring the drawee to pay to his own order, and

purporting to be indorsed by the drawer, and accepted by the drawer, cannot, in an indictment for forgery or uttering, be treated as a bill of exchange.—R. vs. Bartlett, 2 M. & Rob. 262. But an instrument payable to the order of A, and directed "*At* Messrs. P. & Co., Bankers," was held to be properly described as a bill of exchange.—R. vs. Smith, 2 Mood. 295.—It is necessary that the promissory note should be *for the payment of money* only to be within the Statute. In Reg. vs. Howie, 11 Cox, 320, the prisoner had forged a seaman's advance note. He was indicted for forging or uttering a certain promissory note or order for the payment of money: *held*, that a seaman's advance note was not a promissory note or order for the payment of money, and that the indictment was therefore bad: the advance note was conditional, and there must be no condition in a promissory note or order for payment of money.—The adding of a false address to the name of the drawee of a bill, while the bill is in the course of completion, in order to make the acceptance appear to be that of a different existing person, is a forgery.—R. vs. Blenkinsop, 1 Den. 276. See Reg. vs. Mitchell, 1 Den. 282.—A nurseryman and a seedsman got his foreman to accept two bills, the acceptances, having no addition, description or address, and afterwards, without the acceptor's knowledge, he added to the direction a false address, but no description, and represented in one case that the acceptance was that of a customer, and in the other case that it was that of a seedsman, there being in fact no such person at the supposed false address: *held*, that in the one case, the former, he was not guilty of forgery of the acceptance, but that, in the other case, he was.—Reg. vs. Epps, 4 F. & F. 81.—A bill of exchange was made payable to A, B, C, D, or order, executrixes. The indictment charged that

the prisoner forged on the back of the bill a certain forged indorsement, which indorsement was as follows (naming one of the executrixes): *held*, a forged indorsement, and indictment sufficient.—R. vs. Winterbottom, 1 Den. 41.—Putting off a bill of exchange of A, an existing person, as the bill of exchange of A, a fictitious person, is a felonious uttering of the bill of a fictitious drawer.—Reg. vs. Nesbitt, 6 Cox, 320.—If there are two persons of the same name, but of different descriptions or additions, and one signs his name with the description or addition of the other for the purpose of fraud, it is forgery.—R. vs. Webb; Bayley, on Bills, 432.

Upon the trial of any indictment for any offence under this section the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.

FORGING ORDERS, RECEIPTS, &C., FOR MONEY, GOODS, &C.

Sect. 26.—Whosoever forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any undertaking, warrant, order, authority or request, for the payment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money, or for procuring or giving credit, or any indorsement on or assignment of any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance or receipt, for money or for goods, or for any note, bill, or other security for the payment of money, or any indorsement on or assignment of any such accountable receipt, *or any account, book or thing written or printed or otherwise made capable of being read*, with intent, in any of the cases aforesaid, to defraud, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary

for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 98, s. 23, Imp.

The words in *italics* are not in the English Act: they constitute an important extension of the clause.

As to sureties for the peace, in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Greaves says: "This clause is new as far as it relates to any authority or request for the payment of money, or to any authority for the delivery or transfer of any goods, &c., or to any indorsement on or assignment of any such undertaking, warrant, order, authority, request or accountable receipt, as is mentioned in the clause. Rex. vs. Arscott, 6 C. & P. 408, is therefore no authority on this clause. The words 'authority, or request for the payment of money' are introduced to get rid of the question so commonly arising in cases of this kind, whether the forged instrument were either a warrant or order for the payment of money. Requests for the payment of money were not within these words. Reg. vs. Thorn, 1 C. & Marsh, 206; 2 Mood. 210.

It would be a waste of space, and of no practical use, to refer to the cases that have occurred on these points; for, whenever there is any doubt as to the legal character of the instrument, different counts should be inserted describing it in each by one only of the terms *warrant, order, authority or request.* A forged indorsement on a warrant or order for the payment of money was not within the former enactments. Rex. vs. Arscott, 6 C. &

P. 408. But this clause includes that and other forged indorsements."

Indictment.—.....feloniously did forge a certain warrant for the payment of money, with intent thereby then to defraud, against the form.... (2nd Count) .... feloniously did offer, utter....(as, *ante*, form under sect. 23.—Add separate counts, as suggested by Greaves, *suprà*.—Archbold, 581.—See Reg. vs. Kay, 11 Cox, 529, under next section.

A draft upon a banker, although it be post-dated, is a warrant and order for the payment of money.—R. vs. Taylor, 1 C. & K. 213; R. vs. Willoughby, 2 East, P. C. 944. So is, even, a bill of exchange.—R. vs. Sheppard, 1 Leach, 226; R. vs. Smith, 1 Den. 79. An order need not specify any particular sum to fall under the Statute.—R. vs. McIntosh, 2 East P. C. 942. A writing in the form of a bill of exchange, but without any drawee's name, cannot be charged as an order for the payment of money; at least, unless shown by averments to be such.—R. vs. Curry, 2 Mood. 218. In Reg. vs. Howie, 11 Cox, 320, it was held that a seaman's advance note was not an order for payment of money. It would seem, however, to be an *undertaking* for the payment of money, within the statute Archbold, 586; R. vs. Bamfield, 1 Mood. 417; R. vs. Anderson, 2 M. & Rob. 469; R. vs. Reed, 2 Mood. 62; Reg. vs. Joyce, L. & C. 576. The statute applies as well to a written promise for the payment of money by a third person, as by the supposed party to the instrument.—R. vs. Stone, 1 Den. 181. An instrument, professing to be a scrip certificate of a railway company, is not an undertaking within the statute.—R. vs. West, 1 Den. 258. But perhaps, the words *in italics* in the present section would cover this case.

In R. vs. Rogers, 9 C. & P. 41, it was held, that a warrant for the payment of money need not be addressed to any particular person.—See R. vs. Snelling, Dears. 219.

As to what is a warrant or order for the delivery of goods, the following cases may be cited.—A pawnbroker's ticket is a warrant for the delivery of goods.—R. vs. Morrison; Bell, 158. At the London docks, a person bringing a "tasting order" from a merchant having wine there, is not allowed to taste until the order has across it the signature of a clerk of the company: the defendant uttered a tasting order with the merchant's name forged to it, by presenting it to the company's clerk for his signature across it, which the clerk refused: it was held to be, in this state, a forged order for the delivery of goods within the Statute.—R. vs. Illidge, 1 Den. 404. A request for the delivery of goods need not be addressed to any one.—R. vs. Carney, 1 Mood. 351; R. vs. Cullen, 1 Mood. 300; R. vs. Pulbroke, 9, C.& P. 37. Nor need it be signed by a person who can compel a performance of it, or who has any authority over or interest in the goods.—R. vs. Thomas, 2 Mood. 16; R. vs. Thorn, 2 Mood 210. Formerly, if upon an indictment for the misdemeanor of obtaining goods under false pretences, a felonious forgery were proved, the Judge had to direct an acquittal.—R. vs. Evans, 5 C. & P. 553—but now, see sect. 50 of the Procedure Act of 1869

As to what is a receipt, under this section.—As remarked by Greaves, *supra*, the additions in the present clause render many of the cases on the subject of no practical importance. A turnpike toll-gate ticket is a receipt for money within this section.—Reg. vs. Fitch, Reg. vs. Howley, L. & C. 159.—If a person, with intent

to defraud, and to cause it to be supposed contrary to the fact, that he has paid a certain sum into a bank, make in a book, purporting to be a pass-book of the bank, a false entry, which denotes that the bank has received the sum, he is guilty of forging an accountable receipt for money. —R. vs. Moody, L. & C. 173; R. vs. Smith, L. &. C. 168.— A document called a "clearance" issued to members of the Ancient Order of Foresters Friendly Society, certified that the member had paid all his dues and demands, and authorized any Court of the Order to accept the bearer as a clearance member: *Held*, that this was not a receipt for money under this section.—Reg. vs. French, 11 Cox 472.—An ordinary railway ticket is not an acquittance or receipt, within this section, Reg. vs. Gooden, 11 Cox 672; but now, by sect. 32, *post*, forging a railway ticket is a felony.—The prisoner being pressed by a creditor for the payment of £35 obtained further time by giving an I. O. U. for £35, signed by himself, and also purporting to be signed by W.—W's name was a forgery; *held*, that the instrument was a security for the payment of money by W., and that the forgery of his name was a felony within this section.—Reg. vs. Chambers, 12 Cox, 109.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.

MAKING, ACCEPTING ANY BILL, ETC., ETC., ETC., BY PROCURATION, WITHOUT LAWFUL AUTHORITY, ETC., ETC., ETC.

Sect. 27.— Whosoever, with intent to defraud, draws, makes, signs, accepts or indorses, any bill of exchange or promissory note, or any undertaking, warrant, order, authority or request for the payment of money, or for the delivery or transfer of goods or chattels, or of any bill, note, or other security for money, by procuration, or otherwise, for, in the name, or on the account of any other person, without lawful authority or excuse, or offers, utters, disposes of, or puts off, any such bill, note, undertaking, warrant, order, authority or request, so drawn, made, signed, accepted, or indorsed by procuration or otherwise without lawful authority or excuse, as aforesaid, knowing the same to have been so drawn, made, signed, accepted or indorsed as aforesaid, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 98, s. 24, Imp.

As to sureties for the peace, in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Greaves says: "This clause is new, and was framed in order to make persons punishable, who, without authority, make, accept, or indorse bills or notes "per procuration," which was not forgery under the former enactments.—Maddock's case, 2 Russell, 947; Reg. vs. White, 1 Den. 208."

Indictment, as under sect. 25.—See general remarks on forgery.

A deposited with a Building Society £460, for two years, at interest, through the prisoner, who was an agent of the Society. Having obtained the deposit note from A, who gave it up on receiving an accountable receipt

for £500, being made up by the £460, and interest, the prisoner wrote, without authority, the following document: "Received of the S. L. Building Society the sum of £417.13.0, on account of my share, No. 8071, *pp.*, Susey Ambler,—William Kay," and obtained £417.13.0, by means thereof and giving up the deposit note. The jury, having found that, by the custom of the Society, such documents were treated as an "authority to pay," and as "a warrant to pay," and as "request to pay" money, the prisoner was convicted under 24–25 Vict., ch. 98, s. 24, (sect. 27, *ante*, of our Statute): *held*, that the conviction was right.—Reg. vs. Kay, 11 Cox 529.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.

OBLITERATING CROSSING ON CHEQUES.

Sect. 28. — Whenever any cheque or draft on any banker is crossed with the name of a banker, or with two transverse lines with the words "and company," or any abbreviation thereof, whosoever obliterates, adds to, or alters any such crossing, or offers, utters, disposes of, or puts off, any cheque or draft whereon any such obliteration, addition or alteration has been made, knowing the same to have been made, with intent in any of the cases aforesaid to defraud, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 98, s. 25, Imp.

As to sureties for the peace, in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Greaves says: "This clause is so framed as to meet the case of a draft either issued with a crossing on it, or crossed after it was issued."

FORGING DEBENTURES.

Sect. 29.—Whosoever fraudulently forges, or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or fraudulently altered, any debenture issued under any lawful authority whatsoever, either within Her Majesty's Dominions, or elsewhere, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 98, s. 26, Imp.

As to sureties for the peace, in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Greaves says: "The words of this clause originally were *forge or alter*; but as the clause contained no intent to defraud, the Select Committee of the Commons thought 'fraudulently' should be prefixed to 'alter.' By some mistake in the reprint, it is prefixed to forge."

— This error has been inserted into our Statute: the words "*fraudulently* forge" are a tautological expression and do not sound well: forgery need not this qualifica-

tion : its own name bears it : *fraudulent* forgery sounds like *fraudulent* larceny, or *malicious* murder.

See remarks under sect. 14, and general remarks on forgery.

FORGERY OF TRADE MARKS.

Sections 30 and 31 of the Forgery Act of 1869 are repealed by 35 Vict., ch. 32, "*an Act to amend the law relating to the fraudulent marking of merchandise*"; which is a reproduction of the Imperial Statute 25–26 Vict., ch. 88, and reads as follows :—

AN ACT TO AMEND THE LAW RELATING TO THE FRAUDULENT MARKING OF MERCHANDISE.

Whereas it is expedient to amend the Law relating to the fraudulent marking of Merchandise, and to the sale of Merchandise falsely marked for the purpose of fraud : Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows :—

1. In the construction of this Act, the word, "Person" shall include any person, whether a subject of Her Majesty or not, and any body corporate or body of the like nature, whether constituted according to the law of Canada, or of any of Her Majesty's Dominions or Colonies, or according to the law of any foreign country, and also any company, association or society of persons, whether the members thereof be subjects of Her Majesty or not, or some of such persons be subjects of Her Majesty and some of them not, and whether such body corporate, body of the like nature, company, association or society,

be established or carry on business within Her Majesty's Dominions or elsewhere, or partly within Her Majesty's Dominions and partly elsewhere : the word "Mark" shall include any name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket or other mark of any other description : and the expression "Trade Mark," shall include any and every such name, signature, word, letter, device, emblem, figure, sign, seal, stamp, diagram, label, ticket or other mark as aforesaid, registered or unregistered, lawfully used by any person to denote any chattel or article to be an article or thing of the manufacture, workmanship, production or merchandise of such person, or to be an article or thing of any peculiar or particular description, made or sold by such person, and shall also include any name, signature, word, letter, number, figure, mark or sign, which, in pursuance of any statute or statutes for the time being in force, relating to trade marks or registered designs, is to be put or placed upon or attached to any chattel or article during the existence or continuance of any patent, copyright or other sole right acquired under the provisions of such statutes or any of them.

2. Every person who, with intent to defraud, or to enable another to defraud any person, forges or counterfeits, or causes or procures to be forged or counterfeited, any trade mark, or applies, or causes or procures to be applied, any trade mark or any forged or counterfeit trade mark, to any chattel or article, not being the manufacture, workmanship, production or merchandise of any person denoted or intended to be denoted by such trade mark or denoted or intended to be denoted by such forged or counterfeited trade mark, or not being the manufacture, workmanship, production or merchandise of any person whose trade mark is so forged or counterfeited :

or applies, or causes or procures to be applied any trade mark, or any forged or counterfeited trade mark, to any chattel or article, not being the particular or peculiar description of manufacture, workmanship, production or merchandise, denoted or intended to be denoted by such trade mark, or by such forged or counterfeited trade mark, is guilty of a misdemeanor; and every person so committing a misdemeanor shall also forfeit to Her Majesty every chattel and article belonging to such person to which he has so unlawfully applied, or caused or procured to be applied, any such trade mark, or forged or counterfeited trade mark as aforesaid; and every instrument in the possession or power of such person, and by means of which any such trade mark, or forged or counterfeited trade mark as aforesaid, has been so applied, and every instrument or mark in the possession or power of such person for applying any such trade mark, or counterfeited trade mark as aforesaid, shall be forfeited to Her Majesty; and the court before which any such misdemeanour is tried may order such forfeited chattels or articles as aforesaid to be destroyed or otherwise disposed of as such court thinks fit.

3. Every person who, with intent to defraud, or to enable another to defraud any person, applies or causes or procures to be applied any trade mark or any forged or counterfeited trade mark, to any cask, bottle, stopper, cork, capsule, vessel, case, cover, wrapper, band, reel, ticket, label or other thing in, on, or with which any chattel or article is intended to be sold or is sold, or uttered or exposed for sale, or intended for any purpose of trade or manufacture; or encloses or places any chattel or article, or causes or procures any chattel or article to be enclosed or placed in, upon, under, or with any cask,

bottle, stopper, cork, capsule, vessel, case, cover, wrapper, band, reel, ticket, label or other thing to which any trade mark has been falsely applied, or to which any forged or counterfeited trade mark has been applied; or applies, or attaches, or causes or procures to be applied or attached to any chattel or article, any case, cover, reel, ticket or label or other thing to which any trade mark has been falsely applied, or to which any forged or counterfeited trade mark has been applied; or encloses, places or attaches any chattel or article, or causes or procures any chattel or article to be enclosed, placed, or attached in, upon, under, with or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label or other thing having thereon any trade mark of any other person, is guilty of a misdemeanor; and every person so committing a misdemeanor, shall also forfeit to Her Majesty every such chattel and article, and also every such cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label or other thing as aforesaid, in the possession or power of such person; and every other similar cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label or other thing made to be used in like manner as aforesaid, and every instrument in the possession or power of such person, and by means of which any such trade mark, or forged or counterfeited trade mark, as aforesaid, has been applied, and also every instrument or mark in the possession or power of such person for applying any such trade mark, or forged or counterfeited trade mark as aforesaid, shall be forfeited to Her Majesty; and the Court before which any such misdemeanor is tried, may order such forfeited articles, as aforesaid, to be destroyed or otherwise disposed of as such Court thinks fit.

4. Every person who sells, utters or exposes, either for

sale or for any purpose of trade or manufacture, or causes or procures to be sold, uttered, or exposed for sale or other purpose as aforesaid, any chattel or article, together with any forged or counterfeited trade mark, which he knows to be forged or counterfeited, or together with the trade mark of any other person applied or used falsely or wrongfully or without lawful authority or excuse, knowing such trade mark of another person to have been so applied or used as aforesaid, and that, whether any such trade mark, or forged or counterfeited trade mark, as aforesaid, together with which any such chattel or article is sold, uttered or exposed for sale or other purpose as aforesaid, be in, upon, about, or with such chattel or article, or in, upon, about, or with any cask, bottle, stopper, cork, capsule, vessel, case, cover, wrapper, band, reel, ticket, label or other thing in, upon, about or with which such chattel or article is so sold or uttered or exposed for sale or other purpose as aforesaid — shall for every such offence forfeit and pay to Her Majesty a sum of money equal to the value of the chattel or article so sold, uttered, offered or exposed for sale or other purpose as aforesaid, and a further sum not exceeding twenty dollars and not less than two dollars.

5 Every addition to and every alteration of, and also, every imitation of any trade mark which is made, applied or used with intent to defraud, or to enable any other person to defraud, or which causes a trade mark with such alteration or addition, or causes such imitation of a trade mark, to resemble any genuine trade mark so or in such manner as to be calculated or likely to deceive, shall be and be deemed to be a false, forged and counterfeited trade mark within the meaning of this Act; and every act of making, applying or otherwise using, procuring vending, or delivering to another, any such addition to,

or alteration of, a trade mark or any such imitation of a trade mark, as aforesaid, done by any person with intent to defraud, or to enable any other person to defraud, shall be and be deemed to be forging and counterfeiting a trade mark within the meaning of this Act; and every act of making, applying, using, procuring, vending or delivering to another, or having in possession any forged or counterfeited trade mark, or any trade mark without the authority of the owner of such trade mark, or of some person by him authorized to use or apply the same, or other lawful and sufficient excuse, shall be *primâ facie* evidence of an intent to defraud, or to enable another person to defraud, and shall be deemed to be forging and counterfeiting such trade mark, within the meaning of this Act.

6. Where any person has, before or after the coming into force of this Act, sold, uttered or exposed for sale or other purpose as aforesaid, or has caused or procured to be sold, uttered or exposed for sale or other purpose as aforesaid, any chattel or article, together with any forged or counterfeited trade mark, or together with the trade mark of any other person used without lawful authority or excuse as aforesaid, and that, whether such trade mark, or such forged or counterfeited trade mark as aforesaid, be in, upon, about or with such chattel or article, or in, upon, about or with any cask, bottle, stopper, cork, capsule, vessel, case, cover, wrapper, band, reel, ticket, label or other thing in, upon, about or with which such chattel or article has been sold or exposed for sale, such person shall be bound, upon demand in writing delivered to him, or left for him at his last known dwelling house, or at the place of sale or exposure for sale, by or on the behalf of any person whose trade mark has been so forged or counterfeited, or used without lawful

authority or excuse, as aforesaid, to give to the person requiring the same, or his Attorney or Agent, within forty-eight hours after such demand, full information, in writing, of the name and address of the person from whom he purchased or obtained such chattel or article, and of the time when he obtained the same: and it shall be lawful for any Justice of the Peace, on information on oath of such demand and refusal, to summon before him the party refusing, and on being satisfied that such demand ought to be complied with, to order such information to be given within a certain time to be appointed by him; and any such party who refuses or neglects to comply with such order shall for every such offence, forfeit and pay to Her Majesty, the sum of twenty dollars, and such refusal or neglect shall be *primâ facie* evidence that the person so refusing or neglecting had full knowledge that the trade mark, together with which such chattel or article was sold, uttered or exposed for sale or other purpose, as aforesaid, at the time of such selling, uttering or exposing, was a forged, counterfeited and false trade mark, or was the trade mark of a person, which had been used without lawful authority or excuse, as the case may be.

7. Every person who, with intent to defraud, or to enable another to defraud, puts or causes or procures to be put upon any chattel or article, or upon any cask, bottle, stopper, cork, capsule, vessel, case, cover, wrapper, band, reel, ticket, label or other thing, together with which any chattel or article is intended to be, or is sold or uttered, or exposed for sale, or for any purpose of trade or manufacture, or upon any case, frame or other thing, in or by means of which any chattel or article is intended to be, or is exposed for sale, any false description, statement or other indication of or requesting the the quality, number, quantity, measure or weight of such chattel or article, or any part thereof, or of the place or country in which such chattel or article has been made, manufactured, bottled, put up, or produced, or puts or causes, or procures to be put upon any such chattel or article, cask, bottle, stopper, cork, capsule, vessel, case, cover, wrapper, band, reel, ticket, label or thing as aforesaid; any word, letter, figure, signature or mark, for the purpose of falsely indicating such chattel or article, or the mode of manufacturing, bottling or putting up, or producing the same, or the ornamentation, shape or configuration thereof, to be the subject of any existing patent, privilege or copyright, shall, for every such offence, forfeit and pay to Her Majesty a sum of money equal to the value of the chattel or article so sold or uttered or exposed for sale, and a further sum not exceeding twenty dollars, and not less than two dollars.

8. Every person who sells, utters or exposes for sale, or for any purpose of trade or manufacture, or causes or procures to be sold, uttered or exposed for sale, or other purpose as aforesaid, any chattel or article, upon which has been, to his knowledge, put, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label or other thing, together with which such chattel or article is sold or uttered, or exposed for sale or other purpose as aforesaid, has been so put, or upon any case, frame or other thing used or employed to expose or exhibit such chattel or article for sale, has been so put, any false description, statement or other indication of, or respecting the number, quantity, measure or weight of such chattel or article, or any part thereof, or the place or country in which such chattel or article has been made, manufactured or produced, shall, for every such

offence, forfeit and pay to Her Majesty a sum not exceeding twenty dollars, and not less than two dollars.

9. Provided always that the provisions of this Act shall not be construed so as to make it any offence for any person to apply to any chattel or article, or to any cask, bottle, stopper, cork, capsule, vessel, case, cover, wrapper, band, reel, ticket, label or other thing, with which such chattel or article is sold, or intended to be sold, any name, word or expression generally used for indicating such chattel or article to be of some particular class or description of manufacture only; or so as to make it any offence for any person to sell, utter, or offer, or expose for sale any chattel or article to which, or to any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing sold therewith, any such generally used name, word or expression, as aforesaid, has been applied.

10. In every indictment, pleading, proceeding, and document whatsoever, in which any trade mark is intended to be mentioned, it shall be sufficient to mention or state the same to be a trade mark without further or otherwise describing such trade mark, or setting forth any copy or *fac simile* thereof; and in every indictment, pleading, proceeding and document whatsoever, in which it is intended to mention any forged or counterfeited trade mark, it shall be sufficient to mention or state the same to be a forged or counterfeited trade mark, without further or otherwise describing such forged or counterfeited trade mark, or setting forth any copy or *fac simile* thereof.

11. The provisions in this Act contained, of or concerning any act or any proceeding, judgment or conviction for any act hereby declared to be a misdemeanor or offence, shall not, nor shall any of them, take away,

diminish or prejudicially affect any suit, process, proceeding, right, or remedy, which any person aggrieved by such act may be entitled to at law, in equity or otherwise, and shall not, nor shall any of them, exempt or excuse any person from answering or making discovery upon examination as a witness, or upon interrogatories, or otherwise, in any suit or other civil proceeding: provided always, that no evidence, statement or discovery, which any person is so compelled to give or make shall be admissible in evidence against such person in support of any indictment for a misdemeanor at common law or otherwise, or of any proceeding under the provisions of this Act.

12. In every indictment, information, conviction, pleading and proceeding against any person for any misdemeanor or other offence against the provisions of this Act, in which it may be necessary to allege or mention an intent to defraud, or to enable another to defraud, it shall be sufficient to allege or mention that the person accused of having done any act which is hereby made a misdemeanor or other offence, did such act with intent to defraud, or with intent to enable some other person to defraud, without alleging or mentioning any intent to defraud any particular person; and on the trial of any such indictment or information for any such misdemeanor, and on the hearing of any information or charge of or for any such other offence, as aforesaid, and on the trial of any action against any person to recover any penalty for any such other offence, as aforesaid, it shall not be necessary to prove an intent to defraud any particular person, or an intent to enable any particular person to defraud any particular person, but it shall be sufficient to prove with respect to every such misdemeanor or offence that the person accused did the act charged with

intent to defraud, or with intent to enable some other person to defraud, or with the intent that any other person might be enabled to defraud.

13. Every person who aids, abets, counsels or procures the commission of any offence which is by this Act made a misdemeanor, is also guilty of a misdemeanor.

14. Every person convicted or found guilty of any offence which is by this Act made a misdemeanor, shall be liable, at the discretion of the Court, and as the Court shall award, to suffer such punishment by imprisonment for not more than two years, with or without hard labour, or by fine, or both by imprisonment with or without hard labour and fine, and also by imprisonment until the fine (if any) shall have been paid and satisfied.

15. In every case in which any person has committed or done any offence or act, whereby he has forfeited or become liable to pay to Her Majesty any of the penalties or sums of money mentioned in the provisions of this Act, every such penalty or sum of money may be recovered in an action of debt, which any person may, as plaintiff for and on behalf of Her Majesty, commence and prosecute to judgment in any court of record, and the amount of every such penalty or sum of money to be recovered in any such action, shall or may be determined by the jury (if any) sworn to try the issue in such action, and if there be no such jury, then by the court or some other jury as the court thinks fit; or instead of any such action being commenced, such penalty or sum of money may be recovered by a summary proceeding before two Justices of the Peace having jurisdiction in the county or place where the party offending resides

or has any place of business, or in the county or place in which the offence has been committed.

16. In every case in which any such penalty or sum of money forfeited to Her Majesty, as hereinbefore mentioned, is sought to be recovered by a summary proceeding before two Justices of the Peace, the offence or act, by the committing or doing of which such penalty or sum of money has been so forfeited, shall be and be deemed to be an offence and act within the meaning of the Act passed in the session held in the thirty-second and thirty-third years of the reign of Her present Majesty, intituled: "An Act respecting the duties of Jus-"tices of the Peace out of Sessions, in relation to sum-"mary convictions and orders;" and the information, conviction of the offender, and other proceedings for the recovery of the penalty, or sum so forfeited, shall be had according to the provisions of the said Act.

17. In every case in which judgment is obtained in any such action as aforesaid, for the amount of any such penalty or sum of money forfeited to Her Majesty, the amount thereof shall be paid by the defendant to the Sheriff or the officer of the court, who shall account for the same in like manner as other moneys payable to Her Majesty, and, if it be not paid, may be recovered, or the amount thereof levied, or the payment thereof enforced by execution or other proper proceeding as money due to Her Majesty; and the plaintiff suing on behalf of Her Majesty, upon obtaining judgment, shall be entitled to recover and have execution for all his costs of suit, which shall include a full indemnity for all costs and charges which he shall or may have expended or incurred in, about or for the purposes of the action, unless the court or a judge thereof, directs that costs of the ordinary amount only shall be allowed.

18. No person shall commence any action or proceeding for the recovery of any penalty, or for procuring the conviction of any offender in manner hereinbefore provided, after the expiration of three years next after the committing of the offence, or one year next after the first discovery thereof by the person proceeding.

19. In every case in which, after this Act is in force, any person sells or contracts to sell (whether by writing or not) to any other person, any chattel or article, with any trade mark thereon, or upon any cask, bottle, stopper, cork, capsule, vessel, case, cover, wrapper, band, reel, ticket, label or other thing, together with which such chattel or article is sold, or contracted to be sold, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to, or with the vendee, that every trade mark upon such chattel or article, or upon any such cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label or other thing, as aforesaid, was genuine and true, and not forged or counterfeit, and not wrongfully used, unless the contrary be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

20. In every case in which, after this Act is in force, any person sells or contracts to sell (whether by writing or not) to any other person any chattel or article upon which, or upon any cask, bottle, stopper, cork, capsule, vessel, case, cover, wrapper, band, reel, ticket, label or other thing, together with which such chattel is sold or contracted to be sold, there is any description, statement or other indication of or respecting the number, quality, quantity, measure or weight of such chattel or article, or the place or country in which such chattel or article has been made, manufactured, bottled or put up, or produced, the sale or contract to sell shall in every such case, be deemed to have been made with a warranty or contract by the vendor to or with the vendee, that no such description, statement or other indication was in any material respect false or untrue, unless the contrary be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

21. In every case in any suit at law or in equity against any person for forging or counterfeiting any trade mark, or for fraudulently applying any trade mark to any chattel or article, or for selling, exposing for sale, or uttering any chattel or article with any trade mark falsely or wrongfully applied thereto, or with any forged or counterfeit trade mark applied thereto, or for preventing the repetition or continuance of any such wrongful act, or the commission of any similar act, in which the plaintiff obtains a judgment or decree against the defendant, the Court shall have power to direct every such chattel or article to be destroyed or otherwise disposed of: and in every such suit in a Court of law, the Court may, upon giving judgment for the plaintiff, award a writ of injunction or injunctions to the defendant, commanding him to forbear from committing, and not by himself or otherwise, to repeat or commit any offence or wrongful act of the like nature as that of which he has been convicted by such judgment; and any disobedience of any such writ of injunction or injunctions shall be punished as a contempt of Court; and in every such suit at law or in equity, it shall be lawful for the Court, or a judge thereof, to make such order as such Court or judge thinks fit, for the inspection of every or any manufacture or process carried on by the defendant, in which any such forged or counterfeit trade mark, or any such trade mark as aforesaid, is alleged to be used or applied as aforesaid; and of every or

any chattel, article and thing in the possession or power of the defendant, alleged to have thereon, or in any way attached thereto, any forged or counterfeit trade mark, or any trade mark falsely or wrongfully applied, and every or any instrument or mark in the possession or power of the defendant, used, or intended to be, or capable of being used for producing or making any forged or counterfeit trade mark, or trade mark alleged to be forged or counterfeit, or for falsely or wrongfully applying any trade mark; and any person who refuses or neglects to obey any such order, shall be held guilty of a contempt of Court.

22. In every case in which any person does, or causes to be done, any of the wrongful acts following, that is to say:—forges or counterfeits any trade mark; or, for the purpose of sale, or for the purpose of any manufacture or trade, applies any forged or counterfeit trade mark to any chattel or article, or to any cask, bottle, stopper, cork, capsule, vessel, case, cover, wrapper, band, reel, ticket, label or thing in or with which any chattel or article is intended to be sold, or is sold, or uttered, or exposed for sale, or for any purpose of trade or manufacture; or encloses or places any chattel or article in, upon, under or with any cask, bottle, stopper, cork, capsule, vessel, case, cover, wrapper, band, reel, ticket, label or other thing, to which any trade mark has been falsely applied; or to which any forged or counterfeit trade mark has been applied, or applies or attaches to any chattel or article, any case, cover, reel, wrapper, band, ticket, label or other thing to which any trade mark has been falsely applied, or to which any forged or counterfeit trade mark has been applied; or encloses, places or attaches any chattel or article in, upon, under, with or to any cask, bottle, stopper, cork, capsule, vessel, case, cover, reel, wrapper, band,

ticket, label or other thing having thereon any trade mark of any other person, every person aggrieved by any such wrongful act, shall be entitled to maintain an action or suit, for damages in respect thereof, against the person guilty of having done such act, or causing or procuring the same to be done, and for preventing the repetition or continuance of the wrongful act, and the commission of any similar act.

23. In every action which any person under the provisions of this Act, commences as plaintiff for or on behalf of Her Majesty for recovering any penalty or sum of money, if the defendant obtains judgment, he shall be entitled to recover his costs of suit, which shall include a full indemnity for all the costs, charges and expenses by him expended, or incurred, in, about or for the purposes of the action, unless the court or a judge thereof directs that costs of the ordinary amount only shall be allowed.

24. In any action which any person, under the provisions of this Act, commences as plaintiff for or on behalf of Her Majesty, for recovering any penalty or sum of money, if it be shown to the satisfaction of the court, or a judge thereof, that the person suing as plaintiff for or on behalf of Her Majesty has no ground for alleging that he has been aggrieved by the committing of the alleged offence, in respect of which the penalty or sum of money is alleged to have become payable, and also that the person so suing as plaintiff is not resident within the jurisdiction of the court, or is not a person of sufficient property to be able to pay any costs which the defendant may recover in the action, the court or judge may order that the plaintiff shall give security, by the bond or recognizance of himself and a surety, or by the deposit of a

sum of money, or otherwise, as the court or judge thinks fit, for the payment to the defendant of any costs which he may be entitled to recover in the action.

25. This Act shall commence and take effect on the first day of September, in the present year, one thousand eight hundred and seventy-two; and the thirtieth and thirty-first sections of the Act passed in the session held in the thirty-second and thirty-third years of Her Majesty's reign, intituled:—"*An Act respecting Forgery*," and the ninth section of "*The Trade Mark and Design Act of* 1868," are hereby repealed, as regards any offence committed after this Act comes into force.

26. The expression, "The Trade Marks Offences Act, 1872," shall be a sufficient description and citation of this Act.

The prisoner was convicted of forgery: it appeared that one Borwick, the prosecutor, sold powders called "Borwick's Baking Powders" and "Borwick's Egg Powders," which powders he invariably sold in packets, wrapped up in printed papers.

The prisoner procured 10,000 wrappers to be printed similar, with some exceptions, to Borwick's wrappers. In these wrappers, the prisoner enclosed powders of his own, which he sold for Borwick's powders, and it was for the forgery and uttering of these wrappers that the prisoner was indicted. The jury found that the wrappers so far resembled Borwick's as to deceive persons of ordinary observation, and to make them believe them to be Borwick's, and that they were procured and used by the prisoner with intent to defraud: *held* that the conviction was wrong.—Reg. vs. Smith, Dears & B. 566.

The judges were of opinion that the prisoner was guilty of obtaining money under false pretences, but not

of forgery. A similar case would now fall under the above Statute, provided the trade mark was registered.

FORGERY OF RAILWAY TICKETS, ETC.

Sect. 32.—Whosoever knowingly forges or utters, knowing the same to be forged, any ticket or order for a free or paid passage on any railway or on any steam or other vessel, with intent to defraud, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for a term not exceeding three years nor less than two years, or to be imprisoned in any common gaol or place of confinement other than a Penitentiary for any term less than two years.

This clause is the 14th of ch. 94, C. S. C., and is not in the English Act; it will meet such cases, as Reg. vs. Gooden, 11 Cox, 672.

The word "knowingly" before "forges" is useless, and not employed in the other sections, taken from the English Act; the absence of the words "offers, disposes of or puts off" also renders the clause defective and not in conformity with the other parts of the Act.

See general remarks on forgery, and remarks and form of indictment under Sect. 26.

FORGERY OF RECORDS, PROCESS OF COURTS OF JUSTICE, DOCUMENTS PRODUCED IN COURT, ETC.

Sect. 33.—Whosoever forges or fraudulently alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or fraudulently altered, any record, writ, return, panel, process, rule, order, warrant, interrogatory, deposition, affidavit, affirmation, recognizance, *cognovit actionem*, or warrant of attorney, or any original document whatsoever, of or belonging to any court of record,

or any bill, petition, process, notice, rule, answer, pleading, interrogatory, deposition, affidavit, affirmation, report, order, or decree, or any original document whatsoever of or belonging to any Court of Equity or Court of Admiralty, *or any original document whatsoever of or belonging to any Court of Justice,* or any document or writing, or any copy of any document or writing, used or intended to be used as evidence in any court in this section mentioned, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 98, s. 27, Imp.

The words in *Italics* are not in the English Act; they constitute an important extension of the clause. *Cognovit actionem* means a confession of judgment.

Sect. 34.—Whosoever, being the clerk of any court, or other officer having the custody of the records of any court, or being the deputy of any such clerk or officer, utters any false copy or certificate of any record, knowing the same to be false, and whosoever, other than such clerk, officer or deputy, signs or certifies any copy or certificate of any record as such clerk, officer or deputy; and whosoever forges or fraudulently alters, or offers, utters, disposes of, or puts off, knowing the same to be forged, or fraudulently altered, any copy or certificate of any record, or offers, utters, disposes of or puts off, any copy or certificate of any record having thereon any false or forged name, hand-writing or signature, knowing the same to be false or forged; and whosoever forges the seal of any court of record, or forges, or fraudulently alters any process of *any court whatsoever,* or serves or enforces any

forged process of any court whatsoever, knowing the same to be forged, or delivers or causes to be delivered to any person, any paper, falsely purporting to be any such process, or a copy thereof, or to be any judgment, decree or order of any court of law or equity, or a copy thereof, knowing the same to be false, or acts, or professes to act under any such false process, knowing the same to be false, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 98, s. 28, Imp.

The words in *italics* are not in the English Act.

Greaves says: "In Reg. vs. Evans, 1 Dears and B. 236, and Reg. vs. Richmond, Bell 142, Bramwell, B., differing from the other judges, thought that the words in the 9 and 10 Vict., ch. 95, s. 57, "who shall act or profess to act under any false colour or pretence of the process of the Court" implied an acting under genuine process by false colour or pretence; and in order to prevent any such doubt, the words "any such false process" are substituted in this clause. The provisions of this clause are,—1. Against any clerk, officer or deputy, uttering any false copy, or certificate of any record knowing it to be false;—2. Against any person other than such clerk, etc, etc., signing or certifying any such copy or certificate as such clerk;—3. Against forging or uttering, knowing it to be forged, any such copy or certificate, or any such copy or certificate with a forged signature, knowing it to be forged; —4. Against forging the seal of any Court of record, or forging the process of *any Court whatsoever;*—5. Against serving or enforcing any forged process of any

Court whatsoever, knowing it to be forged;—6. Against delivering any paper falsely purporting to be any such process, or a copy thereof, or any judgment, decree or order of any Court of law or equity, or a copy thereof knowing it to be false;—7. Against acting, or professing to act under any such false process, knowing it to be false."

Sect. 35.—Whosoever forges or fraudulently alters, or offers, utters, disposes of or puts off, knowing the same to be forged or fraudulently altered, any instrument, whether written or printed, or partly written and partly printed, which is or shall be made evidence by any Act passed by the Legislature of any one of the late Provinces of Upper Canada, Lower Canada or Canada, or passed or to be passed by the Parliament of Canada, or by the Legislature of any one of the Provinces of Ontario, Quebec, Nova Scotia, or New Brunswick, and for which offence no other punishment is herein provided, is guilty of felony and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, nor less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement. 24–25 Vict., ch. 98, s. 29, Imp.

Sect. 36.—Whenever any such instrument has been admitted in evidence, the Court or the judge or person who has admitted the same, may, at the request of any party against whom the same has been admitted in evidence, direct that the same shall be impounded and be kept in custody of some officer of the Court or other proper person, for such period and subject to such conditions as the Court, judge or person admitting the same, may seem meet.

This clause is not in the English Act. It is taken from the Consolidated Statutes for Upper Canada, ch. 101, sect. 2. *Quoàd* Courts of civil jurisdiction, is it constitutional?

As to sureties for the peace, in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

See general remarks on forgery, and remarks, and form of indictment under sections 1 and 14, *ante*.

In Reg. vs. Powner, 12 Cox 235, it was held by Quain, J., that an indictment for forgery under sect. 28 of the English Act (sect. 34 of our Act, *suprâ*) must allege an intent to defraud, ; but that this averment was unnecessary in a count for *fraudulently* altering under the same section.— The "process" alleged to have been altered in this case, was an order by two Justices of the Peace, under the Poor Laws, and was held to fall under the aforesaid section.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.—2 Russell, 857.

FORGERY OF NOTARIAL ACTS, REGISTERS OF DEEDS, ETC.

Sect. 37.—Whosoever forges, or fraudulently alters, or offers, utters, disposes of or puts off, knowing the same to be forged or fraudulently altered, *any notarial act or instrument, or copy purporting to be an authenticated copy thereof, or any proces verbal of a surveyor, or like copy thereof,* or forges, or fraudulently alters, or offers, or utters, disposes of or puts off, knowing the same to be forged or fraudulently altered, *any duplicate of any instrument,* or any memorial, affidavit, affirmation, entry, certificate, indorsement, document, or writing made or

issued under the provisions of any Act heretofore passed by the Legislature of any one of the late Provinces of Upper Canada, Lower Canada, or Canada, or passed or hereafter to be passed by the Parliament of Canada, or by the Legislature of any one of the Provinces of Ontario, Quebec, Nova Scotia or New Brunswick, for or relating to the registry of deeds, or *other instruments or documents respecting or concerning the title to or claims upon any real or personal property whatever*, or forges, or counterfeits the seal of or belonging to any office for the registry of deeds, *or other instruments as aforesaid*, or any stamp or impression of any such seal; or forges any name, handwriting or signature, purporting to be the name, handwriting or signature of any person to any such memorial, affidavit, affirmation, entry, certificate, indorsement, document, or writing, required or directed to be signed by or by virtue of any Act passed or to be passed, or offers, utters, disposes of or puts off, any such memorial or other writing as in this section before mentioned, having thereon any such forged stamp, or impression of any such seal, or any such forged name, handwriting or signature, knowing the same to be forged, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour and with or without solitary confinement.—24–25 Vict., ch. 98, s. 31, Imp.

The words in *Italics* are not in the English Act: they seem principally adaptable to the Province of Quebec.

As to sureties for the peace, in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

See general remarks on forgery, and remarks and form of indictment, under sections 1 and 14, *ante*; also, under the last preceding section, as to the intent to defraud.

Upon the trial of any indictment for any offence under this section, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.—2 Russell, 939.

FORGERY OF ORDERS, SUMMONS, ETC., ETC., ETC., OF JUSTICES OF THE PEACE.

Sect. 38.— Whosoever, with intent to defraud, forges or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any summons, conviction, order or warrant, of any Justice of the Peace, or any recognizance purporting to have been entered into before any Justice of the Peace or other officer authorized to take the same, or any examination, deposition, affidavit, affirmation, or solemn declaration, taken or made before any Justice of the Peace, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years, nor less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.— 24–25 Vict., ch. 98, s. 32, Imp.

As to sureties for the peace, in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

See general remarks on forgery and form of indictment for forgery therewith.

Reg. vs. Powner, 12 Cox 235, *ante*, under sect. 36, is not very clear as to what is the difference between a "process" of a Court under sections 33 and 34 *ante*, and an order, under the present section.

The forgery of an affidavit taken before a Commissioner to receive affidavits would not fall under this section.

FORGERY OF THE NAMES OF JUDGES, CLERKS, ETC., ETC., ETC.

Sect. 39.—Whosoever, with intent to defraud, forges, or alters any certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument or writing, made or purporting or appearing to be made by any judge, officer or clerk, of any Court in Canada, or the name, handwriting or signature of any such judge, officer or clerk, as aforesaid, or offers, utters, disposes of, or puts off any such certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument or writing, knowing the same to be forged or altered, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement, for any term less than two years, with or without hard labour and with or without solitary confinement.—24–25 Vict., ch. 98, s. 33, Imp.

As to sureties for the peace, in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

See general remarks on forgery, and form of indictment for forgery therewith.

FALSE LYACKNOWLEDGING RECOGNIZANCES, ETC., ETC., ETC.

Sect. 40.—Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, in the name of any other person, acknowledges any recognizance of bail, or any *cognovit actionem* or judgment, or any deed or other instrument, before any Court, Judge, *Notary*, or other person lawfully authorized in that behalf, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 98, s. 34, Imp.

The word "*Notary*" is not in the English Act.

As to sureties for the peace, in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment.—.....on.....feloniously did, without lawful authority or excuse, before.....(the said..... then being lawfully authorized in that behalf) acknowledge a certain recognizance of bail in the name of J. N. in a certain cause then depending in the said Court (or in the court of.....) wherein A. B. was plaintiff, and C. D. defendant, against the form.....—Archbold, 615; 2 Russell, 1016.

Upon the trial of any indictment, for any offence under this section, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.

FORGERY OF MARRIAGE LICENCES.

Sect. 41.—Whosoever forges or fraudulently alters any licence or certificate for marriage, or offers, utters, disposes of or puts off any such licence or certificate, knowing the same to be forged or fraudulently altered, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 98, s. 35, Imp.

See remarks under next section.

FORGERY OF REGISTERS OF BIRTHS, MARRIAGES AND DEATHS.

Sect 42.—Whosoever unlawfully destroys, defaces or injures, or causes or permits to be destroyed, defaced or injured, any register of birth, baptisms, marriages, deaths or burials, which now is or hereafter shall be by law authorized or required to be kept in Canada, or in any one of the Provinces of Ontario, Quebec, Nova Scotia or New Brunswick, or any part of any such register, or any certified copy of any such register, or of any part thereof, or forges, or fraudulently alters in any such register any entry relating to any birth, baptism, marriage, death or burial, or any part of any such register, or any certified copy of such register, or of any part thereof, or knowingly and unlawfully inserts, or causes or permits to be inserted in any such register, or in any certified copy thereof, any false entry of any matter relating to any birth, baptism, marriage, death, or burial,

or knowingly and unlawfully gives any false certificate relating to any birth, baptism, marriage, death or burial, or certifies any writing to be a copy or extract from any such register, knowing such writing or the part of such register whereof such copy or extract is so given, to be false in any material particular, or forges, or counterfeits the seal of or belonging to any register, office, or burial board, or offers, utters, disposes of or puts off any such register, entry, certified copy, certificate or seal, knowing the same to be false, forged or altered, or offers, utters, disposes of or puts off any copy or any entry in any such register, knowing such entry to be false, forged or altered, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 98, s. 36, Imp.

Sect. 43—Whosoever knowingly and wilfully inserts, or causes or permits to be inserted, in any copy of any register directed or required by law to be transmitted to any registrar or other officer, any false entry of any matter relating to any baptism, marriage, or burial, or forges, or alters, or offers, utters, disposes of or puts off knowing the same to be forged or altered, any copy of any register so directed or required to be transmitted as aforesaid, or knowingly or wilfully signs or verifies any copy of any register so directed or required to be transmitted as aforesaid, which copy is false in any part thereof, knowing the same to be false, or unlawfully destroys, defaces or injures, or for any fraudulent purpose takes from its place of deposit, or conceals any such copy of any register, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for

any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 98, s. 37, Imp.

As to sureties for the peace, in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment under sect. 42 for making a false entry in a marriage register.—..... feloniously, knowingly and unlawfully did insert in a certain register of marriages, which was then by law authorized to be kept, a certain false entry of a matter relating to a supposed marriage, and which said false entry is as follows: that is to say (*set it out verbatim with inuendoes if necessary to explain it*); whereas in truth and in fact the said A. B. was not married to the said C. D., at the said church, on the said ——day of—— as in the said entry is falsely alleged and stated; and whereas, in truth and in fact, the said A. B. was not married to the said C. D. at the said church or elsewhere, at the time in the said entry mentioned, or at any other time whatsoever, against the form.....

(2nd Count.).....feloniously did, knowingly and wilfully, offer, utter, dispose of and put off a copy of a certain other false entry relating to a certain supposed marriage, which said last mentioned false entry was before then inserted in a certain register of marriages, by law authorized to be kept, and which said last mentioned false entry is as follows: that is to say (*set it out*) whereas in truth and in fact.....(*as above*). And the jurors aforesaid, upon their oath aforesaid do say that the said J. S. at the time he so offered, uttered, disposed of and put

off the said copy of the said last mentioned false entry well knew the said last mentioned false entry to be false against the form.....—Archbold, 598. See R. vs. Sharpe, 8 C. & P. 436.

In Reg. vs. Bowen, 1 Den. 22, the indictment was under what is now the first part of sect. 42, and charged that .... "John Bowen ..... feloniously and *wilfully* (*wilfully* must now be *unlawfully*) did destroy, deface and injure a certain register of ..... to wit, the register of ..... which said register was then and there kept (*and by law authorized to be kept*) as the register of the parish of..... and was then and there in the custody of ..... rector of the said parish of ..... against the form....." It was objected that the indictment was bad for charging three offences, *destroying*, *defacing* "and" *injuring*, the statute saying, *destroying*, *defacing* "or" *injuring*. A second objection was taken that no scienter was charged, and that the word "knowingly" was not in the indictment. The indictment was held good.

In Reg. vs. Asplin, 12 Cox 291, it was held by Martin, B., that upon an indictment under sect. 36, (sect. 42 of our Act) for making a false entry into a marriage register, it is not necessary that the entry should be made with intent to defraud, and that it is no defence that the marriage solemnized was null and void, being bigamous; also that, if a person knowing his name to be *A*, signs another name without authority, he is guilty, and it is immaterial that he is a third witness, the Marriage Act only requiring two.

Upon the trial of any indictment for any offence under these sections, the jury may, if the evidence warrants it, under sect. 49 of the Procedure Act of 1869, convict the prisoner of an attempt to commit the same.—2 Russel, 939.

DEMANDING PROPERTY UPON FORGED INSTRUMENTS.

Sect. 44.—Whosoever, with intent to defraud, demands, receives or obtains, or causes or procures to be delivered or paid to any person, or endeavours to receive or obtain, or to cause or procure to be delivered or paid to any person, any chattel, money, security for money, or other property whatsoever, under, upon or by virtue of any forged or altered instrument whatsoever, knowing the same to be forged or altered, or under, upon or by virtue of any probate or letters of administration, knowing the will, testament, codicil, or testamentary writing, on which such probate or letters of administration are obtained to have been forged or altered, or knowing such probate or letters of administration to have been obtained by any false oath, affirmation or affidavit, is guilty of felony and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 98, s. 38, Imp.

As to sureties for the peace in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Greaves says: "This clause is new. It is intended to embrace every case of demanding, etc., any property whatsoever upon forged instruments; and it is intended to include bringing an action on any forged bill of exchange, note, or other security for money. The words 'procure to be delivered or paid to any person' were inserted to include cases where one person by means of a forged instrument causes money to be paid to another person, and to avoid

the difficulty which had arisen in the cases as to obtaining money by false pretences.—R. vs. Wavell, 1 Mood. 224; Reg. vs. Garrett, 1 Dears. 232."

In Reg. vs. Adams, 1 Den. 38, the prisoner had obtained goods at a store with a forged order: this was held not to be larceny; it would now fall under this clause.

The clause seems to cover the attempt to commit the offence, as well as the offence itself, and if, as provided for by sect. 49 of the Procedure Act of 1869, a verdict of guilty of the attempt to commit the offence is given by the jury, the prisoner would stand convicted of a felony, and punishable under this clause though see Reg. vs. Connell, 6 Cox, 178.

FORGERY OF ANY DOCUMENT OR WRITING WHATSOEVER.

Sect. 45.— Whosoever maliciously and for any purpose of fraud or deceit, forges any document or thing written, printed or otherwise made capable of being read, or utters any such forged document or thing, knowing the same to be forged, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement; and the wilful alteration for any purpose of fraud or deceit of any such document or thing, or of any document or thing the forging of which is made penal by this Act, shall be held to be a forging thereof.

This clause is not in the English Act.

It is very defective. It seems to be intended to cover all documents, etc., etc., etc., *not before provided for by the Act*, and these words are omitted. And then, the word "maliciously" is here very improperly used: the

absence of the words *offers, disposes of, and puts off*, also renders the clause very dissimilar to the other parts of the Act. The last part is useless, as to documents not mentioned in this clause, and as to those mentioned in the clause, the words "or fraudulently alters" after "forges" in the second line would have been more in conformity with the other parts of the Act.

As to sureties for the peace in felonies under this Act, see *post*, sect. 58.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

See general remarks on forgery, and form of indictment therewith; each count under this clause should have "feloniously, *maliciously and for a purpose of fraud*," and should be repeated with the variance *and for a purpose of deceit*. The count for uttering should not have "*offer, dispose of or put off*." If an alteration of the document is charged, it must be stated to have been done "*wilfully and for a purpose of fraud*," and in another count "*wilfully and for a purpose of deceit*." But it must be remembered that, in consideration of law, every *alteration* of an instrument amounts to a forgery of the whole, and that an indictment for *forgery* will be supported by proof of a *fraudulent alteration*, though, in cases where a genuine instrument has been altered, it is perhaps better to allege the *alteration* in one count of the indictment.—1 Starkie's Crim. pl. 99.

The words "fraud *or deceit*" are certainly very properly employed in this clause, and, if they were not accompanied by the word "maliciously" would cover all possible cases of forgery, (see general remarks, *ante*,) as the clause is not limited to any document or writing, *not otherwise provided for*.

Sect. 49 of the Procedure Act of 1869 would apply to the trial of any indictment for any offence against this clause.

FORGERY OF ANY INSTRUMENT, HOWEVER DESIGNATED, IN LAW A WILL, BILL OF EXCHANGE, ETC., ETC., ETC., FORGERY OF BILLS MADE OUT OF CANADA, ETC., ETC., ETC., VENUE, ETC., ETC., ETC.

Sect. 46.—Where by this or any other Act any person is or shall hereafter be made liable to punishment for forging or altering, or for offering, uttering, disposing of or putting off, knowing the same to be forged or altered, any instrument or writing designated in such Act by any special name or description, and such instrument or writing, however designated, is in law a will, testament, codicil or testamentary writing, or a deed, bond or writing obligatory, or a bill of exchange or a promissory note for the payment of money, or an indorsement on, or assignment of a bill of exchange, or promissory note for the payment of money, or an acceptance of a bill of exchange, or an undertaking, warrant, order, authority, or request for the payment of money, or an indorsement on or assignment of an undertaking, warrant, order, authority or request for the payment of money, within the true intent and meaning of this Act, in every such case, the person forging or altering such instrument or writing, or offering, uttering, disposing of, or putting off such instrument or writing, knowing the same to be forged or altered, may be indicted as an offender against this Act, and punished accordingly.—24–25 Vict., ch. 98, s. 39, Imp.

Sect. 47.—Where the forging or altering any writing or matter whatsoever, or the offering, uttering, disposing

of or putting off any writing or matter whatsoever, knowing the same to be forged or altered, is in this Act expressed to be an offence, if any person in Canada forges, or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any such writing or matter, in whatever country or place out of Canada, whether under the Dominion of Her Majesty or not, such writing or matter may purport to be made or may have been made, and in whatever language the same or any part thereof, may be expressed, every such person and every person, aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this Act, and shall be punishable thereby in the same manner as if the writing or matter had purported to be made, or had been made in Canada, and if any person in Canada forges, or alters, or offers, utters, disposes of or puts off, knowing the same to be forged or altered, any bill of exchange, or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of any goods or security, or any deed, bond, or writing obligatory for the payment of money, whether such deed, bond, or writing obligatory is made only for the payment of money, or for the payment of money together with some other purpose, or any indorsement on or assignment of any such undertaking, warrant, order, authority, request, deed, bond, or writing obligatory, in whatsoever place or country out of Canada, whether under the dominion of Her Majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, authority, request, deed, bond or writing obligatory may

be or may purport to be payable, and in whatever language the same respectively or any part thereof may be expressed, and whether such bill, note, undertaking, warrant, order, authority, or request, be or be not, under seal, every such person, and every person aiding, abetting or counselling such person, shall be deemed to be an offender within the meaning of this Act, and shall be punishable thereby in the same manner as if the money had been payable or had purported to be payable in Canada.—24–25 Vict., ch. 98, s. 40, Imp.

In R. vs. Lee, 2 M. & Rob. 280, it was held, that, in an indictment upon this section, for uttering a forged foreign bill or note, the bill or note need not be alleged to be payable out of England.

Sect. 48.—Whosoever commits any offence against this Act, or commits any offence of forging, or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off, any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case be indictable at common law, or by virtue of any Act passed or to be passed, may be dealt with, indicted, tried and punished in any district, county or place in which he is apprehended or in custody, in the same manner in all respects as if the offence had been actually committed in that district, county or place; and every accessory before or after the fact to any such offence, if the same be a felony, and every person aiding, abetting or counselling the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried and punished, in any district, county or place, in which he shall be apprehended, or be in custody, in the same manner in all respects as if his offence, and the offence of his principal, had been actually committed, in

such district, county or place.—24–25 Vict., ch. 98, s. 41, Imp.

Sect. 46 was first enacted by 11 Geo. 4 & 1 Will. 4. It is doubtful, says Bishop, 2 Crim. Proced. 446, whether this explanatory section does more than affirm what would be the interpretation of the Courts, without it.

As to Sect. 48, it was held, under the corresponding section of the English Act, that where the prisoner is tried in the county where he is in custody, the forgery may be alleged to have been committed in that county, and there need not be any averment that the prisoner is in custody there.—R. vs. James, 7 C. & P. 553. And in the case of Reg. vs. Smythies, 1 Den. 498, it was held that, although the defendant is not shewn to have been in custody in the county where the bill is found, until the moment before his trial, when he surrenders in discharge of his bail, that is sufficient to make him triable there, and the judges said that the same ruling had been given in Reg. vs. Whiley, 2 Mood. 186, though the report is to the contrary.

DESCRIPTION OF INSTRUMENT IN INDICTMENTS FOR FORGING, OR FOR ENGRAVING, ETC.

Sect. 49.—In any indictment for forging, altering, offering, uttering, disposing of or putting off any instrument, *stamp, mark or thing*, it shall be sufficient to describe the same by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or *fac-simile* thereof, or otherwise describing the same or the value thereof.—24–25 Vict. ch. 98, s. 42, Imp.

The words in *Italics* are not in the English Act.

See sect. 24, of the Procedure Act of 1869.

If the instrument be set out, it should be correctly given.—Archbold, 561. In Reg. vs. Williams, 2 Den. 61, the prisoner was indicted for forging a certain warrant, order and request in the words and figures following, (the instrument was then set out in full); it was proved to be only a request: *Held*, that as the instrument was set out in full, the description of its legal character was surplusage, and therefore caused no variance.

And now, any variance of this kind would be amendable, under the Procedure Act of 1869.

Sect. 50.—In any indictment for engraving, or making the whole or any part of any instrument, matter or thing whatsoever, or for using or having the unlawful custody or possession of any plate or other material upon which the whole or any part of any instrument, matter or thing whatsoever has been engraved or made, or for having the unlawful custody or possession of any paper, upon which the whole or any part of any instrument, matter or thing whatsoever has been made or printed, it shall be sufficient to describe such instrument, matter or thing by any name or designation by which the same may be usually known, without setting out any copy or *fac-simile* of the whole or any part of such instrument, matter or thing.—24–25 Vict. ch. 98, s. 43, Imp.

See remarks under last preceding section.

INTENT TO DEFRAUD, HOW TO BE ALLEGED.

Sect. 51.—It shall be sufficient in any indictment for forging, altering, uttering, offering, disposing of, or putting off any instrument whatsoever, where it shall be necessary to allege an intent to defraud, to allege that the party accused did the act with intent to defraud, with-

out alleging an intent to defraud any particular person; and on the trial of any such offence, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud.—24–25 Vict., ch. 98, s. 44, Imp.

See general remarks on forgery.

CRIMINAL POSSESSION, WHAT IS, UNDER THIS ACT.

Sect. 52.—Where the having any matter or thing in the custody or possession of any person is in this Act expressed to be an offence, if any person has any such matter or thing in his personal custody and possession, or knowingly and wilfully has any such matter or thing in the actual custody and possession of any other person, or knowingly and wilfully has any such matter or thing in any dwelling-house or other building, lodging, apartment, field, or other place, open or enclosed, whether belonging to or occupied by himself or not, and whether such matter or thing is so had for his own use, or for the use or benefit of another, every such person shall be deemed and taken to have such matter or thing in his custody or possession within the meaning of this Act.—24–25 Vict., ch. 98, s. 45, Imp.

SEARCH WARRANTS FOR FORGED INSTRUMENTS, ETC.

Sect. 53.—If it is made to appear by information on oath or affirmation before a Justice of the Peace, that there is reasonable cause to believe that any person has in his custody or possession without lawful authority or excuse, any Dominion or Provincial note, or any note or bill of any bank or body corporate, company or person carrying on the business of bankers, or any frame, mould

or implement for making paper in imitation of the paper used for such notes or bills, or any such paper, or any plate, wood, stone or other material, having thereon any words, forms, devices, or characters capable of producing or intended to produce the impression of any such note or bill, or any part thereof, or any tool, implement or material used or employed, or intended to be used or employed, in or about any of the operations aforesaid, or any forged security, document or instrument whatsoever, or any machinery, frame, mould, plate, die, seal, paper or other matter or thing used or employed, or intended to be used or employed, in the forgery of any security, document or instrument whatsoever, such Justice may, if he think fit, grant a warrant to search for the same; and if the same is found upon such search, it shall be lawful to seize and carry the same before some Justice of the district, county or place, to be by him disposed of according to law, and all such matters and things so seized as aforesaid shall by order of the court where any such offender is tried, or in case there be no such trial, then by order of some Justice of the Peace, be defaced and destroyed, or otherwise disposed of as such court or Justice may direct.—24–25 Vict., ch. 98, s. 46, Imp.

Greaves says: "The cases embraced by this clause are:—1. Where any person has in his possession, without lawful authority or excuse, any notes or bills (of any banks): this provision is intended to reach any case where the bills or notes of *any banks* may have been unlawfully taken away before they were regularly issued. It is true that in such a case the bills or notes are not forged, but they have been unlawfully taken out of the bank, and ought not to be circulated, and the case is at

least as strong, as that of coining tools conveyed out of any of Her Majesty's mints without lawful authority or excuse, which may be seized under a search warrant, (by the Coin Act.)

2. Where any person has in his possession, without lawful authority or excuse, any frame, etc., etc., etc., for making paper in imitation of any of the paper used for such notes or bills, — or any such paper, or any plate, wood, etc., etc., etc., having thereon any words, devices, etc., etc., etc., capable of producing the impression of any such note or bill, or any tool, etc., etc., etc., used about any of those operations.

3. Where any person has in his possession, without lawful authority or excuse, any forged security, document, or instrument whatsoever. This is a new provision and a very important amendment of the law; for it will tend to facilitate prosecutions for forgery in many cases. Hitherto, it has frequently happened that forgers have escaped with impunity for want of such a power as is here conferred: this clause includes every forged instrument whatsoever, and it authorizes the search for such an instrument, in every case, at the instance of the Crown or a private prosecutor. It is quite clear that a search may be made under it whenever there is reasonable cause to believe that it is in the possession of the forger, for he can have no lawful authority or excuse for its possession: just as clearly is that the case, where it is in the possession of any agent of the forger, for he can have no more authority or excuse for its possession than the forger. But perhaps it may be said that where a forged instrument is delivered to an attorney under such circumstances that, if it were a genuine instrument, he would be privileged from producing it, the attorney has a lawful authority or excuse for keeping possession of it:

but this, clearly, is not so; the words "without lawful authority or excuse" are introduced in this clause, for the like purpose as (when it is used) in the other sections of this Act, and in the similar sections of the Coin Act, viz. to protect persons who are lawfully in possession of the thing specified and their agents, and are inapplicable to persons who are unlawfully in possession of the things, or their agents, whether attorneys or not. Consequently, all such questions as arose in R. vs. Smith, 1 Phil. Evid. 171; R. vs. Avery, 8 C. & P. 596; Reg. vs. Hayward, 2 C. & K. 234, 1 Den. 166; Reg. vs. Farley, 2 C. & K. 313, 1 Den. 197, and Reg. vs. Tuffs (*Tylney and Tuffs,)* 1 Den. 319, may be avoided in future by seizing the forged instrument under a search warrant issued in pursuance of this clause. (See Dixon's case, decided by Lord Mansfield, 3 Burrows, 1687.) Nor is there any reason why this should not be done: for it is perfectly clear that a stolen deed, bill or note, delivered by a client to his attorney, may be seized under a search warrant issued under s. 103 (s. 117) of the Larceny Act; so that this construction places the search for forged and stolen instruments on precisely the same footing.— Lastly, where any person has in his possession without lawful authority or excuse, any machinery used in the forgery of any security, document or instrument whatsoever."

See Taylor, on Evid., Vol. 1, p. 813, 823, 828

COMPETENCY OF WITNESSES ON TRIAL.

Sect. 54.—In all prosecutions by indictment, or information against any person or persons for any offence punishable under this Act, no person shall be deemed an incompetent witness, in support of the prosecution, by reason of any interest which such person may have or be

supposed to have in respect of any deed, writing, instrument, or other matter given in evidence on the trial of such indictment or information; but the evidence of any person or persons so interested or supposed to be interested shall in no case be deemed sufficient to sustain a conviction for any of the said offences, unless the same is corroborated by other legal evidence in support of such prosecution.—9 Geo. 4, ch. 32, s. 1. Imp.

See R. vs. Hughes, 2 East. P. C. 1002; R. vs. Maguire, Ibid; the Bank Prosecutions, R. & R. 378.

PUNISHMENTS, ETC.

Sect. 55.—Whosoever, after the commencement of this Act, is convicted of any offence which has been subjected by any Act or Acts to the same pains or penalties as are imposed by the Act passed in the fifth year of the Reign of Queen Elizabeth, intituled: "An Act against forgers of false deeds and writings," for any of the offences first enumerated in the said Act, is guilty of felony, and shall, in lieu of such pains and penalties, be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 98. s. 47, Imp.

The Stat. 5 Eliz. ch. 14, relates to the forgery of deeds, charters, writing sealed, court rolls, or wills: the punishment for which was pillory, both ears cut off, the nostrils slit and cut and seared with a hot iron, forfeiture of all property, and imprisonment for life.

Sect. 56.—Where, by any Act now in force in any Province of Canada, any person falsely making, forging, counterfeiting, erasing or altering any matter whatsoever, or uttering, publishing, offering, disposing of, putting away, or making use of any matter whatsoever, knowing the same to have been falsely made, forged, counterfeited, erased, or altered; or any person demanding, or endeavouring to receive or have anything, or to do or to cause to be done any act, upon or by virtue of any matter whatsoever, knowing such matter to have been falsely made, forged, counterfeited, erased, or altered; or where, by any such Act now in force, any person falsely personating another, or falsely acknowledging anything in the name of another, or falsely representing any other person than the real party to be such real party, or wilfully making a false entry in any book, account or document, or in any manner wilfully falsifying any part of any book, account or document, or wilfully making a transfer of any stock, annuity or fund in the name of any person not being the owner thereof, or knowingly taking any false oath, or knowingly making any false affidavit or false affirmation, or demanding or receiving any money or other thing by virtue of any probate or letters of administration, knowing the will on which such probate shall have been obtained to have been false or forged, or knowing such probate or letters of administration to have been obtained by means of any false oath or false affirmation; or where, by any such Act now in force, any person making or using, or knowingly having in his custody or possession, any frame, mould or instrument for the making of paper, with certain words visible in the substance thereof, or any person making such paper, or causing certain words to appear visible in the substance of any paper, would, according to the Provisions contained in any such Act, be guilty of

felony, and be liable to any greater punishment than is provided by this Act, then and in each of the several cases aforesaid; if any person after the commencement of this Act is convicted of any such felony as is hereinbefore in this section mentioned, or of aiding, abetting, counselling or procuring the commission thereof, and the same is not punishable under any of the other Provisions of this Act, every such person shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 98, s. 48, Imp.

It would perhaps have been better to do without this and the last preceding sections, by a repeal clause, and a proper phraseology in sect. 45.

ACCESSORIES AFTER THE FACT.

Sect. 57.—Every accessory after the fact to any felony punishable under this Act, shall be liable to be imprisoned in any gaol or place of confinement, other than the Penitentiary, for any term less than two years, with or without hard labour, and with or without solitary confinement; and every person who aids, abets, counsels or procures the commission of any misdemeanor punishable under this Act, shall be liable to be proceeded against, indicted and punished, as a principal offender.—24–25 Vict. ch. 98, s. 49, Imp.

See sections 4 and 5, 31 Vict.,ch 72.

FINE AND SURETIES FOR KEEPING THE PEACE, IN WHAT CASES.

Sect. 58.—Whenever any person is convicted of a misdemeanor under this Act, the Court may, if it thinks fit, in addition to or in lieu of any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behaviour, and in all cases of felonies in this act mentioned, the Court may, if it thinks fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any of the punishments by this Act authorized, provided that no person shall be imprisoned under this section for not finding sureties, for any period exceeding one year.—24-25 Vict., ch. 98, s. 51, Imp.

See remarks under sect. 74 of the *Act respecting malicious injuries to property.*

Sect. 59.—This Act shall commence and take effect on the first day of January, one thousand, eight hundred and seventy.

FORGERY UNDER THE "ACT RESPECTING THE CUSTOMS." 31 VICT., CH. 6.

Sect. 87.—If any person at any time forges or counterfeits any mark or brand to resemble any mark or brand provided or used for the purposes of this Act, or forges or counterfeits the impression of any such mark or brand, or sells or exposes to sale, or has in his custody or possession, any goods with a counterfeit mark or brand, knowing the same to be counterfeit, or uses or affixes any such mark or brand to any other goods required to be stamped as aforesaid, other than those to which the same was originally affixed, such goods so falsely marked or branded shall be forfeited, and every such offender, and his aiders, abettors or assistants, shall, for every such offence, forfeit and pay the sum of two hundred dollars; which penalty shall be recoverable in a summary way,

before any two Justices of the Peace in Canada, and in default of payment the party so offending shall be committed to any of Her Majesty's Gaols in Canada, for a period not exceeding twelve months.

Sect. 88.—If any person counterfeits or falsifies, or uses when so counterfeited or falsified, any paper or document required under this Act or for any purpose therein mentioned, whether written, printed, or otherwise, or by any false statement procures such document, or forges or counterfeits any certificate relating to any oath, affirmation, or declaration, hereby required or authorized, knowing the same to be so forged or counterfeited, such person shall be guilty of a misdemeanor and being thereof convicted, shall be liable to be punished accordingly.

FORGERY UNDER THE "ACT FOR THE REGULATION OF THE POSTAL SERVICE." 31 VICT., CH. 10.

Sect. 17, par. 9.—To forge, counterfeit or imitate any Post Office Money Order, or advice of such Money Order, or Post Office Savings Bank Depositor's Book, or authority of the Post Master General for repayment of a Post Office Savings Bank deposit or of any part thereof,—or any signature or writing in or upon any Post Office Money Order, Money Order advice, Post Office Savings Bank Depositor's Book, or authority of Post Master General for repayment of a Post Office Savings Bank deposit or of any part thereof with intent to defraud, shall be a felony punishable by imprisonment in the Penitentiary for any term not less than two years and not exceeding seven years, and the accessories to any such offence shall be punishable accordingly.

FORGERY UNDER THE "ACT RESPECTING THE SHIPPING OF SEAMEN." 36 VICT., CH. 129.

Sect. 34.—Every person who fraudulently alters, assists in fraudulently altering, or procures to be fraudulently altered, or makes, or assists in making, or procures to be made, any false entry in, or delivers, assists in delivering, or procures to be delivered, a false copy of any agreement under this Act, shall for each such offence be guilty of a misdemeanor.

The Criminal Law Consolidation Acts.

AN ACT RESPECTING OFFENCES AGAINST THE PERSON.

32-33 Vict., ch. 20.

Whereas it is expedient to assimilate, amend and consolidate the Statute Law of the several Provinces of Quebec, Ontario, Nova Scotia and New Brunswick, relating to offences against the person, and to extend the same as so consolidated to all Canada: Therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

MURDER.

Sect. 1.—Whosoever is convicted of murder shall suffer death as a felon.—24-25 Vict., ch. 100, s. 1, Imp.

Sect. 2.—Upon every conviction for murder the Court shall pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence and in respect thereof may be had and taken in the same manner, and the Court before which the conviction takes place shall have the same powers in all respects, as after a conviction for any other felony for which a prisoner may be sentenced to suffer death as a felon.—24-25 Vict., ch. 100, s. 2, Imp.

Sect. 6.—In any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which, or the means by which the death of the deceased was caused, but it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, of his malice aforethought, kill and murder the deceased; and it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased; and it shall be sufficient in any indictment against any accessory to any murder or manslaughter to charge the principal with the murder or manslaughter, as the case may be, in the manner hereinbefore specified, and then to charge the defendant as an accessory in the manner heretofore used and accustomed *or by law provided.*—24-25 Vict., ch. 100, s. 6, Imp.

The words "*or by law provided*" are not in the English Act.

By sect. 12 of the Procedure Act of 1869, it is enacted that no court of General or Quarter Sessions or Recorder's Court, nor any Court, but a Superior Court having criminal jurisdiction shall have power to try any treason, or any felony punishable with death, or any libel.

Indictment..... The Jurors for Our Lady the Queen, upon their oath present, that A. B., on..... at..... .....in the County (or District) of.... did feloniously, wilfully, and of his malice aforethought, kill and murder one C. D., against the peace of Our Lady the Queen, her crown and dignity.

Upon this indictment the defendant may be acquitted of the murder, and found guilty of manslaughter.—Archbold, 620.

The following rules of law apply to murder and manslaughter.

1. The law takes no cognizance of homicide unless death result from bodily injury, occasioned by some act or unlawful omission, or contradistinguished from death occasioned by any influence on the mind, or by any disease arising from such influence. 2. The terms "*unlawful omission*" comprehend every case where any one, being under any legal obligation to supply food, clothing or other aid or support, or to do any other Act, or make any other provision for the sustentation of life, or prevention of injury to life, is guilty of any breach of duty. 3. It is essential to homicide of which the law takes cognizance that the party die of the injury done within one year and a day thereafter: In the computation of the year and the day from the time of the injury, the whole of the day on which the act was done or of any day on which the cause of injury was continuing, is to be reckoned the first. 4. A child in the womb is not a subject of homicide in respect of any injury inflicted in the womb, unless it afterwards be born alive: it is otherwise if a child die within a year and a day after birth of any bodily injury inflicted upon such child, whilst it was yet in the womb.—4th Cr. L. Com. Report, p. XXXII, 8th of March, 1839.

If a man have a disease which in all likelihood would terminate his life in a short time, and another give him a wound or hurt which hastens his death, it is murder or other species of homicide as the case may be. And it has been ruled that though the stroke given is not in itself so mortal but that with good care it might be cured, yet if the party die of this wound within a year and day, it is murder or other species of homicide as the case may be. And when a wound, not in itself mortal,

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

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

Murder is the killing any person under the king's peace, with malice prepense or aforethought, either express or implied by law. Of this description the malice prepense, *malitia precogitata*, is the chief characteristic, the grand criterion by which murder is to be distinguished from any other species of homicide, and it will therefore be necessary to inquire concerning the cases in which such malice has been held to exist. It should, however,

be observed that when the law makes use of the term *malice aforethought*, as descriptive of the crime of murder, it is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent upon mischief. And in general any formed design of doing mischief may be called malice. And therefore, not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also, in many other cases, such killing as is accompanied with circumstances that show the heart to be perversely wicked is adjudged to be of *malice prepense* and consequently murder.—1 Russell, 667.

Malice may be either *express* or *implied by law*. Express malice is, when one person kills another with a sedate deliberate mind and formed design; such formed design being evidenced by external circumstances, discovering the inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. And malice is implied by law from any deliberate cruel act committed by one person against another, however sudden; thus, where a man kills another suddenly without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. So if a man wilfully poisons another: in such a deliberate act the law presumes malice, though no particular enmity be proved. And where one is killed in consequence of such a wilful act as shows the person by whom it is committed to be an enemy to all mankind, the law will infer a general malice from such depraved inclination to

mischief. And it should be observed as a general rule, that all homicide is presumed to be malicious, and of course amounting to murder, until the contrary appears, from circumstances of alleviation, excuse or justification: and that it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the court and jury, unless they arise out of the evidence produced against him. It should also be remarked that, where the defence rests upon some violent provocation, it will not avail, however grievous such provocation may have been, if it appears that there was an interval of reflection, or a reasonable time for the blood to have cooled before the deadly purpose was effected. And provocation will be no answer to proof of *express* malice: so that, if, upon a provocation received, one party deliberately and advisedly denounce vengeance against the other, as by declaring that *he will have his blood*, or the like, and afterwards carry his design into execution, he will be guilty of murder; although the death happened so recently after the provocation as that the law might, apart from such evidence of express malice, have imputed the act to unadvised passion. But where fresh provocation intervenes between preconceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice; for if there be an old quarrel between A and B, and they are reconciled again, and then upon a new and sudden falling out, A kills B, this is not murder. It is not to be presumed that the parties fought upon the old grudge, unless it appear from the whole circumstances of the fact; but if upon the circumstances it should appear that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, then such killing will be murder.—1 Russell, 667.

If a man, after receiving a blow, feigns a reconciliation, and, after the lapse of a few minutes, invites a renewal of the aggression, with intent to use a deadly weapon, and, on such renewal, uses such weapon with deadly effect, there is evidence of implied malice to sustain the charge of murder. But if, after such reconciliation, the aggressor renews the contest, or attempts to do so, and the other, having a deadly weapon about him, on such sudden renewal of the provocation, uses it without previous intent to do so, there is evidence which may reduce the crime to manslaughter.—Reg. vs. Selton, 11 Cox 674. Mr. Justice Hannen in his charge to the jury in that case said: "Now, murder is killing with malice aforethought; but though the malice may be harboured for a long time for the gratification of a cherished revenge, it may, on the other hand, be generated in a man's mind according to the character of that mind, in a short space of time, and therefore it becomes the duty of the jury in each case to distinguish whether such motive had arisen in the mind of the prisoner, and whether it was for the gratification of such malice he committed the fatal act. But the law, having regard to the infirmity of man's nature, admits evidence of such provocation as is calculated to throw a man's mind off its balance, so as to show that he committed the act while under the influence of temporary excitement, and thus to negative the malice which is of the essence of the crime of murder. It must not be a light provocation, it must be a grave provocation; and undoubtedly a blow is regarded by the law as such a grave provocation; and supposing a deadly stroke inflicted promptly upon such provocation, a jury would be justified in regarding the crime as reduced to manslaughter. But if such a period of time has elapsed as would be sufficient to enable the mind to recover its balance, and it

appears that the fatal blow has been struck in the pursuit of revenge, then the crime will be murder." Verdict of manslaughter.

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

Where a man finds another in the act of adultery with his wife, and kills him or her in the first transport of passion, he is only guilty of manslaughter and that in the lowest degree; for the provocation is grievous, such as the law reasonably concludes cannot be borne in the first transport of passion: and the Court in such cases will not inflict a severe punishment.—1 Russell, 786.

So it seems that if a father were to see a person in the act of committing an unnatural offence with his son and were instantly to kill him, it would only be manslaughter. —Reg. vs. Fisher, 8 C. & P. 182.

But in the case of the most grievous provocation to which a man can be exposed, that of finding another in the act of adultery with his wife, though it would be but manslaughter if he should kill the adulterer in

the first transport of passion, yet if he kill him deliberately, and upon revenge, after the fact, and sufficient cooling time, it would undoubtedly be murder. For let it be observed that in all possible cases, deliberate homicide upon a principle of revenge is murder. No man under the protection of the law is to be the avenger of his own wrongs. If they are of a nature for which the laws of Society will give him an adequate remedy, thither he ought to resort, but be they of what nature soever, he ought to bear his lot with patience and remember that vengeance belongeth only to the Most High. —Foster, 296.

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

In this last case, the Court said: "Whether the blood has had time to cool or not is a question *for the Court* and not for the jury, but it is for the jury to find what length of time elapsed between the provocation received and the act done.— 1 Russell, 725, but Greaves, note *d*, loc. cit., questions this dictum, and refers to Rex vs. Lynch, 5 C. & P. 324, and Rex vs. Maynard, *suprà*, where Tenterden and Tindal left it *to the jury* to say if the blood had had time to cool or not.

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

Even blows previously received will not extenuate homicide upon deliberate malice and revenge, especially where it is to be collected from the circumstances that the provocation was sought for the purpose of colouring the revenge.—Rex vs. Mason, 1 East P. C. 239.

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

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

reasonably minded man to lose his self-control and commit such an act." Verdict: Guilty of murder.

So also if a man be greatly provoked, as by pulling his nose or other great indignity, and immediately kills the aggressor, though he is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself, yet neither is it murder for there is no previous malice: but it is manslaughter. But in this and every other case of homicide upon provocation, if there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kill the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder.— 4 Blackstone, 191.

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

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

Though the general rule of law is that provocation by words will not reduce the crime of murder to that of manslaughter, special circumstances attending such a provocation might be held to take the case out of the general rule. In Reg. vs. Rothwell, 12 Cox 147, Blackburn, J., in summing up, said: "A person who inflicted a danger-

ous wound, that is to say a wound of such a nature as he must know to be dangerous, and death ensues, is guilty of murder; but there may be such heat of blood and provocation as to reduce the crime to manslaughter. A blow is such a provocation as will reduce the crime of murder to that of manslaughter. Where, however, there are no blows, there must be a provocation equal to blows; it must be at least as great as blows. For instance a man who discovers his wife in adultery, and thereupon kills the adulterer, is only guilty of manslaughter. As a general rule of law, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect, for instance, if a husband, suddenly hearing from his wife that she had committed adultery, and he having no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter. Now, in this case, words spoken by the deceased just previous to the blows inflicted by the prisoner were these: 'Aye; but I'll take no more for thee, for I will have no more children of thee: I have done it once, and I'll do it again,' meaning adultery. Now, what you will have to consider is, would these words, which were spoken just previous to the blows, amount to such a provocation as would in an ordinary man, not in a man of violent or passionate disposition, provoke him in such a way as to justify him in striking her as the prisoner did." Verdict of manslaughter.

In Sherwood's case, 1 C. & K. 556, Pollock, C. B., in summing up said: "It is true that no provocation by words only will reduce the crime of murder to that of manslaughter; but it is equally true that every provocation by blows will not have this effect, particularly when, as in this case, the prisoner appears to have resented the blow by using a weapon calculated to cause death.

Still, however, if there be a provocation by blows, which would not of itself render the killing manslaughter, but it be accompanied by such provocation by means of words and gestures as would be calculated to produce a degree of exasperation equal to that which would be produced by a violent blow, I am not prepared to say that the law will not regard these circumstances as reducing the crime to that of manslaughter only."

When A, finding a trespasser upon his land, in the first transport of his passion, beat him and unluckily killed him, and it was holden to be manslaughter, it must be understood that he beat the trespasser, not with a mischievous intention, but *merely to chastise* him, and to deter him from a future commission of such a trespass. For if A had knocked his brains out with a bill or hedge stake, or had killed him by an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, it would have been murder: these circumstances being some of the genuine symptoms of the *mala mens*, the heart bent upon mischief, which enter into the true notion of malice in the legal sense of the word. Moir having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length discharged a pistol at a person who was trespassing, and wounded him in the thigh, which led to erysipelas, and the man died. Moir was convicted of murder and executed.—1 Russell, 718.

As there are very many nice distinctions upon this subject of malice prepense, express and implied, the following additional quotations are given here.

Malitia in its proper or legal sense, is different from that sense which it bears in common speech. In common acceptation, it signifies a desire of revenge, or a settled anger against the particular person; but this is

not the legal sense, and Lord Holt, C. J., says: "Some have been led into mistakes by not well considering what the passion of malice is; they have construed it to be a rancour of mind lodged in the person killing for some considerable time before the commission of the fact, *which is a mistake*, arising from the not well distinguishing between *hatred* and *malice*. *Envy*, *hatred* and *malice* are three distinct passions of the mind. 1. *Envy* properly is a repining or being grieved at the happiness and prosperity of another, *Invidus alterius rebus macrescit opimis*. 2. *Hatred* which is *odium*, is as Tully said, *ira inveterata*, a rancour fixed and settled in the mind of one towards another which admits of several degrees. 3. *Malice* is a design formed of doing mischief to another; *cum quis data opera male agit*, he that designs and useth the means to do ill is malicious: he that doth a cruel act voluntarily doth it of malice prepensed." Kelyng's Cr. C. *Stevens & Haynes' reprint*, 174.

But the meaning of the words "*malice aforethought*" is not to be determined in the same way as if they were found in a statute just enacted, and had never been construed. On the other hand they were employed in a Statute on this subject as far back as 1389, were found also in several other early Statutes, and were first construed at a time when the Courts took more liberties with Statutes than they do now. Thus, it is said in an old book, "He that doth a cruel act voluntarily, doth it of malice prepensed"..... The doctrine was long ago and is now established that to constitute the *malice prepensed or aforethought*, which distinguishes murder from manslaughter, the slayer need not have contemplated the injury before hand, and need at no time have intended to take life. If he specifically meant not death, but bodily harm of a certain standard in magnitude or kind, or if he purposely employed a certain weapon or did certain acts from which the law implies malice, the offence is murder when death follows within a year and a day, the same as though he intended to kill. The actual intent is in many circumstances an important element; but there may be murder as well without as with a murderous mind, and especially the fatal result need not be predetermined. Thus the words "*malice aforethought*" have a technical legal meaning, differing considerably from the popular idea of them.—Bishop, Stat. Cr. 467.

Malice in its legal sense denotes a wrongful act done intentionally without just cause or excuse. Per Littledale, J., in McPherson vs. Daniels, 10 B. & C. 272, and approved of by Cresswell, J., in Reg. vs. Noon, 6 Cox 137.

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

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

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

When negligence reaches a certain point, it is the same as intentional wrong. "Every one must be taken to intend that which is the natural consequence of his

action." If any one acts in exactly the same way as he would do if he bore express malice to another, he cannot be allowed to say he does not. Wharton's Law lexicon, v. malice.

Malice aforethought, which makes a felonious killing murder, may be practically defined to be not *actual malice or actual aforethought*, or any other particular actual state of the mind, but any such combination of wrongful deed and mental culpability as judicial usage has determined to be sufficient to render that murder which else would be only manslaughter..... One proposition is plain: that an actual intent to take life is not a necessary ingredient in murder, any more than it is in manslaughter. Where the prisoner fired a loaded pistol at a person on horseback, and the ball took effect on another, whose death it caused, the offence was held to be murder; though the motive for firing it was not to kill the man, but only to frighten his horse, and cause the horse to throw him.—2 Bishop, Cr. L. 675. 676, 682.

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

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

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

Although the malice in murder is what is called "*malice aforethought*," yet there is no particular period of time during which it is necessary it should have existed, or the prisoner should have contemplated the homicide. If, for example, the intent to kill or to do other great bodily harm is executed the instant it springs into the mind, the offence is as truly murder, as if it had dwelt there for a longer period.—2 Bishop, Cr. L. 677.

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

If an action, unlawful in itself, be done deliberately, and with intention of mischief or great bodily harm to particular individuals, or of mischief indiscriminately, fall where it may, and death ensue against or beside the original intention of the party, it will be murder.—1 Russell, 739. If a man deliberately shoot at A and miss him, but kill B, this is murder.—1 Hale, 438. So where A gave a poisoned apple to his wife, intending to poison her, and the wife, ignorant of the matter, gave it to a child who took it and died, this was held murder in A,

though he, being present at the time, endeavoured to dissuade his wife from giving the apple to the child.—Hale, loc. cit.

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

Whenever one does an act with the design of committing any felony, though not a felony dangerous to human life, yet, if the life of another is accidentally taken, his offence is murder. So if a man set fire to a house, whereby a person in it is burned to death, he is guilty of murder, even if he had no idea that any one was or was likely to be there.—1 Russell, 741.

In Reg. vs. Lee, 4 F. & F. 63, Pollock, C. B., told the jury "that if two or more persons go out to commit a felony with intent that personal violence shall be used in its committal, and such violence is used and causes death, then they are all guilty of murder, even although death was not intended."

Also, where the intent is to do some great bodily harm to another and death ensues, it will be murder: as if A intend only to *beat* B in anger, or from preconceived malice, and happen to kill him, it will be no excuse that he did not intend *all* the mischief that followed; for what he did was *malum in se*, and he must be answerable for all its consequences: he beat B with an intention of doing him some bodily harm, and is therefore answerable for all the harm he did. So, if a large stone be thrown at one with a deliberate intention to hurt, though not to

kill him, and, *by accident*, it kill him, or any other, this is murder.—1 Russell, 742.

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

See, *post*, sect. 74, 31 Vict., ch. 68, which reduces to manslaughter the killing of any person on a railway, though the act causing the death is unlawful, as by removing a rail, or obstructing the railway.

CASES ILLUSTRATIVE OF GENERAL PRINCIPLES.

The circumstance of a person having acted under an irresistible influence to the commission of homicide, is no defence, if at the time he committed the act, he knew he was doing what was wrong.—Reg. vs. Haynes, F. & F. 666.

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

Killing a man who was out at night dressed in white as a ghost, for the purpose of frightening the neighbour-

hood, is murder : it is no excuse that he could not otherwise be taken.— 1 Russell, 749.

Forcing a person to do an act which is likely to produce and does produce death is murder; so, if the deceased threw himself out of a window, or in a river to avoid the violence of the prisoner.— 1 Russell, 676; Reg. vs. Pitts, Car. & M. 284.

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

If a person being in possession of a deadly weapon enters into a contest with another intending at the time to avail himself of it, and in the course of the contest actually uses it, and kills the other, it will be murder, but if he did not intend to use it when he began the contest, but used it in the heat of passion, in consequence of an attack made upon him, it will be manslaughter. If he uses it to protect his own life or to protect himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger, having no other means of defence, and no means of escape, and retreating as far as he can, it will be justifiable homicide. — Reg. vs. Smith, 8 C. & P. 160.

A person cannot be indicted for murder in procuring another to be executed, by falsely charging him with a crime of which he was innocent.—R. vs. Macdaniel, 1 Leach, 44. Sed quære. 4 Blackstone, 196; 2d Report, 1846, Cr. Law Comm. 45.

Child murder.— To justify a conviction on an indictment charging a woman with the wilful murder of a child of which she was delivered and which was born alive, the jury must be satisfied affirmatively that the whole

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

An infant in its mother's womb is not considered as a person who can be killed within the description of murder or manslaughter. The rule is thus : it must be born, every part of it must have come from the mother, before the killing of it will constitute a felonious homicide.—Rex vs. Wright, 9 C. & P. 754; R. vs. Blain, 6 C. & P. 349; 1 Russell, 670; 2 Bishop, Cr. L. 632.—Giving a child, whilst in the act of being born, a mortal wound in the head, as soon as the head appears, and before the child has breathed, will, if the child is afterwards born alive and dies thereof, and there is malice, be murder, but if there is not malice, manslaughter.—R. vs. Senior, 1 Mood. C. 346; 1 Lewin, C. C. 183.

Murder by poisoning.— Of all the forms of death, by which human nature may be overcome, the most detestable is that of poison: because it can, of all others, be the least prevented either by manhood or forethought.—3

Inst. 48.—He that wilfully gives poison to another, that hath provoked him or not, is guilty of wilful murder; the reason is because it is an act of deliberation odious in law, and presumes malice.—1 Hale. 455.—A prisoner was indicted for the murder of her infant child by poison. She purchased a bottle of laudanum, and directed the person who had the care of the child to give it a teaspoonful every night. That person did not do so, but put the bottle on the mantel-piece, where another little child found it, and gave part of the contents to the prisoner's child who soon after died: held, that the administering of the laudanum by the child was as much, in point of law, an administering by the prisoner, as if she herself had actually administered it with her own hand.—Reg. vs. Michael, 2 Mood. 120.—On a trial for murder by poisoning, statements made by the deceased in a conversation shortly before the time at which the poison is supposed to have been administered, are evidence to prove the state of his health at that time. Reg. vs. Johnston, 2 C. & K. 354.—On an indictment for the murder of A, evidence is not admissible that three others in the same family died of similar poison, and that the prisoner was at all the deaths, and administered something to two of his patients. —Reg. vs. Winslow, 8 Cox 397.—On an indictment against a woman for the murder of her husband by arsenic, in September, evidence was tendered, on behalf of the prosecution, of arsenic having been taken by her two sons, one of whom died in December and the other in March subsequently, and also, by a third son, who took arsenic in April following but did not die. Proof was given of a similarity of symptoms in the four cases. Evidence was also tendered that she lived in the same house with her husband and sons, and that she prepared their tea, cooked their victuals, and distributed them to the four parties: *held*

that this evidence was admissible for the purpose of proving, first, that the deceased husband actually died of arsenic; secondly, that his death was not accidental; and that it was not inadmissible by reason of its tendency to prove or create a suspicion of a subsequent felony.—Reg. vs. Geering, 18 L. J. M. C. 215.—Upon the trial of a husband and wife for the murder of the mother of the former by administering arsenic to her, for the purpose of rebutting the inference that the arsenic had been taken by accident, evidence was admitted that the male prisoner's first wife had been poisoned nine months previously; that the woman who waited upon her, and occasionally tasted her food, shewed symptoms of having taken poison; that the food was always prepared by the female prisoner; and that the two prisoners, the only other persons in the house, were not affected with any symptoms of poison.—Reg. vs. Garner, 4 F. & F. 346. And Archibald, J., after consulting Pollock, C. B., in Reg. vs. Cotton, March, 1873, 12 Cox 400, held, that where a prisoner was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers and a lodger in her house had died previous to the present charge, after having been attended by her, was admissible.

MURDER BY KILLING OFFICERS OF JUSTICE.

Ministers of justice, as bailiffs, constables, watchmen, etc., (either civil or criminal justice) while in the execution of their offices, are under the peculiar protection of the law; a protection founded in wisdom and equity, and in every principle of political justice; for without it the public tranquillity cannot possibly be maintained, or pri-

vate property secured. For these reasons, the killing of officers so employed has been deemed murder of malice prepense as being an outrage wilfully committed in defiance of the justice of the kingdom. The law extends the same protection to any person acting in aid of an officer of justice, whether specially called thereunto or not. And a public officer is to be considered as acting strictly in discharge of his duty, not only while executing the process intrusted to him, but likewise while he is coming to perform, and returning from the performance of his duty.

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

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

Where a constable interferes in an affray to keep the peace, and is killed, such of the persons concerned in killing him as knew him to be a constable are guilty of

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

Killing an officer will amount to murder, though he had no warrant, and was not present when any felony was committed, and takes the party upon a charge only, and though such charge does not in terms specify all the particulars necessary to constitute the felony.—R. vs. Ford, Russ & Ry. 329.

Killing an officer who attempts to arrest a man will be murder, though the officer had no warrant, and though the man has done nothing for which he was liable to be arrested, if the officer has a charge against him for felony, and the man knows the individual to be an officer, though the officer does not notify to him that he has such a charge —Rex vs. Woolmer, 1 Mood. 334.

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

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

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

MURDER.—KILLING BY OFFICERS OF JUSTICE.

Where an officer of justice in endeavouring to execute his duty, kills a man, this is justifiable homicide, or manslaughter, or murder, according to circumstances. Where an officer of justice is resisted in the legal execution of his duty, he may repel force by force; and if in doing so, he kills the party resisting him, it is justifiable homicide; and this in civil as well as in criminal cases.—1 Hale, 494; 2 Hale, 118. And the same as to persons acting in aid of such officer. Thus if a peace officer have a legal warrant against B for felony, or if B stand indicted for felony, in these cases, if B resist, and in the struggle be killed by the officer, or any person acting in aid of him, the killing is justifiable.—Foster, 318. So, if a private person attempt to arrest one who commits a felony in his presence or interferes to suppress an affray, and be resisted, and kill the person resisting, this is also justifiable homicide.—1 Hale, 481, 484. Still there must be an apparent necessity for the killing: for if the officer were to kill after the resisting had ceased, or if there were no reasonable necessity for the violence used upon the part of the officer, the killing would be manslaughter at the least. Also, in order to justify an officer or private person in these cases, it is necessary that they should, at the time, be in the act of *legally* executing a duty imposed upom them by law, and under such circumstances that, if the officer or private person were killed, it would have been murder; for if the circumstances of the case were such that it would have been manslaughter only to kill the officer or private person, it will be manslaughter, at least, in the officer or private person to kill the party resisting.—Fost. 318; 1 Hale, 490. If the prisoners in a gaol, or going to a gaol, assault the gaoler or officer, and he, in his defence, kill any of them, it is justifiable, for the sake of preventing an escape.—1 Hale, 496.

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

endeavouring to disperse the mob are justifiable in killing them, both at common law, and by the Riot Act, if the riot cannot otherwise be suppressed.—Archbold, 646.

DUELLING.

Where words of reproach or other sudden provocations have led to blows and mutual combat, and death has ensued, the important enquiry will be, whether the occasion was altogether sudden and not the result of preconceived anger or malice; for in no case will the killing, though in mutual combat, admit of alleviation, if the fighting were upon a malice. Thus a party killing another in a deliberate duel is guilty of murder.—1 Rus. 727.

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

Where two persons go out to fight a deliberate duel and death ensues, all persons who are present, encouraging and promoting that death, will be guilty of murder. And the person who acted as the second of the deceased

person in such a duel may be convicted of murder, on an indictment charging him with being present, aiding and abetting the person by whose act the death of his principal was occasioned.—Reg. vs. Cuddy, 1 C. & K. 210.

Verdict.—General Remarks.—By sect. 49 of the Procedure Act of 1869, if upon the trial of any person charged with any felony or misdemeanor, it appears to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged but is guilty of an attempt to commit the same: and thereupon, such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the indictment.—Same in England, 14–15 Vict., ch. 100, s. 9. 1 Russell, 773.

And by sect. 51 of the Procedure Act of 1869, on the trial of any person for any felony whatever, where the crime *charged* includes an assault against the person, although an assault be not charged in terms, the jury may acquit of the felony, and find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding, and the person so convicted shall be liable to be imprisoned in the Penitentiary for any term not exceeding five years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years.—In England, a similar clause, 7 Will. 4 & 1 Vict., ch. 85, sect. 11, has been repealed.

SELF-MURDER.

A *felo de se*, or felon of himself, is a person who being

of sound mind and of the age of discretion, voluntarily killeth himself. 3 Inst. 54.

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

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

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

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

If one encourages another to commit a suicide and is present abetting him while he does so, such person is guilty

of murder as a principal, and if two encourage each other to murder themselves, and one does so, the other being present, but failing in the attempt on himself, the latter is a principal in the murder of the first.—R. vs. Dyson, R. & R. 523; R. vs. Alison, 8 C. & P. 418.

An attempt to commit suicide is not an attempt to commit murder, within 32–33 Vict., ch. 20, but still remains a common law misdemeanor.—Reg. vs. Burgess, Leigh & Cave, 258.

The finding of *felo de se* by the Coroner's jury, carries a forfeiture of goods and chattels.—2 Burns' Justice, 1340.

An attempt to commit suicide is a misdemeanor at common law.—Reg. vs. Doody, 6 Cox, 463. See Reg. vs. Maloney, 9 Cox, 6.

MANSLAUGHTER.

Sect. 5.—Whosoever is convicted of manslaughter shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, or to pay such fine as the court may award, in addition to or without any such other discretionary punishment as aforesaid.—24–25 Vict., ch. 100, s. 5, Imp.

See *post*, as to section 74 of the Railway Act of 1868.

Sect. 6.—In any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, of his malice aforethought, kill and murder the deceased; and it shall be sufficient in any indictment for man-

slaughter to charge that the defendant did feloniously kill and slay the deceased, and it shall be sufficient in any indictment against any accessory to any murder or manslaughter to charge the prisoner with the murder or manslaughter, as the case may be, in the manner hereinbefore specified, and then to charge the defendant as an accessory, in the manner heretofore used and accustomed *or by law provided.* —24–25 Vict., ch. 100, s. 6, Imp.

The words *or by law provided* are not in the English Statute.

Indictment.—..... The jurors ..... that A, B, on ..... at ..... in the county ..... did feloniously kill and slay one ..... against the peace .....

It need not conclude *contra formam statuti.*—R. vs. Chatburn, 1 Mood. 402. Nor is it necessary where the manslaughter arises from an act of omission, that such act of omission should be stated in the indictment.—R. vs. Smith, 11 Cox, 210.

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

In this species of homicide, malice, which is the main ingredient and characteristic of murder, is considered to be wanting; and though manslaughter is in its degree felonious, yet it is imputed by the benignity of the law to human infirmity; to infirmity which, though in the eye of the law criminal, is considered as incident to the frailty of the human constitution. In order to make an

abettor to a manslaughter a principal in the felony, he must be present aiding and abetting the fact committed. It was formerly considered that there could not be any accessories before the fact in any case of manslaughter, because it was presumed to be altogether sudden, and without premeditation. And it was laid down that if the indictment be for murder against A, and that B and C were counselling and abetting as accessories before only (and not as *present* aiding and abetting, for such are principals), if A be found guilty only of manslaughter, and acquitted of murder, the accessories before will be thereby discharged. But the position ought to be limited to these cases where the killing is sudden and unpremeditated; for there are cases of manslaughter where there may be accessories. Thus a man may be such an accessory by purchasing poison for a pregnant woman to take in order to procure abortion, and which she takes and thereby causes her death.—Reg. vs. Gaylor, Dears. & Bell, 288. If therefore upon an indictment against the principal and an accessory after the fact for murder, the offence of the principal be reduced to manslaughter, the accessory may be convicted as accessory to the manslaughter.—1 Russell, 783.

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

The several instances of manslaughter may be considered in the following order. 1. Cases of provocation. 2. Cases of mutual combat. 3. Cases of resistance to officers of justice, to persons acting in their aid, and to private persons lawfully interfering to apprehend felons, or to prevent a breach of the peace. 4. Cases where the killing takes place in the prosecution of some criminal unlawful or wanton act. 5. Cases where the killing takes place in consequence of some lawful act being criminally or

improperly performed, or of some act performed without lawful authority.—1. Russ. loc. cit.

CASES OF PROVOCATION.

Whenever death ensues from the sudden transport of passion, or heat of blood upon a reasonable provocation, and without malice, it is considered as solely imputable to human infirmity: and the offence will be manslaughter. It should be remembered that the person sheltering himself under this plea of provocation must make out the circumstances of alleviation to the satisfaction of the Court and jury, unless they arise out of the evidence produced against him; as the presumption of law deems all homicide to be malicious, until the contrary is proved. The most grievous *words* of reproach, contemptuous and insulting actions or gestures, or trespasses against lands or goods will not free the party killing from the guilt of murder, if upon such provocation a deadly weapon was made use of, or an intention to kill, or to do some great bodily harm, was otherwise manifested. But if no such weapon be used, or intention manifested, and the party so provoked give the other a box on the ear or strike with a stick or other weapon not likely to kill, and kill him unluckily and against his intention, it will be only manslaughter. Where an assault is made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose, and the party so assaulted kills the aggressor, the crime will be reduced to manslaughter, in case it appears that the assault was resented immediately, and the aggressor killed in the heat of blood, the *furor brevis* occasioned by the provocation. So if A be passing along the street, and B meeting him (there being convenient distance between A and the wall) take the wall of

him and justle him, and thereupon A kill B, it is said that such justling would amount to provocation which would make the killing only manslaughter.

And again it appears to have been considered that where A riding on the road, B whipped the horse of A out of the track, and then A alighted and killed B, it was only manslaughter. But in the two last cases, it should seem that the first aggression must have been accompanied with circumstances of great violence or insolence; for it is not every trivial provocation which, in point of law, amounts to an assault, that will of course reduce the crime of the party killing to manslaughter. Even a blow will not be considered as sufficient provocation to extenuate in cases where the revenge is disproportioned to the injury, and outrageous and barbarous in its nature; but where the blow which gave the provocation has been so violent as reasonably to have caused a sudden transport of passion and heat of blood, the killing which ensued has been regarded as the consequence of human infirmity, and entitled to lenient consideration.—1 Russ. 784. For cases on this defence of provocation, see under the head *Murder*.

In Reg. vs. Fisher, 8 C. & P. 182, it was ruled that whether the blood has had time to cool or not is a question for the Court and not for the jury, but it is for the jury to find what length of time elapsed between the provocation received, and the act done.—But in Rex vs. Lynch, 5 C. & P. 324; R. vs. Hayward, 6 C. & P. 127; Reg. vs. Eagle, 2 F. & F. 827, the question, whether or not the blow was struck before the blood had time to cool and in the heat of passion, was left to the jury: and this seems now settled to be the law on the question. The English commissioners, 4th Report, p. XXV, are also of opinion that "the law may pronounce whether

any extenuating occasion of provocation existed, but it is for the jury to decide whether the offender acted solely on that provocation, or was guilty of a malicious excess in respect of the instrument used or the manner of using it."

Cases of mutual combat.— Where, upon words of reproach, or any other sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being sought or taken on either side, if death happen under such circumstances, the offence of the party killing will amount only to manslaughter. If A has formed a deliberate design to kill B, and after this they meet and have a quarrel and many blows pass, and A kills B, this will be murder, if the jury is of opinion that the death was in consequence of previous malice, and not of the sudden provocation.— Reg. vs. Kirkham, 8 C. & P. 115. If after an exchange of blows on equal terms, one of the parties on a sudden and without any such intention at the commencement of the affray, snatches up a deadly weapon and kills the other party with it, such killing will only amount to manslaughter; but it will amount to murder if he placed the weapon, before they began to fight, so that he might use it during the affray. —1 Russell, 731; R. vs. Kessel, 1 C. & P. 437; R. vs. Whiteley, 1 Lewin, 173.

Where there had been mutual blows, and then, upon one of the parties being pushed down on the ground the other stamped upon his stomach and belly with great force, and thereby killed him, it was considered only to be manslaughter.—Rex vs. Ayes, Russ. & Ry. 166.

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

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

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

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

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

A warrant leaving a blank for the christian name of the person to be apprehended, and giving no reason for

omitting it but describing him only as the son of J. S., (it appears that J. S. had four sons, all living in his house) and stating the charge to be for assaulting A without particularizing the time, place or any other circumstances of the assault, is too general and unspecific. A resistance to an arrest thereon, and killing the person attempting to execute it, will not be murder.— R. vs. Hood, 1 Moo. 381.

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

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

If a prisoner, having been lawfully apprehended by a police-constable on a criminal charge, uses violence to the constable, or to any one lawfully aiding or assisting him, which causes death, and does so with intent to inflict grievous bodily harm, he is guilty of murder: and so, if he does so, only with intent to escape. But if in the course of the struggle, he accidentally causes an injury,

it would be manslaughter. Suppose a constable, having a good and bad warrant, arrest a man on the bad warrant only, which he allows the man to read, who sees it is void, and resists his arrest on that ground, and the result is the death of the officer; if this had been the only authority the officer had, the offence would have been only manslaughter; is the man guilty of murder by reason of the good warrant of which he knew nothing? It would seem that there are strong reasons for saying that he would not be guilty of murder. The ground on which the killing an officer is murder is that the killer is wilfully setting the law at defiance, and killing an officer in the execution of his duty. The ground on which the killing of an officer whilst executing an unlawful warrant is manslaughter is that every man has a right to resist an unlawful arrest, and that such an arrest is a sufficient provocation to reduce the killing to manslaughter. In the supposed case the killer would not be setting the law at defiance, but would be resisting to what appeared to him to be an unlawful arrest; and the actual provocation would be just as great as if the bad warrant alone existed. It is of the essence of a warrant that "the party upon whom it is executed should *know* whether he is bound to submit to the arrest:" (Per Coltman J., in *Hoye* vs. *Bush*, citing *Rex* vs. *Weir*, 1 B. & C. 288.) And where an arrest is made without a warrant, it is of the essence of the lawfulness of the arrest that the party arrested should have either express or implied notice of the cause of the arrest. Now, where a constable in the supposed case arrests on the void warrant, the party arrested has no express notice of the good warrant, for it is not shown, and no implied notice of it, for every thing done by the constable is referable to the void warrant; and, besides, the conduct of the constable is calculated

to mislead, and it may well be that the party is innocent, and knows nothing of the offence specified in the valid warrant. Lastly, it must be remembered that in such a case the criminality of the act depends upon the intention of the party arrested, and that intention cannot in any way be affected by facts of which he is ignorant.

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

Cases where the killing takes place in the prosecution of some criminal, unlawful or wanton act.—Where from an action unlawful in itself, done deliberately and with mischievous intention, death ensues, though against or beside the original intention of the party, it will be murder: and if such deliberation and mischievous intention do not appear, which is matter of fact and to be attested from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter.

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

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

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

If a man take a gun, not knowing whether it is loaded or unloaded and using no means to ascertain, fires it in the direction of any other person, and death ensues, this is manslaughter.—Reg. vs. Campbell, 11 Cox, 323.

The prisoner was charged with manslaughter. The evidence showed that the prisoner had struck the deceased twice with a heavy stick, that he had afterwards left him asleep by the side of a small fire in a country by-lane during the whole of a frosty night in January, and the next morning finding him just alive, put him under some straw in a barn, where his body was found some months after. The jury were directed that if the death of the deceased had resulted from the beating or from the exposure during the night in question, such exposure being the result of the prisoner's criminal negligence, or from the prisoner leaving the boy under the straw ill but not dead, the prisoner was guilty of manslaughter. Verdict, manslaughter.—Reg. vs. Martin, 11 Cox, 137. (See Reg. vs. Towers, 12 Cox 530, as to causing death through frightening the deceased.)

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

In making arrests in cases of midemeanor and breach of the peace (with the exception, however, of some cases of flagrant misdemeanors) it is not lawful to kill the party accused if he fly from the arrest, though he cannot otherwise be overtaken and though there be a warrant to apprehend him, and generally speaking it will be murder; but under circumstances it may amount only to manslaughter, if it appear that death was not intended.— 1 Russell, 858.

If an officer whose duty it is to execute a sentence of whipping upon a criminal, should be so barbarous as to cause the party's death by excessive execution of the sentence, he will at least be guilty of manslaughter.— 1 Hawkins P. C., ch. 29, s. 5.

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

Where a master struck his servant with one of his clogs, because he had not cleaned them, and death unfortunately ensued, it was holden to be manslaughter only because the clog was very unlikely to cause death, and the master could not have the intention of taking away the servant's life by hitting him with it.—R. vs. Wiggs, 1 Leach, 378.

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

Where a person in *loco parentis* inflicts corporal punishment on a child, and compels it to work for an unreasonable number of hours, and beyond its strength, and the child dies, the death being of consumption, but hastened by the ill-treatment, it will not be murder but only manslaughter in the person inflicting the punishment, although it was cruel and excessive, and accompanied by violent and threatening language, if such person believed that the child was shamming illness, and was really able to do the quantity of work required.—R. vs. Cheeseman, 7 C. & P. 454.

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

Death caused by negligence.—Where persons employed about such of their lawful occupations, from whence danger may probably arise to others, neglect the ordinary cautions, it will be manslaughter at least, if death is caused by such negligence.—1 Russell, 864.

That which constitutes murder when by design and of malice prepense, constitutes manslaughter when arising from culpable negligence. The deceased was with others employed in walling the inside of a shaft. It was the duty of the prisoner to place a stage over the mouth of the shaft and the death of the deceased was occasioned by

the negligent omission on his part to perform such duty. He was convicted of manslaughter, and upon a case reserved the conviction was affirmed.— Reg. vs. Hughes, 7 Cox, 301.

In an indictment for manslaughter, caused by an act of omission it is not necessary to state in the indictment that it was an act of omission on the part of the prisoner which caused the death of the deceased. The prisoner, as the private servant of B, the owner of a tramway crossing a public road, was entrusted to watch it. While he was absent from his duty, an accident happened and C was killed. The Private Act of Parliament, authorizing the road, did not require B to watch the tramway: *held*, that there was no duty between B and the public, and therefore that the prisoner was not guilty of negligence.— Reg. vs. Smith, 11 Cox, 210.

Although it is manslaughter, where the death was the result of the joint negligence of the prisoner and others, yet it must have been the direct result wholly or in part of the prisoner's negligence, and his neglect must have been wholly or in part the proximate and efficient cause of the death, and it is not so where the negligence of some other person has intervened between his act or omission and the fatal result.— Reg. vs. Ledger, 2 F. & F. 857.

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

And it is no defence to an indictment for manslaughter where the death of the deceased is shown to have been caused in part by the negligence of the prisoner, that

the deceased was also guilty of negligence, and so contributed to his own death. Contributory negligence is not an answer to a criminal charge.—R. vs. Swindall, 2 Cox, 141. In summing up in that case, Pollock, C. B., said:

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

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

And in Reg. vs. Hutchinson, 9 Cox 555, Byles, J., in his charge to the Grand-Jury, said: "If the man had not been killed, and had brought an action for damages, or if his wife and family had brought an action, if he had in any degree contributed to the result, an action could not be maintained. But in a criminal case, it was dif-

ferent. The Queen was the prosecutor and could be guilty of no negligence; and if both the parties were negligent the survivor was guilty."

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

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

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

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

In order to convict the captain of a steamer of manslaughter in causing a death by running down another vessel, there must be some act of personal misconduct or personal negligence shown on his part.— Reg. vs. Allen, 7 C. & P., 153; Reg. vs. Green, 7 C. & P. 156; Reg. vs. Taylor, 9 C. & P. 672.

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

Where a fatal railway accident had been caused by the train running off the line, at a spot where rails had been taken up, without allowing sufficient time to replace them, and also without giving sufficient, or at all events effective warning to the engine-driver; and it was the duty of the foreman of plate-layers to direct when the work should be done: *held*, that, though he was under the general control of an inspector of the district, the inspector was not liable, but that the foreman was, assuming his negligence to have been a material and a substan-

tial cause of the accident, even although there had also been negligence on the part of the engine-driver in not keeping a sufficient lookout.— Reg. vs. Benge, 4 F. & F. 504.

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

Where a person grossly ignorant of medicine administers a dangerous remedy to one labouring under a disease, proper medical assistance being at the time procurable,

and that dangerous remedy causes death, the person so administering it is guilty of manslaughter—R. vs. Webb, 2 Lewin, 196.

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

If a medical man, though lawfully qualified to practise as such, causes the death of a person by the grossly unskilful, or grossly incautious use of a dangerous instrument, he is guilty of manslaughter.—Reg. vs. Spilling, 2 M. & Rob. 107.—Any person whether a licensed medical practitioner or not who deals with the life or health of any of His Majesty's subject, is bound to have competent skill; and is bound to treat his or her patients with care, attention and assiduity, and if a patient dies for want of either, the person is guilty of manslaughter.—R. vs. Spiller, 5 C. & P. 333; R. vs. Simpson, 1 Lewin, 172; R. vs. Ferguson, 1 Lewin, 181. In cases of this nature, the question for the jury is always, whether the prisoner caused the death by his criminal inattention and carelessness.—Reg. vs. Crick, and Reg. vs. Crook, 4 F. & F. 519, 521; Reg. vs. McLeod, 12 Cox 534. On an indictment for manslaughter, by reason of gross ignorance and

negligence in surgical treatment, neither on one side nor the other can evidence be gone into of former cases treated by the prisoner.—Reg. vs. Whitehead, 3 C. & K. 202.

A mistake on the part of a chemist in putting a poisonous liniment into a medicine bottle, instead of a liniment bottle, in consequence of which the liniment was taken by his customer internally with fatal results, the mistake being made under circumstances which rather threw the prisoner off his guard, does not amount to such criminal negligence as will warrant a conviction for manslaughter.—Reg. vs. Noakes, 4 F. & F. 920—.On an indictment for manslaughter against a medical man by administering poison by mistake for some other drug, it is not sufficient for the prosecution merely to show that the prisoner who dispensed his own drugs supplied a mixture which contained a large quantity of poison, they are bound also to show that this happened through the gross negligence of the prisoner.—Reg. vs. Spencer, 10 Cox, 525.—A medical man who administered to his mother for some disease prussic acid, of which she almost immediately died, is not guilty of manslaughter, it not appearing distinctly what the quantity was which he had administered or what quantity would be too great to be administered with safety to life.—Reg. vs. Bull, 2 F. & F. 201.—An unskilled practitioner who ventures to prescribe dangerous medicines of the use of which he is ignorant, that is culpable rashness, for which he will be held responsible.—Reg. vs. Markuss, 4 F. & F. 356; Reg. vs. McLeod, 12 Cox, 234.

The prisoner was indicted for the manslaughter of an infant child: the prisoner, who practised midwifery was called in to attend a woman who was taken in labour, and when the head of the child became visible, the pri-

soner, being grossly ignorant of the art which he professed, and unable to deliver the woman with safety to herself and the child, as might have been done by a person of ordinary skill, broke and compressed the skull of the infant, and thereby occasioned its death immediately after it was born; the prisoner was found guilty; it was submitted that the child being *en ventre de sa mère* when the wound was given, the prisoner could not be guilty of manslaughter; but, upon a case reserved, the judges were unanimously of opinion that the conviction was right.—R. vs. Senior, 1 Mood. 346.

NEGLECT OF NATURAL DUTIES.

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

A master is not bound by the common law to find medical advice for his servant; but the case is different with respect to an apprentice, for a master is bound during the illness of his apprentice to find him with proper medicines, and if he die for want of them, it is manslaughter in the master.—R. vs. Smith, 8 C. & P. 153. Where a person undertakes to provide necessaries for a

person who is so aged and infirm that he is incapable of doing it for himself, and through his neglect to perform his undertaking death ensues, he is criminally responsible. On an indictment for the murder of an aged and infirm woman by confining her against her will, and not providing her with meat, drink, clothing, firing, medicines and other necessaries, and not allowing her the enjoyment of the open air, in breach of an alleged duty, if the jury think that the prisoner was guilty of wilful neglect, so gross and wilful that they are satisfied he must have contemplated her death, he will be guilty of murder; but if they only think that he was so careless that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter.—R. vs. Marriott, 8 C. & P. 425.

Verdict— General remarks.— See *ante*, under head *murder, in fine*, sect. 51, of the Procedure Act of 1869, as to a verdict of assault, in certain cases, upon any indictment for any felony. See sect. 77, *post*, as to requiring the offender to enter into recognizances and to find sureties for keeping the peace, both or either, in felonies under this Act.

Before leaving the subject of manslaughter a reference to a special clause to be found in our Statutes, on this offence, should be made.

The Railway Act of 1868, 31 Vict., chap. 68, sect. 74, says: "If any person wilfully and maliciously displaces or removes any railway switch or rail of any railway, or breaks down, rips up, injures or destroys any railway track or railway bridge or fence of any railway or any portion thereof, or places any obstruction whatever on any such rail or railway track or bridge, or does or causes to be done any act whatever, whereby any engine, machine or structure, or any matter or thing appertaining thereto is stopped, obstructed, impaired, weakened, injured or destroyed, with intent thereby to injure any person or property passing over or along such railway, and if, in consequence thereof, any person be killed, or his life be lost, such person so offending shall be guilty of manslaughter, and being found guilty, shall be punished by imprisonment in the Penitentiary for any period not more than ten nor less than four years."

It is difficult to understand *why* this clause has been inserted in the Statute Book. The killing of any person, under the circumstances mentioned in it would, at common law, be murder. What induced the Legislature to reduce it to manslaughter? Or has the clause been inserted, under the impression that the killing of any person under such circumstances would not, at common law, be punishable either as manslaughter or as murder? This is hardly possible. In all cases, it would be felonious homicide, and in most cases murder. Supposing the act done a felony in itself, and it would be such in almost all cases, as well by the last part of section 73 of the same Act, as by section 31 of chap. 20, and section 39 of chap. 22, of the 32–33 Victoria, the killing in such a case is always murder. "A common and plain rule on this subject," says Bishop, 2 Cr. L. 694, "is, that, whenever one does an act with the design of committing any felony, though not a felony dangerous to human life, yet, if the life of another is accidentally taken, his offence is murder." Or in the language of Baron Bramwell, in Reg. vs. Horsay, 3 F. & F. 287: "the law laid down was that where a prisoner, in the course of committing a felony, caused the death of a human being, that was murder, *even though he did not intend it.*"

And if the act committed or attempted is only a mis-

demeanor, yet the "*accidental*" causing of death, in consequence of this act, is murder, if the misdemeanor is one endangering human life.—Bishop, 2 Cr. L. 691. And, in saying that "if the act intended or attempted were unlawful but not amounting to felony, the killing is manslaughter, not murder," page 246 of his valuable *treatise on the Criminal Law of Canada*, Mr. Clarke seems to have extended rather erroneously the rule of the common law. All our books repeat, for instance, that if a large stone be thrown at one with a deliberate intention to hurt, though not to kill him, and, by accident, it kill him, or any other, this is murder.—1 Hale, 440, 1 Russell, 742. Also, that where the intent is to do some great bodily harm to another, and death ensues, it will be murder: as if A intend only *to beat* B in anger, or from preconceived malice, and happen to kill him, it will be no excuse that he did not intend all the mischief that followed: for what he did was *malum in se*, and he must be answerable for all its consequences: he beat B with an intention of doing him some bodily harm, and is therefore answerable for all the harm he did.—1 Russell, 742. And the rule seems very clearly laid down in Foster, 261, as follows: "If an action unlawful in itself be done deliberately and with intention of mischief or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue *against or beside the original intention of the party*, it will be murder. But if such mischievous intention doth not appear, which is matter of fact and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death, because the act upon which death ensued was unlawful."

These authorities show clearly that, if a man, with intent to injure any person or property, wilfully and

maliciously removes a rail from a railway track, and that, in consequence, a train is thrown off the track and a person killed, this man, at common law, is guilty of murder. And yet, in Canada, by sect. 74 of the Railway Act, he is only guilty of manslaughter. And then, though, generally, manslaughter is punishable by imprisonment for life, (sect. 5, ch. 20, 32–33 Vict.) the legislator has specially provided, by this sect. 74 of the Railway Act, that manslaughter which may, at one blow, destroy hundreds of human beings shall not be punished by more than ten years imprisonment!

It is thought useful to insert here the special report made by the Select Committee of the House of Commons, to which was referred, during the last Session of the Imperial Parliament, the *Homicide Law Amendment Bill*, to show that, in England, the necessity of a change in the law on murder and manslaughter is fully admitted. It requires no elaborate argumentation to prove that what is wrong there cannot be right here, especially when fundamental principles, on such a grave and important subject, are at issue; and a glance at the notes above given, on the present state of our law of homicide, will conclusively demonstrate the necessity of a complete change in the matter: *if there is any case in which the law should speak plainly without sophism or evasion, it is where life is at stake and it is on this very occasion that the law is most evasive and most sophistical.*

"Your committee have examined Mr. Justice Blackburn and Baron Bramwell, and have received from the Chief Justice of England a letter containing an elaborate criticism of the Homicide Law Amendment Bill. They have also examined Mr. Stephen, Q.C., by whom the Bill was drawn.

It was been strongly urged before your committee that partial codification is a mistake, and that no measure should be passed till the whole of that branch of the law to which it belongs has been reduced to a series of simple and abstract positions. Your committee think that such a doctrine would be fatal to the prospect of producing any code.

At the same time, they observe that in the Bill before them there are many provisions which are not peculiar to the law of Homicide, but extend to almost every sort of crime, and that there are others which are common to homicide and to other injuries to the person. It may be that the best way of commencing a penal code would be to deal first with such rules of law as are common to all or to large classes of crimes, and thus at once to avoid needless repetition, and to place the whole doctrine of criminal responsibility on a clear and intelligible basis.

The subject referred to your committee is of the highest importance. The responsibility of declaring the terms on which it shall be lawful to take the life of a fellow creature, is the most awful that can be undertaken. It should not be adventured on as a test or experiment, but should be reserved till the method of codification has been perfected by numerous trials or less momentous subjects.

The subjects best adapted for a code are obviously those in which the law is most technical, where its definitions are most accurate, and the terms it employs are furthest removed from the loose and careless vocabulary of common life. With such terms it is comparatively easy to construct abstract legal propositions. But in the case of homicide, we have to deal, not with technical terms, but with ordinary language, which is quite intelligible when used by a Judge in directing a jury on a state of facts proved before them, but which, when reduced to abstract propositions, becomes obscure and ambiguous from the want of particulars to which the proposition applies, and from the want of a clear definition of the terms used. These terms, such as "causing death without actual injury to the body," "causing death by a course of conduct" "an act by which death is caused, which would not have caused death but for intermediate events, not its consequences" and so forth, would doubtless ultimately have a fixed and technical meaning given to them by judicial interpretation, but in the meantime would, it may be apprehended, rather serve to provoke than to remove controversy. It would seem that a code aiming, like the Homicide Bill, to reduce a large and complicated subject to a few abstract propositions, can hardly be made intelligible to the non-legal mind without the use of illustrations, by putting particular cases, an important innovation which your committee recommend to the favourable attention of the House.

It has been urged with great force that the law of homicide requires codification more than any other, because it is not to be found in books or statutes, but in a kind of oral tradition and understanding among lawyers, which is only acquired by practice. But if this be so, it furnishes a conclusive reason against commencing to codify with the law of homicide and above all against delegating such a duty to a select committee of the House of Commons. To make a code is a work of compression, simplification and arrangement. It assumes the knowledge of the law by the codifier, but in order to codify the law of homicide it is necessary first to declare what it is and that is impossible, as it seems, to any but practising lawyers, for the reason stated above. It is better

surely to begin with that which is easily ascertained than select a subject where we must take upon ourselves to declare the law first before we co-ordinate and condense it.

The law of homicide requires very considerable alterations in substance, before it is reduced to its simplest form and made permanent in a code. We are required to declare that negligence is not manslaughter, and that suicide is not murder; both, probably, salutary changes, but which should be settled on their own merits.

The existing definition of murder, which may be roughly stated as killing with malice aforethought, is far too narrow, and the defect has been supplied, not by redefining the crime, but by subtle intendments of law, by which malice is presumed to exist in some cases where the action is unpremeditated, and even in some cases where death is caused by accident. It is most desirable that a state of the law under which people are condemned and executed by means of a legal fiction should cease. But such a change, however urgently required, is, in the opinion of your committee, not a matter for them, but rather for the law officers of the Crown, assisted by the advice, and fortified by the sanction, of the highest legal authorities, after mature and careful deliberation. Nothing would be more likely to impede, or indeed, utterly to frustrate the work of codification than the suspicion or certainty that, under the pretext of simplification and rearrangement, great and important changes were effected which had never been brought in a clear and simple way to the notice of Parliament. For these reasons your committee are of opinion that it is not desirable to proceed with the present Bill, notwithstanding that this experiment in codification has been presented to them with every advantage that learning and skill can give it.

Finally, your committee earnestly recommend that the attention of the Government and of Parliament should be directed to the present imperfect state of the definition of the law of murder. They believe that they have collected materials from which a re-definition of murder can be produced, and they are convinced that such a definition is urgently needed, not only to rescue the law from its present discreditable state, but to give clear notions to the public at large of the real nature and extent of this crime, and to prevent the confusion often created in the minds of jurors by an appeal to the doctrine that murder cannot be without malice aforethought, which it is not always easy for the judge to remove. If there is any case in which the law should speak plainly, without sophism or evasion, it is where life is at stake; and it is on this very occasion that the law is most evasive and most sophistical."

CONSPIRING OR SOLICITING TO MURDER.

Sect. 3.—All persons who conspire, confederate and agree to murder any person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, and whosoever solicits, encourages, persuades, endeavours to persuade or proposes to any person to murder any other person, whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not, are and is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding ten years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour.—24–25 Vict. ch. 100 s. 4, Imp.

Indictment..... That J. S., J. T., and E. T. on ——— unlawfully and wickedly did conspire, confederate and agree together one J. N. feloniously, wilfully, and of their malice aforethought to kill and murder, against the form..... (*you may add counts charging the defendants or any of them with "soliciting, encouraging, etc., or endeavouring to persuade, etc., if the facts warrant such a charge,*)—Archbold, 647.

No indictment can be preferred for conspiracy, unless one or other of the preliminary steps required by sect. 28 of the Procedure Act of 1869 has been taken.

As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour, both or either, in addition to or in lieu of any other punishment, see sect. 77, *post.*

See 1 Russell, 967; 3 Russell, 664.

Reg. vs. Bernard, 1 F. & F. 240.

In Reg. vs. Banks, 12 Cox, 393, upon an indictment under this clause, the defendants were convicted of an attempt to commit the misdemeanor charged.— *See sect.* 49 of the Procedure Act of 1869.

PUNISHMENT OF ACCESSORIES AFTER THE FACT TO MURDER.

Sect. 4.—Every accessory after the fact to murder shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour. —24–25 Vict., ch. 100, s. 67, Imp.

See 31 Vict., ch. 72, as to accessories and abettors of indictable offences. The above clause provides for a

different punishment in cases of accessories after the fact to murder; the procedure and trial in such cases continue to be ruled by sects. 4 and 5 of the said 31 Vict., ch. 72.

EXCUSABLE HOMICIDE.

Sect. 7.—No punishment or forfeiture shall be incurred by any person who kills another by misfortune, or in his own defence or in any other manner without felony.—24-25 Vict., ch. 100, s. 7, Imp.

Homicide in self-defence, *i.e.* committed *se et sua defendendo* in defence of a man's person or property, upon some sudden affray, has been usually classed with homicide *per infortunium*, under the title of *excusable*, as distinct from *justifiable*, because it was formerly considered by the law as in some measure blameable, and the person convicted either of that or of homicide by misadventure forfeited his goods. The above clause has put an end to these distinctions, which Foster says "had thrown some darkness and confusion upon this part of the law."—Foster, 273.

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

gering his life, kills the other without retreating at all.—1 Hawkins, ch. 11, s. 13-14.

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

Before a person can avail himself of the defence that he used a weapon in defence of his life, he must satisfy the jury that the defence was necessary, that he did all he could to avoid it, and that it was necessary to protect himself from such bodily harm as would give him a reasonable apprehension that his life was in immediate danger. If he used the weapon having no other means of resistance and no means of escape, in such case, if he retreated as far as he could, he would be justified.—Reg. vs. Smith, 8 C. & P. 160; Reg. vs. Bull, 9 C. & P. 22.

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

Chance medley, or as it was sometimes written, *chaud medley*, has been often indiscriminately applied to any manner of homicide by misadventure: its correct interpretation seems to be a killing happening in a sudden encounter: it will be manslaughter or self-defence according to whether the slayer was actually striving and

combating at the time. the mortal stroke was given, or had *bonâ fide* endeavoured to withdraw from the contest, and afterwards, being closely pressed, killed his antagonist to avoid his own destruction; in the latter case, it will be justifiable or excusable homicide, in the former, manslaughter.—1 Russell, 888.

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

But it would seem that in no case is a man justified in intentionally taking away the life of a mere trespasser, his own life not being in jeopardy: he is only protected from the consequences of such force as is reasonably necessary to turn the wrong-doer out. A kick has been held an unjustifiable mode of doing so,— Child's case, 2 Lewin, 214: throwing a stone has been held a proper mode.—Hinchcliffe's case, 2 Lewin, 161.

Homicide committed in prevention of a forcible and atrocious crime, amounting to felony, is justifiable. As if a man come to burn my house, and I shoot out of my house, or issue out of my house and kill him. So, if A makes an assault upon B, a woman or maid, with intent to ravish her, and she kills him in the attempt, it is justifiable, because he intended to commit a felony. And not only the person upon whom a felony is attempted may repel force by force, but also his servant or any other person present may interpose to prevent the mischief; and if death ensue, the party so interposing will be justified; but the attempt to commit a felony should be apparent and not

left in doubt, otherwise the homicide will be manslaughter at least; and the rule does not extend to felonies without force, such as picking pockets, nor to misdemeanors of any kind.—2 Burn 1314.

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

As to justifiable homicide by officers of justice or other persons in arresting felons, see under the heads *Murder* and *Manslaughter*. Also Foster, 258. As to homicide by misadventure, 2 Burn, 316.

PETIT TREASON ABOLISHED.

Sect. 8.—Every offence which before the abolition of the crime of petit treason, would have amounted to petit treason shall be deemed to be murder only, and no greater offence; all persons guilty in respect thereof, whether as principals or accessories, shall be dealt with, indicted, tried and punished as principals and accessories in murder.—24–25 Vict., ch. 100, sect. 8, Imp.

Petit treason was a breach of the lower allegiance of

private and domestic faith, and considered as proceeding from the same principle of treachery in private life as would have led the person harbouring it to have conspired in public against his liege lord and sovereign. At common law, the instances of this kind of crime were somewhat numerous and involved in some uncertainty; but by the 25 Edw. 3, ch. 2, they were reduced to the following cases: 1. Where a servant killed his master. 2. Where a wife killed her husband. 3. Where an ecclesiastical person, secular or regular, killed his superior, to whom he owed faith and obedience. It was murder aggravated by the circumstance of the allegiance which the murderer owed to the deceased; and in consequence of that circumstance of aggravation, the judgment upon a conviction was more grievous than in murder. Petit treason is now nothing more than murder.—Greaves' note, 1 Russell, 710.

VENUE IN TRIAL OF MURDER IN CERTAIN CASES.

Sect. 9.—Where any person being feloniously stricken, poisoned, or otherwise hurt, upon the sea, or at any place out of Canada, shall die of such stroke, poisoning or hurt in Canada, or being feloniously stricken, poisoned, or otherwise hurt at any place in Canada, shall die of such stroke, poisoning or hurt upon the sea, or at any place out of Canada, every offence committed in respect of any such case, whether the same amounts to murder or manslaughter, or of being accessory to murder or manslaughter, may be dealt with, enquired of, tried, determined and punished in the district, county or place in Canada in which such death, stroke, poisoning or hurt happens, in the same manner in all respects as if such offence had been wholly committed in that district, county or place. —24–25 Vict., ch. 100, s. 10, Imp.

ATTEMPTS TO MURDER.

ADMINISTERING POISON, WOUNDING, ETC., WITH INTENT TO MURDER.

Sect. 10.—Whosoever administers or causes to be administered to or to be taken by any person, any poison or other destructive thing, or by any means whatsoever, wounds or causes any grievous bodily harm to any person, with intent, in any of the cases aforesaid, to commit murder, is guilty of felony, and shall suffer death as a felon.—24-25 Vict., ch. 100, s. 11, Imp.

Not triable at Quarter Sessions.—Procedure Act, 1869, s. 12.

Indictment for administering poison with intent to murder.—.....The jurors for Our Lady the Queen upon their oath present, that J. S., on.....feloniously and unlawfully did administer to one A. B., (*administer or cause to be administered to or to be taken by any person*) a large quantity, to wit, two drachms of a certain deadly poison called white arsenic, (*any poison or other destructive thing*) with intent thereby then feloniously, wilfully, and of his malice aforethought the said A. B. to kill and murder, against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity. (*Add counts stating that the defendant "did cause to be administered to" and "did cause to be taken by" a large quantity, etc., etc., and if the description of poison be doubtful, add counts describing it in different ways; and one count stating it to be "a certain destructive thing to the jurors aforesaid unknown."*)—Archbold, 649.

The indictment must allege the thing administered to be poisonous or destructive; and therefore an indictment

for administering sponge mixed with milk, not alleging the sponge to be destructive, was holden bad.—R. vs. Powler, 4 C. & P. 571.

If there be any doubt whether the poison was intended for A. B. add a count, stating the intent to be to "commit murder" generally.

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

An indictment stating that the prisoner gave and administered poison is supported by proof that the prisoner gave the poison to A to administer as a medicine to B, with intent to murder B, and that A neglecting to do so, it was accidentally given to B by a child, the prisoner's intention to murder continuing. Reg. vs. Michael, 2 Moo. 120.

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

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

Evidence of administering at different times may be given to show the intent.— Archbold, 650. The intent to murder must be proved by circumstances from which that intent may be implied.

Indictment for wounding with intent to murder.—..... ..... one J. N. feloniously and unlawfully did wound (*wound or cause any grievous bodily harm*) with intent &c., &c., &c., (*as in the last precedent.*) Add a count "with the intent to commit murder" generally. Archbold, 650.

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

"As the general term "wound" includes every "stab" and "cut" as well as other wounds, that general term has alone been used in these Acts. All therefore that it is now necessary to allege in the indictment is, that the

prisoner did wound the prosecutor; and that allegation will be proved by any wound, whether it be a stab, cut, or other wound." Greaves, Cons. Acts, 45. The word "wound" includes incised wounds, punctured wounds, lacerated wounds, contused wounds, and gunshot wounds. —Archbold, 664.

But to constitute a wound, within the meaning of this Statute, the continuity of the skin must be broken.—R. vs. Wood, 1 Mood. 278.

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

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

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

It is not necessary that the prosecutor should be in fact wounded in a vital part; for the question is not what the wound is, but what wound was intended.— R. vs. Hunt, 1 Mood. 93.

There does not seem any objection to insert counts on the 10th and 17th sections (Canada); and it is in all cases advisable, where it is doubtful whether the prisoner intended to murder or merely to maim.—3 Burn 752.— Archbold, form of indictment, 650; R. vs. Strange, 8 Car. & P. 172; R. vs. Murphy, 1 Cox, 108.

On the trial of any indictment for wounding with intent to murder, if the intent be not proved, the jury may convict of unlawfully wounding.—Archbold, 650.

This verdict would fall under the last part of sect. 19, of the 32-33 Vict., ch. 20, see *post.*

Archbold, 650, says that a defendant cannot, on an indictment for the felony, *plead guilty* to the misdemeanor. But it appears to have been done recently, in Reg. vs. Roxburg, 12 Cox, 8, and allowed by Ch. Justice Cockburn.

The defendant may also be found guilty of an attempt to commit the felony charged: s. 49, Procedure Act, 1869.

The jury may also find a verdict of common assault, if the evidence warrants it.—Sect. 51, Procedure Act, 1869. Reg. vs. Archer, 2 Mood. 283.

If the defendant is *convicted* of a misdemeanor only, sect. 77 *post* as to fine and sureties applies.

An attempt to commit suicide remains a misdemeanor at common law, and is not an attempt to commit murder within this Statute.—R. vs. Burgess, L. & C. 258.

ATTEMPTING TO MURDER BY DESTROYING OR DAMAGING BUILDING WITH GUNPOWDER.

Sect. 11.—Whosoever, by the explosion of gunpowder or other explosive substance, destroys or damages any building, with intent to commit murder is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 100, s. 12, Imp.

Indictment.— ..... feloniously, unlawfully and maliciously did, by the explosion of a certain explosive substance, that is to say, gunpowder, destroy (*destroy or damage*) a certain building situate.....with intent thereby then feloniously, wilfully and of his malice aforethought, one J. N. to kill and murder, against..... (*Add a count, stating the intent to be generally "to commit murder."*)

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

See sect. 77 of this Act *post*, as to recognizance and sureties.

The jury may return a verdict of an attempt to commit the felony.—S. 49, Procedure Act, 1869

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

SETTING FIRE TO OR DESTROYING SHIPS WITH INTENT TO MURDER.

Sect. 12.—Whosoever sets fire to any ship or vessel, or any part thereof, or any part of the tackle, apparel or furniture thereof, or any goods or any chattels being therein or casts away or destroys any ship or vessel, with the intent in any of such cases to commit murder, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 100, s. 13, Imp.

Indictment.— ..... feloniously and unlawfully did set fire to (*cast away or destroy*) a certain ship called ..... with intent thereby then feloniously, wilfully and of his malice aforethought, to kill one..... (*Add a count stating the intent to "commit murder" generally.*)

Sect. 49 of the Procedure Act of 1869 allows a verdict for an attempt to commit the felony charged in certain cases.

See section 77 *post* as to sureties to keep the peace, and sect. 94 of the Procedure Act of 1869, as to solitary confinement.

ATTEMPTING TO POISON, SHOOT, DROWN, ETC., WITH INTENT TO MURDER.

Sect. 13.—Whosoever attempts to administer to, or attempts to cause to be administered to, or to be taken by any person, any poison or other destructive thing, or shoots at any person, or by drawing a trigger or in any other manner, attempts to discharge any kind of loaded arms at any person, or attempts to drown, suffocate or strangle any person, with intent in any of the cases aforesaid to commit murder, whether any bodily injury be effected or not, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 100, sect. 14, Imp.

Sect. 18.—Any gun, pistol or other arm, loaded in the barrel with gunpowder or 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, shall be deemed to be loaded arms, within the meaning of this Act, although the attempt to discharge the same may fail for want of proper priming or other cause.—24-25 Vict., ch. 100, s. 19, Imp.

Greaves (Consol. Acts, 48) on clause 14, Imp. remarks: "Where the prisoner delivered poison to a guilty agent, with directions to him to cause it to be administered to another in the absence of the prisoner, it was held that the prisoner was not guilty of an attempt to administer poison, within the repealed acts.—Reg. vs. Williams, 1 Den. 39; and the words 'attempt to cause to be administered to, or to be taken by' were introduced in this section to meet such cases."

And on sect. 19 Imp., he says: "This clause is new, and is introduced to meet every case where a prisoner attempts to discharge a gun, etc., etc., loaded in the barrel, but which misses fire for want of priming, or of a copper cap, or from any like cause. Rex vs. Carr, Rus. & Ry. 377; Anon, 1 Russell, 979; and Rex vs. Harris, 5 C. & P. 159, cannot therefore be considered as authorities under this Act."

Indictment for attempting to poison with intent.—.....feloniously and unlawfully did attempt to administer (*attempt to administer to, or attempt to cause to be administered to, or to be taken by*) to one J. N. a large quantity, to wit, two drachms of a certain deadly poison called white arsenic (*any poison or other destructive thing*) with intent thereby then feloniously, wilfully, and of his malice aforethought, the said J. N. to kill and murder, against..... (*Add a count stating the intent "to commit murder," generally. Add counts charging that the defendant "attempted to cause to be administered to" and that he "attempted to cause to be taken by" J. N. the poison.*) Archbold, 651.

In R. vs. Cadman, 1 Mood. 114, the defendant gave the prosecutrix a cake containing poison, which the prosecutrix merely put into her mouth, and spit out again, and did not swallow any part of it. It is said in Archbold,

651, that these circumstances would support an indictment under the above clause.

Where the prisoner put salts of sorrel in a sugar basin, in order that the prosecutor might take it with his tea, it was held an attempt to administer.—Reg. vs. Dale, 6 Cox, 547.

See remarks under clause 10 *supra.*

Indictment for attempting to drown with intent to murder. —.....feloniously and unlawfully did take one J. N. into both the hands of him the said J. S. and feloniously and unlawfully did cast, throw, and push the said J. N. into a certain pond wherein there was a great quantity of water, and did thereby then feloniously and unlawfully attempt the said J. N. to drown and suffocate, with intent thereby then feloniously, wilfully and of his malice aforethought, the said J. N. to kill and murder, against .....(*Add a count charging generally that the defendant did attempt to drown J. N. and counts charging the intent to be to commit murder.*)— Archbold, 652.

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

the consequences. Coltman, J., stopped the case, being of opinion that the evidence against the prisoner showed his intention to have been rather to prevent the landing of the boys than to do them any injury.— Sinclair's case, 2 Lew. 49.

Indictment for shooting with intent to murder.—.....a certain gun, then loaded with gunpowder and divers leaden shot, at and against one J. N. feloniously and unlawfully did shoot, with intent thereby then feloniously .....(*as in the last precedent.*) *Add also counts stating "with intent to commit murder" generally. Also a count for shooting with intent to maim, etc., etc , under sect.* 17, *post*—Archbold, 652.

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

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

It seems doubtful whether it must not appear, in order to make out the intent to murder, that that in-

tent existed in the mind of the defendant at the time of the offence, or whether it would be sufficient if it would have been murder had death ensued.—Archbold, 652.

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

These difficulties, however, seem to be obviated by the present Statute, which, instead of using the words "with intent to murder such person" has the words "with intent to commit murder".....In all cases of doubt, as to the intention, it would be prudent to insert one count for shooting at A with intent to murder him; another "with intent to commit murder;" and a third for shooting at A, with intent to murder the person really intended to be killed, and if the party intended to be killed were unknown, a count for shooting at A with intent to murder a person to the jurors unknown.

In a recent case, 1870, Reg. vs. Stopford, 11 Cox 643, Brett, J., after consulting Mellor, J., held, following Reg. vs. Smith, *supra*, that an indictment charging the prisoner with wounding Haley, with intent to do him, Haley, grievous bodily harm, was good, although it was proved that the prisoner intended to wound somebody else, and that he mistook Haley for another man.

A bodily injury is, in cases under this section, not material, "whether any bodily injury be effected or not."

Indictment for attempting to shoot with intent, &c.—.....did, by drawing the trigger (*drawing a trigger or in any other manner*) of a certain pistol then loaded in the barrel with gunpowder and one leaden bullet, feloniously and unlawfully attempt to discharge the said pistol at and against one J N with intent..... (*as in the last precedent.*) *Add a count charging an intent to commit murder, and counts for attempting to shoot with intent to main, under sect.* 17. *The indictment need not in the latter clause, describe it as "the said pistol so loaded as aforesaid."*—Archbold, 653.

See remarks under this section, *supra*.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

See sect. 77, *post*, as to sureties to keep the peace.

A verdict of common assault may, in certain cases, be given, upon an indictment under this section.—Sect. 51 Procedure Act, 1869.

Sect. 14.—Whosoever by any means other than those specified in any of the preceding sections of this Act, attempts to commit murder, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 100, s. 15, Imp.

Indictment.—.....feloniously, unlawfully and maliciously, did, by then (*state the act*) attempt feloniously, wilfully and of his malice aforethought, one J N to kill and murder against..... (*Add a count charging the intent to be to commit murder.*)—Archbold, 655.

Greaves, on this clause, says (Consol. Acts, 48): "This section is entirely new, and contains one of the most important amendments in these Acts. It includes every attempt to murder not specified in any preceding section. It will therefore embrace all those atrocious cases where the ropes, chains, or machinery used in lowering miners into mines have been injured with intent that they may break, and precipitate the miners to the bottom of the pit. So, also, all cases where steam engines are injured, set on work, stopped, or anything put into them, in order to kill any person, will fall into it. So, also, cases of sending or placing infernal machines with intent to murder. See Rex vs. Mountford, R. & M. C. C. 441. Indeed, the malicious may now rest satisfied that every attempt to murder, which their perverted ingenuity may devise, or their fiendish malignity suggest, will fall within some clause of this Act, and may be visited with penal servitude for life. In any case where there may be a doubt whether the attempt falls within the terms of any of the preceding sections, a count framed on this clause should be added."

As to solitary confinement, see sect. 94 of the Procedure Act of 1869, and sect. 77.—As to requiring the offender to enter in to his own recognizances and to find sureties, *both or either*, for keeping the peace, in addition to any authorized punishment.

LETTERS THREATENING TO MURDER.

Sec. 15. — Whosoever 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, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding ten years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement. —24-25 Vict., ch. 100, s. 16, Imp.

Indictment:—.. feloniously and maliciously did send (*send, deliver, utter, or directly or indirectly cause to be received*) to one J. N. a certain letter (*letter or writing*) directed to the said J. N., by the name and description of Mr. J. N. threatening to kill and murder the said J. N., he the said.....(*defendant*) then well knowing the contents of the said letter, which said letter is as follows, that is to say....Against the form....And the ju-

rors aforesaid.....that the said....on....feloniously and maliciously did utter a certain writing..... (*as in the first count, substituting writing for letter.*—Archbold, 853.

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

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

The Procedure Act of 1869, sect. 24, now gives the following rule on the matter: "Whenever it is necessary to make an averment in an indictment, as to any instrument, whether the same consists wholly or in part of writing, print or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or *fac-simile* of the whole or of any part thereof."—14-15 Vic., ch. 100, s. 7, Imp.

Greaves, Crim. L. Consol. Acts, 50, says on this clause: "The words *directly or indirectly caused to be received*, are taken from the 9 Geo. 4, c. 55, s. 8, and introduced here in order to prevent any difficulty which might arise as to a case falling within the words *send, deliver or utter*. The words *to any other person* in the 10 & 11 Vic., c. 66. s. 1, were advisedly omitted, in order that ordering, sending, delivering, uttering, or causing to be received may be included. If, therefore, a person were to send a letter or writing without any address by a person with direction to drop it in the garden of a house in which several persons lived, or if a person were

to drop such a letter or writing anywhere, these cases would be within this clause. In truth, this clause makes the offence to consist in sending, &c., any letter or writing which contains a threat to kill or murder any person whatsoever, and it is wholly immaterial whether it be sent, &c., to the person threatened or to any other person. The cases, therefore, of Rex. vs. Paddle, R. & R. 484; Reg. vs. Burridge, 2 M. & Rob. 296; Reg. vs. Jones, 2 C. & K. 398; 1 Den. C. C. R. 218; and Reg. vs. Grimwade, 1 Den. C. C. R. 30, are not to be considered as authorities on this clause, so far as they decide that the letter must be sent, &c., to the party threatened. In every indictment on this and the similar clauses in the other Acts, a count should be inserted alleging that the defendant uttered the writing without stating any person to whom it was uttered."

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

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

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

In Rex. vs. Boucher, 4 C. & P. 562, the following letter was held to contain a threat to murder:—"You are a rogue, thief and vagabond, and if you had your deserts, you should not live the week out; I shall be with you shortly, and then you shall nap it, my banker. Have a care, old chap, or you shall disgorge some of your ill-gotten gains, watches and cash, that you have robbed

the widows and fatherless of. Don't make light of this, or I'll make light of you and yours. Signed, *Cut-throat.*"

Where an indictment contained three counts, each charging the sending of a different threatening letter, Byles, J., held that the prosecutor must elect on which count he would proceed, though any letter leading up to or explaining the letter on which the trial proceeded would be admissible.—Reg. vs. Ward, 10 Cox, 42.

As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

And sect. 77, *post*, as to requiring the offender to enter into his own recognizances and to find sureties, in addition to any other authorized punishment.

IMPEDING PERSONS ENDEAVOURING TO ESCAPE FROM WRECKS.

Sect. 16.—Whosoever unlawfully and maliciously prevents or impedes any person, being on board of or having quitted any ship or vessel in distress, or wrecked, stranded or cast on shore, in his endeavour to save his life, or unlawfully and maliciously prevents or impedes any person in his endeavour to save the life of any such person as in this section first aforesaid, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vict., ch. 100, s. 17, Imp.

Indictment.—The jurors for Our Lady the Queen upon their oath present, that before and at the time of the committing of the felony hereinafter mentioned, to wit, on.....a certain ship was stranded and cast on shore,

and that J. S. on the day and year aforesaid, one A. B. then endeavouring to save his life from the said vessel so stranded and cast on shore as aforesaid, feloniously, unlawfully and maliciously did prevent and impede against .....—Archbold, 680.

As to solitary confinement, see the Procedure Act of 1869, sect. 94; and sect. 51 of the same Act, as to a verdict of common assault in certain cases, upon an indictment for felony.

See sect. 77, *post*, as to sureties to keep the peace in addition to any other punishment in certain cases. By sect. 19 of 36 Vict., ch. 55, *an act respecting wreck and salvage* other provisions for the offences here above mentioned are made; but by sect. 33 of the said Act, it is enacted that—"Any person committing an offence against this Act, which is also an offence against some other Act, may be prosecuted, tried, and, if convicted, punished under either Act."

SHOOTING OR ATTEMPTING TO SHOOT, WOUNDING, ETC., ETC., ETC., WITH INTENT TO DO GRIEVOUS BODILY HARM.

Sect. 17.—Whosoever unlawfully and maliciously, by any means whatsoever, wounds or causes any grievous bodily harm to *any* person, or shoots at any person, or by drawing a trigger or in any other manner attempts to discharge any kind of loaded arms at any person, with intent in any of the cases aforesaid to maim, disfigure or disable *any* person, or to do some other grievous bodily harm to *any* person, or with the intent to resist or prevent the lawful apprehension or detainer of *any* person, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term

not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years with or without hard labour, and with or without solitary confinement—24-25 Vict., ch. 100, s. 18, —Imp.

See section 18, *supra*, as to what constitutes a loaded arm within the meaning of this Act.

Indictment for wounding with intent to maim—.....That J. S. on.....one J. N. feloniously, unlawfully and maliciously did wound, with intent in so doing, him the said J. N. thereby then to maim; against ....*Add count stating "with intent to disfigure," and one "with intent to disable." Also one stating with "intent to do some grievous bodily harm."—And if necessary one "with intent to prevent (or resist) the lawful apprehension of."*—Archbold, 663.

An indictment charging the act to have been done "feloniously, wilfully and maliciously" is bad, the words of the Statute being "unlawfully and maliciously."—R. vs. Ryan, 2 Mood. 15. In practice the first count of the indictment is generally for wounding with intent to murder, under sect. 10. These counts are allowed to be joined in the same indictment, though the punishments of the several offences specified in them are different.—Archbold, 664.

The word "maliciously" in this section does not mean with malice aforethought; for if it did the offence would be included under the 13th section. This clause includes every wounding done without lawful excuse, with any of the intents mentioned in it, for from the act itself malice will be inferred.—Archbold 669.

The instrument or means by which the injury was inflicted need not be stated in the indictment, and, if stated, need not be proved as laid.—R. vs. Briggs, 1

Mood. 318. And in the same case, it was held that upon an indictment which charged a wound to have been inflicted by striking with a stick and kicking with the feet, proof that the wound was caused either by striking with a stick or kicking was sufficient, though it was uncertain by which of the two the injury was inflicted.

As to what is "a wound" within the Statute, see *ante* remarks under section 10.

In order to convict of the felony, the intent must be proved as laid; hence the necessity of several counts charging the offence to have been committed with different intents. If an indictment alleged that the defendant cut the prosecutor with intent to murder, to disable, and to do some grievous bodily harm, it will not be supported by proof of an intention to prevent a lawful apprehension., R. vs. Duffin, R. & R. 365; R. vs. Boyce, 1 Mood. 29; unless for the purpose of effecting his escape the defendant also harboured one of the intents stated in the indictment, R. vs. Gillow, 1 Mood. 85; for where both intents exist, it is immaterial which is the principal and which the subordinate. Therefore, where, in order to commit a rape, the defendant cut the private parts of an infant, and thereby did her grievous bodily harm, it was holden that he was guilty of cutting with intent to do her grievous bodily harm notwithstanding his principal object was to commit the rape.—R. vs. Cox, Russ. & Ry. 362. So also, if a person wound another in order to rob him, and thereby inflict grievous bodily harm, he may be convicted on a count charging him with an intent to do grievous bodily harm.—Archbold, 666.

An indictment charging the prisoner with wounding A, with intent to do him grievous bodily harm, is good, although it is proved that he mistook A for some body

else, and that he intended to wound another person. —11 Cox, 643, Reg. vs. Stopford.

The prisoner was indicted for shooting at A with intent to do him grievous bodily harm. He fired a pistol into a group of persons, who had assaulted and annoyed him, among whom was A, without aiming at A, or any one in particular, but intending generally to do grievous bodily harm, and wounded A. Held, on a case reserved, that he was rightly convicted.—1864, Reg. vs. Fretwell, Leigh & Cave, 443.

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

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

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

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

Under an indictment for a felonious assault with intent to do grievous bodily harm, a plea of guilty to a common assault may be received, if the prosecution consents.—Reg. vs. Roxbury, 12 Cox, 8.

Upon an indictment, for the felony under this clause, the jury may find a verdict of guilty of an attempt to commit it.—Sect. 49, Procedure Act, 1869.

A verdict of common assault may also be found.—Sect. 51, Procedure Act, 1869.

And, if the prosecutor fail in proving the intent, the defendant, in virtue of the last part of sect. 19 of chap. 20, 32-33 Vict., *(next section)* may be convicted of the misdemeanor of unlawfully wounding, and sentenced under said sect.—Archbold, 667.

And where three are indicted for malicious wounding with intent to do grievous bodily harm, the jury may convict two of the felony and the third of unlawfully wounding.—Reg. vs. Cunningham, Bell C.C. 72.

As to solitary confinement, see Procedure Act, 1869, sect. 94.

And sect. 77, *post*, for additional punishment in certain cases.

WHAT CONSTITUTES LOADED ARMS.

Sect. 18.—See, *ante*, under sect. 13.

UNLAWFULLY WOUNDING OR INFLICTING GRIEVOUS BODILY HARM.

Sect. 19.— Whosoever unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour.—24–25 Vict., ch. 100, s. 18, Imp.

Sect. 19 *continued.*—And if upon the trial of any indictment for any felony (except in cases of murder and manslaughter) the indictment alleges that the defendant did cut, stab, wound or *inflict grievous bodily harm on* any person, and the jury be satisfied that the defendant is guilty of the cutting, stabbing or wounding, *or inflicting grievous bodily harm* charged in the indictment, but be not satisfied that the defendant is guilty of the felony charged in such indictment, the jury may acquit of the felony, and find the defendant guilty of unlawfully cutting, stabbing or wounding, *or inflicting grievous bodily harm*, and such defendant shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years and not less than two years, or to be imprisoned in any gaol or place of confinement, other than the Penitentiary, for any term less than two years. — 14–15 Vict., ch. 19, s. 5, Imp.

Indictment for unlawfully wounding.—.....one J. N. unlawfully and maliciously did wound (*wound or inflict any grievous bodily harm upon*) against the form....*Add a count charging that the defendant "did inflict grievous bodily harm upon J. N."*—Archbold, 668.

As to what is a wounding, see *ante*, remarks under sect. 10.

The act must have been done maliciously. Malice would in most cases be presumed.—3 Burn, 754.

See, *ante*, remarks under sects. 13 and 17.

Upon an indictment for assaulting, beating, wounding and inflicting grievous bodily harm, the prisoner may be convicted of a common assault.—Reg. vs. Oliver, Bell C. C. 287.

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

In Reg. vs. Taylor, 11 Cox,261, the indictment was as follows....."That Taylor on.....unlawfully and maliciously did wound one Thomas ..... And the jurors ..... that the said Taylor did unlawfully and maliciously inflict grievous bodily harm upon the said Thomas" ..... Upon this indictment the jury returned a verdict of common assault, and upon a case reserved, the conviction was affirmed.

In Reg. vs. Canwell, 11 Cox, 263, a verdict of common assault was also given upon an indictment contain-

ing only one count for maliciously and unlawfully inflicting grievous bodily harm, and the conviction was affirmed, upon a case reserved.

The last part of the above section, the 19th, forms, in England, a separate clause of quite a different Statute, 14–15 Vict., ch. 19, sect. 5.

It would apply to an indictment for robbery with wounding. See remarks on sect. 42 of the Larceny Act.

The words in *italics* are not in the English Act.

The words *cutting or stabbing* ought to have been left out. There is no such offence in the whole Statute. Of course these words are in the Imperial Statute, but at the time of this enactment, in England, 14–15 Vict., ch. 19, s. 5, there was then there, as there was for us, the offence of *cutting or stabbing*. But there is no such thing now, neither in England nor in Canada. *Wounding* is now the general term covering all these cases, by our Act concerning offences against the person of 1869, ch. 20, as it is in England by the 24–25 Vict., ch. 100.

In Reg. vs. Ward, 12 Cox, 123, the indictment charged a felonious wounding with intent to do grievous bodily harm. The jury returned a verdict of unlawful wounding, under 14-15 Vict., ch. 19, s. 5, (second part of our s. 19 ch. 20, *supra*.) Upon a case reserved, it was held that the words "*maliciously and*" must be understood to precede the word unlawfully in this section, and that to support the verdict, the act must have been done maliciously as well as unlawfully.

Greaves, in an article on this case, 1 *Law Magazine* 379, censures severely this ruling. According to him, a new offence, that of unlawful wounding, was created by that clause, and the word *maliciously* has been purposely

omitted from it. In a preceding number of the same magazine, p. 269, an anonymous writer, attacks the decision in Ward's case from another point of view. The shooting was certainly proved not to have been intended to strike the prosecutor, but the Court, by twelve judges against three, found that there was proof of malice sufficient to support the conviction. On this appreciation of the facts of the case, this anonymous writer censures the judgment, at the same time admitting its correctness, so far as the Court held the *maliciously* as necessary as the *unlawfully* under this clause, though the word *maliciously* had been dropped in the Statute. It thus appears that the question is not very well settled in England, so far.

Why does our Statute allow imprisonment *with or without hard labour*, for unlawfully and maliciously wounding under sect. 19,—and simple imprisonment only, without *hard labour*, for unlawfully wounding, found upon an indictment for feloniously wounding?

The defendant may be found guilty of the attempt to commit the misdemeanor, *charged* upon an indictment under sect. 19, Procedure Act of 1869, s. 49.

And if, upon the trial of any person for any misdemeanor, it appears that the facts given in evidence, while they include such misdemeanor, amount in law to a felony, such person shall not, by reason thereof, be entitled to be acquitted of such misdemeanor, (and the person tried for such misdemeanor, if *convicted*, shall not be liable to be afterwards prosecuted for felony, on the same facts) unless the Court before which such trial is had thinks fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects, as if he had not been put upon

his trial for such misdemeanor. (Procedure Act of 1869, s. 50.)

See sect. 77, *post*, as to fine and sureties to keep the peace, in the discretion of the Court.

ATTEMPTING TO CHOKE, ETC., WITH INTENT TO COMMIT ANY INDICTABLE OFFENCE.

Sect. 20.—Whosoever 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, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing any indictable offence, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and if a male with or without whipping.—24–25 Vict., ch. 100, s. 21, and 26–27 Vict., ch. 44, Imp.

Indictment.—.....feloniously and unlawfully did attempt by then (*state the means or by any means whatsoever*) to choke, suffocate and strangle one J. N., (*choke, suffocate or strangle any person, or*.....) with intent thereby then to enable him, the said A. B., the monies, goods, and chattels of the said J. N., from the person of the said J. N. feloniously and unlawfully to steal, take and carry away, against the form .....Add counts varying the statement of the overt acts and of the intent.—Archbold, 669.

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

The clause gives the intent "to commit any *indictable* offence;" that is to say, either a misdemeanor or a felony.

See sect. 77 of the same Act, *post*, for sureties to keep the peace.

In certain cases, a verdict of common assault may be given, upon an indictment for this felony.—Procedure Act of 1869, sect. 51.

If a male, for the whipping, see Procedure Act of 1869, sect. 95.

USING CHLOROFORM, ETC., ETC., ETC., TO COMMIT INDICTABLE OFFENCES.

Sect. 21.—Whosoever unlawfully applies or administers to, or causes to be taken by, or attempts to apply or administered 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, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing any indictable offence, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and if a male with or without whipping.—24–25 Vict., ch. 100, s. 22, Imp.

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

If it be not certain that it was chloroform, or laudanum, that was administered, add a count or counts stating it to be "a certain stupefying and overpowering drug and matter to the jurors aforesaid unknown." Add also counts varying the intent if necessary.—Archbold, 670.

As to what constitutes an "administering, or attempting to administer," see remarks under sects. 10 and 13, *ante*.

Under the Procedure Act of 1869, sect. 51, a verdict of common assault may be given, if the evidence warrants it.

See also s. 95, of the said Procedure Act, as to the whipping.

And sect. 77, *post*, as to sureties to keep the peace.

ADMINISTERING POISON, ETC., ETC., ETC., SO AS TO ENDANGER LIFE OR WITH INTENT TO INJURE, ETC., ETC., ETC.

Sect. 22.—Whosoever 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, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding ten years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years with or without hard labour.—24–25 Vict., ch. 100, s. 23, Imp.

Sect. 23.—Whosoever 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, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour.—24–25 Vict., ch. 100, s. 24, Imp.

Sect. 24.—If, upon the trial of any person for any felony in the last but one preceding section mentioned, the jury are not satisfied that such person is guilty thereof, but are satisfied that he is guilty of any misdemeanor in the last preceding section mentioned, then, and in every such case, the jury may acquit the accused of such felony, and find him guilty of such misdemeanor, and thereupon he shall be punished in the same manner as if convicted upon an indictment for such misdemeanor.—24–25 Vict., chap. 100, s. 25, Imp.

Indictment for administering poison so as to endanger life.— ..... feloniously, unlawfully and maliciously did administer to one J. N., (*or cause*.....) a large quantity, to wit, two drachms of a certain deadly poison called white arsenic, and thereby then did endanger the life of the said J. N. against.....

Add a count stating that the defendant "did cause to be taken by J. N. a large quantity....." and if the kind of poison be doubtful, add counts describing it in different ways, and also stating it to be "a certain destructive thing, (*or a certain noxious thing*) to the jurors aforesaid unknown." There should be also a set of counts stating that the defendant thereby "inflicted upon J. N. grievous bodily harm."—Archbold, 671.

Administering cantharides to a woman with intent to excite her sexual passion, in order to obtain connexion with her, is an administering with intent to injure, aggrieve or annoy, within the meaning of the Statute.—Reg. vs. Wilkins, Leigh & Cave, 89.

If the poison is administered merely with intent to injure, aggrieve or annoy, which in itself would merely amount to a misdemeanor under sect. 23, yet if it does in fact inflict grievous bodily harm, this amounts to a felony under section 22.—Tuley vs. Corrie, 10 Cox, 640.

See, *post*, sect. 77, as to fine and sureties to keep the peace in certain cases.

Under sect. 49 of the Procedure Act of 1869, the defendant, in certain cases, may be found guilty of the attempt to commit the offence charged.

NEGLECT TO PROVIDE WITH FOOD, ETC., ETC., WIFE, CHILD, APPRENTICE, ETC.

Sect. 25.—Whosoever 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 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, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years and not less than two years, or to be imprisoned

in any other gaol or place of confinement for any term less than two years, with or without hard labour.—24–25 Vict., ch. 100, s. 26, Imp.

The words in *Italics* are not in the Imperial Statute. They were in the Bill as introduced in the House of Lords, but were struck out by the Commons.—Greaves, Cons. Acts. 56.

Indictment for not providing an apprentice with necessary food...That J. S., on....then being the master of J. N. his apprentice, and then being legally liable to provide for the said J. N., as his apprentice as aforesaid, necessary food (*clothing or lodging*), unlawfully, wilfully and without lawful excuse did refuse and neglect to provide the same, so that the life of the said J. N. was thereby endangered (*or the health of the said J. N. has been or is likely to be permanently injured*) against the form....Add counts varying the statement of the injury sustained.—Archbold, 692.

Prove the apprenticeship; if it was by deed, by production and proof of the execution of the deed, or in case it be in the possession of the defendant, and there be no counterpart, by secondary evidence of its contents, after due notice given to the defendant to produce it. The legal liability of the defendant to provide the prosecutor with necessary food, clothing or lodging will be inferred, even if it be not expressly stipulated for, from the apprenticeship itself. Prove the wilful refusal or neglect of the defendant to provide the prosecutor with necessary food, &c., as stated in the indictment. Whether it be necessary to prove that by such neglect, the prosecutor's life was endangered, or his health was or was likely to be permanently injured, depends upon the construction which is to be put upon the Statute. If the words "so that the life of such person shall be

endangered, or, &c.," apply to all the preceding matter, such proof will be necessary; if only to the branch of the section which relates to the actual doing of bodily harm to the apprentice or servant, such proof will be unnecessary. Until there has been some decision on the subject, it will be safer to allege "so that the life ....or health...." as the case may be, and to be prepared with evidence to sustain it. It would seem indeed to be the better opinion, that the words "so that, &c." override all the preceding matter, otherwise a mere single wilful refusal to provide a dinner would be within the clause. Upon an indictment for unlawfully and maliciously assaulting an apprentice or servant, it is clear that such allegation and proof are necessary.—Archbold, 692.

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

It is to be remarked that the indictment in that case was under the Common law, since, in England, the Statute corresponding to our s. 25, ch. 20, 32–33 Vict., as *ante*, applies only to masters and servants or apprentices. By the common law, an indictment lies for all misde-

meanors of a public nature. Thus it lies, for a breach of duty, which is not a mere private injury, but an outrage upon the moral duties of society; as for the neglect to provide sufficient food or other necessaries for an infant of tender years, unable to provide for and take care of itself, whom the defendant is obliged by duty to provide, so as thereby to injure its health.—Archbold, 1.

But the parent must have a present means or ability to support the child; the possibility of obtaining such relief is not sufficient: and by the neglect of such duty, the child must have suffered a serious injury. An opportunity of applying to a relieving officer of the union, from which the mother would have received adequate relief on application, is not a sufficient proof of her having present means.—R. vs. Chandler, Dears. 453; R. vs. Hogan, 2 Den. 277; R. vs. Philpott, Dears. 145. But these and similar cases, are no authorities under our present Statute, in Canada.

As to fining the offender and requiring him to enter into recognizances and give sureties for keeping the peace see *post*, sect. 77.

EXPOSING CHILDREN UNDER TWO YEARS OF AGE.

Sect. 26.—Whosoever unlawfully abandons or exposes any child being under the age of two years, whereby the life of such child is endangered, or the health of such child has been or is likely to be permanently injured, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour —24–25 Vict., ch. 100, s. 27, Imp.

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

This provision is new. In order to sustain an indictment under it, it is only necessary to prove that the defendant wilfully abandoned or exposed the child mentioned in the indictment: that the child was then under two years of age, and that its life was thereby endangered, and its health had been or then was likely to be permanently injured.—Archbold, 693.

A and B were indicted for that they "did abandon and expose a child then being under the age of two years, whereby the life of the child was endangered." A, the mother of a child five weeks old, and B put the child into a hamper, wrapped up in a shawl, and packed with shavings and cotton wool, and A, with the connivance of B, took the hamper to M, about four or five miles off, to the booking office of the railway station there. She there paid for the carriage of the hamper, and told the clerk to be very careful of it, and to send it to G by the next train, which would leave M in ten minutes from that time. She said nothing as to the contents of the hamper, which was addressed "Mr. Carr's, Northoutgate, Gisbro, with care, to be delivered immediately," at which address the father of the child (a bastard) was then living. The hamper was carried by the ordinary passenger train, and delivered at its address the same evening. The child died three weeks afterwards, from causes not attributable to the conduct of the prisoners. On proof of these facts, it was objected for the prisoners that there was no evidence that the life of the child was endangered and

that there was no abandonment and no exposure of the child within the meaning of the Statute. The objections were overruled and the prisoners found guilty: *Held*, that the conviction should be affirmed.—Reg. vs Falkingham, 11 Cox, 475.

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

See sect. 77, *post*, as to fine and sureties to keep the peace, in certain cases.

CAUSING BODILY INJURY BY GUNPOWDER, ETC., EXPLOSION, ETC., THROWING CORROSIVE FLUID ON A PERSON, ETC., PLACING GUNPOWDER NEAR A BUILDING WITH INTENT, ETC.

Sect. 27—Whosoever unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burns, maims, disfigures, disables or does grievous bodily

harm to any person is guilty of felony and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 100, s. 28, Imp.

Sect. 28.—Whosoever unlawfully and maliciously causes any gunpowder or other explosive substance to explode, or 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 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, with intent, in any of the cases aforesaid, to burn, maim, disfigure or disable any person, or to do some grievous bodily harm to any person, whether any bodily harm be effected or not, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 100, s. 29, Imp.

Sect. 29.—Whosoever unlawfully and maliciously 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*, is guilty of felony and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years, and not less than two years, or to be imprisoned in any other

gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24–25 Vict., ch. 100, s. 30, Imp.

Indictment for burning by gunpowder—....feloniously, unlawfully and maliciously, by the explosion of a certain explosive substance, that is to say, gunpowder, one J. N. did burn; against the form.....Add counts, vaying the statement of the injury, according to circumstances. —Archbold, 673.

Indictment for sending an explosive substance with intent, etc......feloniously, unlawfully and maliciously did send (*or deliver to, or cause to be taken or received by*) to one J. N. a certain explosive substance and dangerous and noxious thing, to wit, two drachms of fulminating silver, and two pounds weight of gunpowder, with intent in so doing him the said J. N. thereby then to burn (*maim, disfigure or disable, or do some grievous bodily harm*) against..... Add counts varying the injury and intent.—Archbold, 673.

Indictment for throwing corrosive fluid, with intent, etc. ..... feloniously, unlawfully and maliciously did cast and throw upon one J. N. a certain corrosive fluid, to wit, one pint of oil of vitriol, with intent in so doing him the said J. N. thereby then to burn..... Add counts varying the injury and the intent. Archbold, 674.

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

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

In R. vs. Murrow, 1 Mood., 456, it was held, where the defendant threw vitriol in the prosecutor's face, and so wounded him, that this wounding was not the "wounding" meant by the 9 Geo. 4, ch. 31, s. 12.—Archbold, 665: but it would now fall under this Statute.

By section 48, *post*, "neither the justice of the Peace acting in and for any district, county, division, city or place, nor any judge of the sessions of the Peace, nor the recorder of any city, shall, at any session of the Peace, or at any adjournment thereof try any person for any offence under the twenty-seventh, twenty-eighth or twenty-ninth section of this Act."

And see section 77, *post*, as to requiring sureties to keep the peace, in certain cases.

Upon an indictment for any felony, the prisoner may be convicted of an attempt to commit the same in certain cases.—Procedure Act of 1869, sect. 49, and see sect. 94 of the same Act, as to solitary confinement.

SETTING SPRING-GUNS, ETC,, ETC., WITH INTENT, ETC., ETC.

Sect. 30.— Whosoever 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,

is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour; and whosoever knowingly and wilfully permits any such spring-gun, man-trap or other engine which may have been set or placed in any place then being in or afterwards coming into his possession or occupation by some other person, to continue so set or placed shall be deemed to have set or placed such gun, trap or engine with such intent, as aforesaid; provided that nothing in this section contained shall extend to make it illegal to set or place any gin or trap such as may have been or may be usually set or placed with the intent of destroying vermin.—24–25 Vict., ch. 100, s. 31, Imp.

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

The omission of this proviso in our Statute, whether intentional or not, is very important.

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

upon any trespasser who might come in contact therewith, against.....

Prove that the defendant placed or continued the spring-gun loaded in a place where persons might come in contact with it; and if any injury was in reality occasioned, state it in the indictment, and prove it as laid. The intent can only be inferred from circumstances, as the position of the gun, the declarations of the defendant, and so forth; any injury actually done will, of course, be some evidence of the intent.—Archbold, 675.

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

The instrument must be calculated to destroy life of cause grievous bodily harm, and proved to be such; and, if the prosecutor, while searching for a fowl among some bushes in the defendant's garden, came in contact with a wire which caused a loud explosion, whereby he was knocked down, and slightly injured about the face, it was held that the case was not within the Statute, as it was not proved what was the nature of the engine or substance which caused the explosion, and it was not enough that the instrument was one calculated to create alarm.—1 Russell, 1053.

See sect. 77, *post*, as to fining the offender, and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour.

PLACING WOOD, ETC., CASTING STONES ON A RAILWAY OR RAILWAY CARRIAGE WITH INTENT, ETC., ENDANGERING SAFETY OF PASSENGERS BY UNLAWFUL ACT OR WILFUL NEGLECT.—

Sect. 31.—Whosoever unlawfully and maliciously puts or throws upon or across any railway any wood, stone or other matter or thing, or unlawfully and maliciously takes up, removes or displaces any rail, sleeper or other matter or thing belonging to any railway, or unlawfully and maliciously turns, moves, or diverts any point or other machinery belonging to any railway, or unlawfully and maliciously makes or shows, hides or removes any signal or light upon or near to any railway, or unlawfully "*or*" maliciously does or causes to be done any other matter or thing, with intent in any of the cases aforesaid, to endanger the safety of any person travelling or being upon such railway, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour.—24-25 Vict., ch. 100, s. 32, Imp.

See, *post*, under section 39 of the Act concerning malicious injuries to property for form of indictment, with the necessary change in the statement of the intent.

Sect. 32.—Whosoever unlawfully and maliciously 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 of any train, of which such first mentioned engine, tender, carriage or

truck forms part, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement, for any term less than two years, with or without hard labour.—24-25 Vict., ch. 100, s. 33 Imp.

SECT. 33.—Whosoever, 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, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement, other than a Penitentiary, for any term less than two years, with or without hard labour.—24-25 Vict., ch. 100, s. 34, Imp.

In the eighth line of the 31st section the word *or* is erroneously inserted instead of *and*, making it unlawfully *or* maliciously, instead of unlawfully *and* maliciously. An error of this kind may lead to grave consequences.

The words *of duty* in the 33rd section are not in the English Act. But they are superfluous. In such a case, a *neglect* means a *neglect of duty*.

See, *post*, sect. 67, 31 Vic. ch. 12, and sect. 78, 31 Vict. ch. 68, which seem to relate to the same offence.

Indictment for endangering by wilful neglect the safety of Railway passengers.....That J. S. on....unlawfully did, by a certain wilful omission and neglect of his duty, that is to say by then wilfully omitting and neglecting to turn certain points in and upon a certain railway called....in the parish....which points it was then the duty of him, the said J. S., to turn, endanger the safety of certain persons then conveyed and being in and upon the said railway, against the form.....

Add counts, varying the statement of defendant's duty, etc.—Archbold, 676.

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

In Reg. vs. Holroyd, 2 M. and Rob. 339, it appeared that large quantities of earth and rubbish were found placed across the railway, and the prosecutor's case was that this had been done by the defendant wilfully and in order to obstruct the use of the railway; and the defendant's case was that the earth and rubbish had been accidentally dropped on the railway: Maule, J., told th jury, that if the rubbish had been dropped on the rails by mere accident, the defendant was not guilty; but "it was by no means necessary, in order to bring the case within this Act, that the defendant should have thrown the rubbish on the rails expressly with the view to upset the train of carriages. If the defendant designedly placed these substances, having a tendency to produce an obstruction, not caring whether they actually impeded the carriages or not, that was a case within the Act." And on one of the jury asking what was the meaning of the term "wilfully", used in the Statute, the learned Judge added "he should consider the act to have been *wilfully* done, if the defendant *intentionally* placed the rubbish on the line, knowing that it was a substance likely to produce an obstruction; if for instance, he had done so in order to throw upon the Company's officers the necessary trouble of removing the rubbish." This decision may afford a safe guide to the meaning of the term *wilful* in this clause. Greaves, Cons. Acts, 62, on s. 34.

33 *of our Statute*).—In the other clauses, the word *wilfully* is now replaced by *unlawfully*.

On s. 33 (32 *of our Statute*,) Greaves says: (Consol. Acts, 61.) "The introduction of the word *at* extends this clause to cases where the missile fails to strike any engine or carriage. Other words were introduced to meet cases where a person throws into or upon one carriage of a train, when he intended to injure a person being in another carriage of the same train, and similar cases. In Reg. vs. Court, 6 Cox 202, the prisoner was indicted for throwing a stone against a tender with intent to endanger the safety of persons on the tender, and it appeared that the stone fell on the tender, but there was no person on it at the time, and it was held that the section was limited to something thrown upon an engine or carriage having some person therein, and consequently that no offence within the Statute was proved, but now, this case would clearly come within this clause."

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

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

It is not necessary that the defendant should have entertained any feeling of malice against the railway company, or against any person on the train: it is quite enough to support an indictment under the Statute, if the

act was done mischievously, and with a view to cause an obstruction of a train. Reg. vs. Upton, 5 Cox, 298.

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

See, *post*, section 77, as to sureties for the peace in felonies, and fine and sureties for the peace, in misdemeanors under this Act.

—Before taking any proceedings under any of the above sections, or under sections 39 or 40 of the act concerning malicious injuries to property (32–33 Vict., ch. 22) the practitioner should refer to the penal clauses of the General Railway Act of 1868, 31 Vict., ch. 68, which are as follows:

Sect. 72, par. 2.—Every person who, by any means, or in any manner or way whatsoever, obstructs or interrupts the free use of the Railway, or the carriages, vessels, engines or other works incidental or relative thereto, or connected therewith, shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by imprisonment in the Common Gaol of the District or County, where the conviction takes place, for

any term less than two years, or in the Penitentiary for a term not to exceed five years, and not less than two years.

Sect. 72, par. 3.—All persons wilfully and maliciously, and to the prejudice of the Railway, breaking, throwing down, damaging or destroying the same, or any part thereof, or any of the buildings, stations, depots, wharves, vessels, fixtures, machinery or other works or devices incidental or relative thereto, or connected therewith, or doing any other wilful hurt or mischief, or wilfully "*or*" maliciously obstructing or interrupting the free use of the Railway, vessels or works, or obstructing, hindering, or preventing the carrying on, completing, supporting and maintaining the Railway, vessels, or works, shall be guilty of a misdemeanor, *unless the offence committed amounts, under some other act or law, to a felony, in which case such person shall be guilty of a felony;* and the Court by and before whom the person is tried and convicted, may cause such person to be punished in like manner as persons guilty of misdemeanor or felony, as the case may be, are directed to be punished by the laws in force in Canada.

Sect. 73.—If any person wilfully and maliciously displaces or removes any Railway switch or rail of any Railway, or breaks down, rips up, injures or destroys any Railway track or Railway bridge or fence of any Railway or any portion thereof, or places any obstruction whatsoever on any such rail, or Railway track, or bridge, with intent thereby to injure any person or property passing over or along such Railway, or to endanger human life, such person shall be guilty of a misdemeanor, and shall be punished by imprisonment, with hard labour, in the common gaol of the Territorial Division in which

such offence is committed or tried, for any period not exceeding one year from conviction thereof; and if in consequence of such act, done with the intent aforesaid, any person so passing over and along such Railway actually suffers any bodily harm, or if any property passing over and along such Railway be injured, such suffering or injury shall be an aggravation of the offence, and shall render the offence a felony, and shall subject the offender to punishment by imprisonment in the Penitentiary for two years, or in any other prison or place of confinement for any period exceeding one year and less than two years.

Sect. 74 enacts that if, in consequence of any act punishable under sections 73 and 75, any person be killed, or his life be lost, the offence is manslaughter, punishable by imprisonment in the Penitentiary for any period not more than ten nor less than four years. As to this clause, see, *ante*, under head "*manslaughter.*"

Sect. 75.—If any person wilfully and maliciously does or causes to be done, any act whatever, whereby any building, fence, construction or work of any Railway, or any engine, machine or structure of any Railway, or any matter or thing appertaining to the same is stopped, obstructed, impaired, weakened, injured or destroyed, the person so offending shall be guilty of a misdemeanor, and be punished by imprisonment with hard labour not exceeding one year, in the Common Gaol of the Territorial Division in which the offence was committed or has been tried.

In England, sect. 15 of the General Railway Act, 3 & 4 Vict., ch. 97, contained enactments of the same nature as the above, but was repealed by the General Repeal Act, 24–25 Vict., ch. 95, passed with the Consolidation of the Criminal Statutes. Our General Repeal Act, 32–33

Vict., ch. 36, makes no mention of the above clauses of our Railway Act. They then stand unrepealed, and in full force, according to the third paragraph of section 1 of the said Repeal Act; and in virtue thereof offences against Railway, &c., are to be tried and punished either under the said Railway Act, or under chapters 20 or 22 of the 32–33 Vict. Now, there is a wide difference between these Acts: for instance, if a man removes a rail, with intent to endanger human life, by the Railway Act, he is guilty of misdemeanor, and punishable by imprisonment for any period not exceeding one year (sect. 73); by ch. 20, sect. 31, he is guilty of felony, and liable to Penitentiary for life! And this difference between these Acts is remarkable throughout all the penal clauses of the Railway Act, when compared with the clauses on the same subject of chapters 20 and 22 of the 32–33 Vict. Parliament should, it is submitted, remedy these anomalies in the law.

Then why not repeal, as to railways, sect. 67 and sect. 68 of 31 Vict., ch. 12—"an Act respecting the public works of Canada?" They are as follows:

Sect. 67.—And whereas, for the better protection of life and property, as well on the Public Works and Railways of the Dominion, as on Railways managed by companies in Nova Scotia and New-Brunswick, it is expedient to extend to them the provisions made for that purpose as regards Railways managed by companies in Quebec and Ontario, therefore if any officer or servant of, or any person employed by the Department on any Railway or Public Work being under the control of the Department, or by any Railway company in Nova Scotia or New Brunswick, wilfully or negligently contravenes any by-law, order or regulation of the Department, or of the Company, or any order in Council, lawfully made

or in force respecting the Railway or the Public Work on which he is employed, and of which a copy has been delivered to him, or has been posted up or open to his inspection in some place where his work or his duties or any of them are to be performed, then if such contravention causes injury to any property or to any person, or exposes any property or any person to the risk of injury, or renders such risk greater than it would have been without such contravention, although no actual injury occurs, such contravention shall be a misdemeanor, and the person convicted thereof shall, in the discretion of the court before whom the conviction is had, and according as such court considers the offence proved to be more or less grave, or the injury or risk of injury to person or property to be more or less great, be punished by fine or imprisonment or both, so as no such fine exceeds four hundred dollars, nor any such imprisonment the term of five years; and such imprisonment, if for two years or upwards, shall be in the Penitentiary for the Province in which the conviction takes place.

Sect. 68.—If such contravention does not cause injury to any property or person, nor expose any property or person to the risk of injury, nor make such risk greater than it would have been without such contravention, then the officer, servant, or other person guilty thereof shall thereby incur a penalty not exceeding the amount of thirty days pay, nor less than fifteen days pay of the offender from the Department or Company, in the discretion of the Justice of the Peace before whom the conviction is had, and such penalty shall be recoverable with costs before any one Justice of the Peace having jurisdiction where the offence has been committed or where the offender is found, on the oath of one credible witness, other than the informer.

Sections 78 and 79 of the Railway Act of 1868, 31 Vict. ch. 68, should also be repealed. Section 78 is as follows:—If any officer or servant of, or person employed by any Railway Company, wilfully or negligently contravenes any By-Law or regulation of the Company lawfully made and in force, or any order or notice of the Railway Committee, or of the inspecting engineer or engineers, of which a copy has been delivered to him, or has been posted up or open to his inspection in some place where his work or his duties, or any of them are to be performed, then if such contravention causes injury to any property or to any person, or exposes any property or any person to the risk of injury, or renders such risk greater than it would have been without such contravention, although no actual injury occurs, such contravention shall be a misdemeanor, and the person convicted thereof shall in the discretion of the Court before whom the conviction is had, and according as such Court considers the offence proved to be more or less grave, or the injury or risk of injury to person or property to be more or less great, be punished by fine or imprisonment, or both, so as no such fine exceeds four hundred dollars, nor any such imprisonment the term of five years; and such imprisonment, if for over two years, shall be in the Penitentiary.

It is evident that these clauses clash with sect. 33 of ch. 20, cited *ante*.

In England before the Consolidation Acts of 1861, the Statute law was, for sometime, in the same state as it is just now for us in Canada, (two different Statutes on these offences) and it may be useful to insert here the remarks then made by Greaves on 14–15 Vict., chap. 19, sect. 6. (*Lord Campbell's Acts, by Greaves*, 42.

"It may be well to observe that the 3 & 4 Vict.,

c. 97, sects. 13 & 14, provided for the punishment of servants, of railway companies, who (*inter alia*) wilfully or maliciously did any acts, whereby the life or limb of any person passing along or being upon the railway should or might be injured, or endangered, or the passage of any engine, carriage or train impeded or obstructed. Such persons might either be summarily convicted before one justice, or tried at the sessions, but the greatest punishment was two years imprisonment with hard labour. By sect. 15 of the same act, persons who wilfully did, or caused to be done any thing in such manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons conveyed upon the same, were made guilty of a misdemeanor, but the greatest punishment was two years imprisonment with hard labour. Every one was perfectly satisfied that these provisions were quite inadequate to meet many malicious acts, that might be committed in respect of railway passengers, and therefore this and the next clause were introduced (31 *and* 32 *ante, of chap.* 20, 32-33 *Vict. of our Statutes*) to provide a fitting punishment for offences of such a serious character.

Although such parts of the clauses of the 3 & 4 Vict. c. 97, as relate to the offences specified in this Act are not in terms repealed, yet they ought never to be acted upon; for the offences being made felony and subjected to so much more severe punishment, all cases falling within this Act ought to be prosecuted under it, and if any indictment were preferred under the former Act when the case fell within this, no doubt the Court would order the jury to be discharged, and an indictment for the felony to be preferred, under the 14 and 15 Vict., c. 100, s. 12 *ante* p. 16; this being just the sort of case to which that clause is properly applicable. Whether the misde-

meanor would at common law have merged in the felony need not now be considered."

The clause of the Imperial Statute hereinbefore cited by Greaves, 14-15 Vict., chap. 100, sect. 12, is repeated in our Procedure Act of 1869, sect. 50, so that, what this learned man said for England in 1851, may now be applied in Canada, and if any one were to prefer an indictment for a misdemeanor for any offences respecting a railway under the Railway Act of 1868, instead of under the Act on offences against the person, or on malicious injuries to property, it would be proper—generally speaking—to discharge the jury and order an indictment for felony to be preferred.—Lord Campbell's Acts, by Greaves, p. 16.

DRIVERS OF CARRIAGES INJURING PERSONS.

Sect. 34.—Whosoever, 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 whatsoever, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement other than a Penitentiary, for any term less than two years with or without hard labour.—24-25 Vict., ch. 100, s. 35, Imp.

Indictment.—.....being then a coachman, and then having charge of a certain carriage and vehicle called an omnibus, unlawfully did, by the wanton and furious driving of the said carriage and vehicle by him the said..... (*defendant*) cause certain bodily harm to be done to one J. N. against the form.....—Archbold, 677.

This section includes all carriages and vehicles of every description, both public and private. *Wilful* means *voluntary*. Greaves, Consol. Acts, 63.

By sect. 77, *post*, the Court may in addition to *or in lieu* of any punishment authorized by this Act fine the offender, *and* require him to enter into his own recognizances and to find sureties, *both or either*, for keeping the peace, and being of good behaviour.

CAUSING BODILY INJURY BY UNLAWFUL ACT, OR NEGLECT OF DUTY.

Sect. 35.—Whosoever, 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, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement other than a Penitentiary for any term less than two years.

This clause is not in the English Act. It is in the same terms as s. 33, *ante*, except that this last one applies only to passengers by railway endangered by the unlawful act or neglect, or omission of duty.

See s. 77, *post*, as to fining the offender and requiring him to give sureties for the peace, or both, or either.

An injury resulting from an omission does not subject the person causing it to punishment, unless such omission be unlawful. An omission is deemed unlawful whensoever it is a breach of some duty imposed by law, or gives cause to a civil action. 2nd Report Cr. L. Com. 14 May, 1846.

Mr. Starkie, one of the English Commissioners, in a separate report, objected strongly to such an enactment, and the framers of the Imperial Statutes have thought proper to leave it out. What reasons can be given for introducing it in Canada?

The fact that it forms part of the Criminal laws of the Colony of Victoria, Australia, (section 24) is not a con-

clusive proof of the soundness of this enactment when we have the weight of Imperial legislation against it.

ASSAULTING A CLERGYMAN IN THE DISCHARGE OF HIS DUTY.

Sect. 36.—Whosoever by threats or force unlawfully obstructs or prevents, or endeavours to obstruct or prevent any clergyman or other minister in or from celebrating Divine Service, or otherwise officiating in any church, chapel, meeting-house, *school-house*, or other place *used for* divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or 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 section aforesaid, or who, to the knowledge of the offender, is going to perform the same, or returning from the performance thereof, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement, other than a Penitentiary, for any term less than two years, with or without hard labour.—24-25 Vict., ch. 100, s. 36, Imp.

The words *school-house* are not in the English Act, and the words *used for* divine worship are substituted for *of* divine worship.

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

Prove that J. N. is a clergyman and vicar of the parish of B., as stated in the indictment; that the defendant by force obstructed and prevented him from celebrating divine service in the parish church, etc., etc., or assisted in doing so.—Archbold, 678.

Indictment for arresting a clergyman about to engage in the performance of divine service.....unlawfully did arrest one J. N., a clergyman, upon certain civil process, whilst he, the said J. N., as such clergyman as aforesaid, was going to perform divine service, he the said (*defendant*) then well knowing that the said J. N. was a clergyman, and was so going to perform divine service as aforesaid; against the form.....Archbold, 678.

As to fining the offender and requiring him to enter into recognizances and find sureties for keeping the peace and being of good behaviour, see s. 77, *post*.

DISTURBING CONGREGATIONS MET FOR RELIGIOUS WORSHIP, &C.

Sect. 37.—Whosoever wilfully disturbs, interrupts or disquiets any assemblage of persons met for religious worship, or for any moral, social or benevolent purpose, by profane discourse, by rude or indecent behaviour, or by making a noise, either within the place of such meeting or so near it as to disturb the order or solemnity of the meeting, may be arrested on view by any peace officer present at such meeting or by any other person present thereto verbally authorized by any Justice of the Peace present thereat, and detained until he can be brought

before a Justice of the Peace; and such offender shall, upon conviction thereof before a Justice of the Peace, on the oath of one or more credible witnesses, forfeit and pay such sum of money, not exceeding twenty dollars, as the said Justice may think fit, and costs, within the period specified for the payment thereof by the convicting Justice, at the time of the conviction, and in default of payment, such Justice shall issue his warrant to a constable, to levy such fine and costs within a time to be specified in the warrant, and, if no sufficient distress can be found, such Justice shall commit the offender to the common gaol of the district, county or place wherein the offence was committed, for any term not exceeding one month, unless the fine and costs be sooner paid.

The Imperial Statutes on the subject are the 1 Will. & M., ch. 18: 52 G. 3, ch. 155, s. 12; 15–16 Vict., ch. 36; 23–24 Vict., ch. 32.

The offences against this clause are punishable by summary conviction. The clause seems to be based on ch. 92, s. 18, C. S. Canada, and ch. 22, s. 3, C. S. L. Canada. The procedure, in cases under this clause, would be under the Summary Conviction Act, ch. 31, 32, 33 Vict.

ASSAULTS ON OFFICERS, ETC., SAVING WRECK.

Sect. 38.—Whosoever assaults and strikes or wounds any magistrate, officer or other person whatsoever, lawfully authorized in or on account of the exercise of his duty, in or concerning the preservation of any vessel in distress, or of any vessel, goods or effects wrecked, stranded, or cast on shore, or lying under water, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not less than two years, or to be imprisoned

in any other gaol or place of confinement for any term less than two years, with or without hard labour.—24 25 Vict., ch. 100, s. 37, Imp.

Indictment for assaulting a Magistrate, etc., on account of the exercise of his duty in preserving wrecks.....

That, before and at the time of the committing of the offence hereinafter mentioned, to wit, on..... one J. N., then being a magistrate, was engaged in the exercise of his duty as such magistrate, in and concerning the preservation of a certain vessel then wrecked, stranded, and cast on shore, the said J. N. being then lawfully authorized thereunto; and that J. S. well knowing the premises, on the day and year aforesaid, in and upon the said J. N. unlawfully did make an assault, and him the said J. N. then unlawfully did strike and wound in and on account of the exercise of the said duty of him the said J. N. in and concerning the preservation of the said vessel so wrecked, stranded, and cast on shore as aforesaid, against the form.....

Prove that J. N. was a magistrate as stated in the indictment: that a vessel was wrecked, etc.; that J. N. was engaged endeavouring to preserve the vessel: that J. S. struck and wounded him as stated, and that he did so on account of his doing his duty in the preservation of the vessel. This may be proved by the declarations or acts of the defendant, or by circumstances from which his motive may be inferred.—Archbold, 679.

See sect. 77, *post*, as to fine and sureties for the peace in misdemeanors under this Act.

See sects. 19, 20 and 33 of the 36 Vict., ch. 55, *an act respecting wreck and salvage*.

ASSAULT WITH INTENT TO COMMIT FELONY, OR ON PEACE OFFICERS, ETC.

Sect. 39—Whosoever assaults any person with intent to commit felony, or assaults, resists, or wilfully obstructs any *revenue* or peace officer in the due execution of his duty or any person acting in aid of such officer, or assaults any person with intent to resist or prevent the lawful apprehension or detainer of himself, or of any other person for any offence, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement other than a Penitentiary for any term less than two years with or without hard labour.—24–25 Vict., ch. 100, s. 38, Imp.

Revenue officers are not included in the corresponding clause of the English Act, assaults on them being, there, otherwise provided for.—Greaves, Cons. Acts, 65.

And see 31 Vict., ch. 6, sect. 97 of our Statutes.

Indictment.— ..... in and upon one J. N. unlawfully did make an assault, and him the said J. N. did beat, wound and ill-treat with intent him the said J. N. feloniously, wilfully and of his malice aforethought to kill and murder, and other wrongs to the said J. N. then did, to the great damage of the said J. N., against the form .....Add a count for a common assault.—Archbold, 684.

Every attempt to commit a felony against the person of an individual without his consent involves an assault. Prove an attempt to commit such a felony, and prove it to have been done under such circumstances, that had the attempt succeeded, the defendant might have been convicted of the felony. If you fail proving the intent, but prove the assault, the defendant may be convicted of the common assault.—Archbold, loc. cit.

INDICTMENT FOR ASSAULTING A PEACE OFFICER IN THE EXECUTION OF HIS DUTY.

....in and upon one J. N., then being a peace officer, to wit, a constable *(any peace officer in the execution of his duty, or any revenue officer in the execution of his duty, or any person acting in aid of)* and then being in the due execution of his duty as such constable, did make an assault, and him, the said J. N., so being in the execution of his duty as aforesaid, did then beat, wound and ill-treat, and other wrongs to the said J. N. then did, to the great damage of the said J. N., against the form....(Add a count for a common assault.)—Archbold, loc. cit.

Prove that J. N. was a peace or revenue officer, as stated in the indictment, by showing that he had acted as such.

It is a maxim of law, that "*omnia præsumuntur rite et solenniter esse acta donec probetur in contrarium,*" upon which ground it will be presumed, even in a case of murder, that a man who has acted in a public capacity or situation was duly appointed.—R. vs. Verelet, 3 Camp. 432; R. vs. Gordon, 1 Leach, 515; R. vs. Murphy, 8 C. & P. 297; R. vs. Newton, 1 C. & K. 469; Taylor, on evidence, par. 139, 431. Prove that J. N. was in the due execution of his duty, and the assault. If you fail in proving that J. N. was a peace officer, or that he was acting lawfully as such, the defendant may be convicted of a common assault.

The fact that the defendant did not know that the person assaulted was a peace officer, or that he was acting in the execution of his duty, is no defence.—R. vs. Forbes, 10 Cox, 362.

INDICTMENT FOR AN ASSAULT TO PREVENT ARREST.

....in and upon one J. N. did make an assault, and him, the said J. N., did then beat, wound and ill-treat with intent in so doing to resist and prevent (resist *or* prevent) the lawful apprehension of .... *(himself or of any other person)* for a certain offence, that is to say *(state the offence generally)* against the....*(count for common assault.)*—Archbold, 685.

It must be stated and proved that the apprehension was lawful. See R. vs. Davis, L. & C., 64. If this and the intent be not proved, a verdict of common assault may be given. But it must be remembered that resistance to an illegal arrest is justifiable.

As to fining the offender and requiring him to give sureties for the peace and good behaviour. See sect. 77, *post.*

ASSAULT WITH INTENT TO OBSTRUCT THE SALE OF GRAIN, ETC.

Sect. 40.—Whosoever beats or uses any violence or threat of violence to any person with intent to deter or hinder him from buying, selling or otherwise disposing of, any wheat or other grain, flour, meal, malt or potatoes, or other produce or goods, in any market or other place, or beats or uses any such violence or threat to any person having the charge or care of any wheat or other grain, flour, meal, malt or potatoes, whilst on the way to or from any city, market, town or other place, with intent to stop the conveyance of the same shall, on conviction thereof, before two Justices of the Peace, be liable to be imprisoned and kept to hard labour in any gaol or place of confinement, other than a Penitentiary, for any term not exceeding three months; provided that no person

punished for any such offence by virtue of this section shall be punished for the same offence by virtue of any other law whatsoever.—24–25 Vict., ch. 100, s. 39, Imp.

The English Act has the words, *or to compel him to buy, sell or otherwise dispose of,* after the words, *or otherwise disposing of.*

Section 80 enacts that all summary proceedings under this clause should be taken under ch. 31, 32–33 Vict.

See 1 Burn's Justice, 331, for a form of conviction.

ASSAULT ON SEAMEN, STEVEDORES, SHIP-CARPENTERS, ETC.

Sect. 41.—Whosoever unlawfully and with force hinders or prevents any *seaman, stevedore, ship-carpenter, or other person usually working at or on board any ship or vessel,* from working at or exercising his lawful trade, business or occupation, or beats or uses any violence to any such person with intent to hinder or prevent him from working at or exercising the same, shall, on conviction thereof before two Justices of the Peace, be liable to be imprisoned and kept to hard labour, in any gaol or place of confinement other than a Penitentiary for any term not exceeding three months; provided that no person for any such offence by reason of this section shall be punished for the same offence by any other law whatsoever.—24–25 Vict., ch. 100, s. 40, Imp.

The words in *Italics* are not in the English Act, which, in lieu thereof, has the words "*keelman or caster.*"

The word "punished" is omitted after the words "provided that no person."

Summary proceedings under this clause are to be taken as under the last clause.

See 1 Burn's Justice, 333, for form of conviction.

ASSAULTS ARISING FROM COMBINATION OR CONSPIRACY.

Sect. 42.—Whosoever, in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business or manufacture, or respecting any person concerned or employed therein, unlawfully assaults any person, *or in pursuance of any such combination or conspiracy, uses any violence or threat of violence to any person, with a view to hinder him from working or being employed at such trade, business or manufacture,* is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement, other than a Penitentiary, for any term less than two years, with or without hard labour.—24-25 Vict., ch. 100, s. 41, Imp., repealed by 34-35 Vict., ch. 32, Imp.

The words in *Italics* are not in the English Act. They cover any violence or threat of violence with a view to hinder any person from working or being employed at a trade, business or manufacture, in pursuance of a combination or conspiracy respecting such trade, business or manufacture.

Indictment for an assault in pursuance of a conspiracy to raise wages.—The jurors for Our Lady the Queen upon their oath present, that J. S., J. W., and E. W. on....did amongst themselves conspire, combine, confederate, and agree together to raise the rate of wages then usually paid to workmen and labourers in the art, mystery and business of cotton spinners; and that the said.....(*defendants*) in pursuance of the said conspiracy, on the day and year aforesaid, in and upon one J. N. unlawfully did make an assault, and him the said J. N. did then beat, wound and ill-treat, and other wrongs to the said J. N. did, to the

great damage of the said J. N., against the form.... (Add a count stating that the defendants assaulted J. N. "in pursuance of a certain conspiracy before then entered into by the said.....(*defendants*) to raise the rate of wages of workmen and labourers in the art, mystery and business of cotton-spinners;" also a count for a common assault.)—Archbold, 686.

For a number of workmen to combine to go in a body to a master and say that they will leave the works, if he does not discharge two fellow workmen in his employ is an unlawful combination by threats to force the prosecutor to limit the description of his workmen. Walsby vs. Auley, 3 E. & E. 516. And a combination to endeavour to force workmen to depart from their work by such a threat as that they would be considered as blacks, and that other workmen would strike against them all over London, is unlawful.—Ex parte Perham, 5 H. & N. 30. So also is a combination with a similar object to threaten a workman by saying to him that he must either leave his master's employ, or lose the benefit of belonging to a particular club and have his name sent round all over the country.—O'Neil vs. Longman, 4 B. & S. 476. An indictment or commitment alleging the offence to be a conspiracy to force workmen to depart from their work by threats need not set out the threats. —Ex parte Perham, *supra.*

As to fining the offender, and requiring sureties, in certain cases, for the peace and good behaviour, see sect. 77, *post.*

We have now additional enactments (the above clause is not repealed) on these offences, by the 35 Vict., ch. 31, (Ottawa, 1872,) being *an Act to amend the Criminal law relating to violence, threats and molestation,* copied on the English Act, 34-35 Vict., ch. 32.

Sect. 1—provides that every person who uses violence to any person or property, or threatens or intimidates any person in such manner as would justify a Justice of the Peace, on complaint made to him, to bind over the person so threatening or intimidating to keep the peace, or molests or obstructs any person in the manner defined by this section, shall be guilty of an offence against this statute, and shall be liable to imprisonment, with or without hard labour, for a term not exceeding three months, if these acts are done with a view to coerce such person—1st. Being a master, to dismiss or cease to employ any workman, or being a workman, to quit any employment, or to return work before it is finished.—2nd. Being a master, not to offer, or being a workman, not to accept any employment or work.—3rd. Being a master or workman to belong to, or not to belong to, any temporary or permanent association or combination.—4th. Being a master or workman, to pay any fine or penalty imposed by any temporary or permanent association or combination.—5th. Being a master, to alter the mode of carrying on his business or the number or description of any persons employed by him.

Par. 4—of the same section enacts that, for the purposes of this Act, a person shall be deemed to molest or obstruct another person in any of the following cases, that is to say:—if he persistently follows such other person about from place to place:—if he hides away tools, clothes or other property owned or used by such other person, or deprives him of, or hinders him in the use thereof:—if he watches or besets the house or place where such other person resides or works or carries on business, or happens to be, or the approach to such house or place, or if with two or more other persons he follows such other

person in a disorderly manner in or through any street or road.

Par. 5—declares that nothing in this section shall prevent any person from being liable under any other Act, to any other punishment than is provided for any offence by this section; provided that no person shall be liable to any punishment for doing or conspiring to do any act, on the ground that such act restrains or tends to restrain the free course of trade, unless such act is one of the acts hereinbefore specified in this section, and is done with the object of coercing as hereinbefore mentioned.

The above proviso appears to amend and alter, if not repeal, sect. 42, of ch. 20, 32–33 Vict., though it is not given as so doing; but sect. 5 repeals so much of any act or law as may be inconsistent with this Act.

Sects. 2, 3, 4, enact that all offences under this Act shall be prosecuted under the provisions of ch. 31, 32-33 Vict., and provide for the procedure under the Statute.

As above remarked the English Act repealed expressly sect. 41 of the Act concerning offences against the person, 24–25 Vict., ch. 100. In Reg. vs. Bunn et al, 12 Cox, 316, it was held that, notwithstanding 34–35 Vict., ch. 32, Imp. (above mentioned) and the Trades Union Act, 34–35 Vict., ch. 31, Imp., an indictment would lie, at common law, for conspiracy against servants of a Gas company under contract of service, who, being offended by the dismissal of a fellow servant, agreed together to quit the service of their employers, without notice and in breach of their contract of service, by reason of which the Company were seriously impeded in the conduct of their business. These two Statutes being now incorporated in our own law, this decision applies fully to this country.—Our Trade Union Act, is the 35 Vict., ch. 30.

SUMMARY CONVICTION FOR COMMON ASSAULTS.

Sect. 43.—Where any person unlawfully assaults or beats any other person, any Justice of the Peace upon complaint by or on behalf of the party aggrieved, *praying him to proceed summarily on the complaint*, may hear and determine such offence, and the offender shall, upon conviction thereof before him, at the discretion of the Justice either be committed to any gaol or place of confinement other than the Penitentiary, there to be imprisoned, with or without hard labour, for any term not exceeding two months, or else shall forfeit and pay such fine as shall appear to such Justice to be meet, not exceeding the sum of twenty dollars, together with costs (if ordered); and if such fine so awarded, together with the costs (if ordered) are not paid either immediately after the conviction or within such period as the said Justice shall, at the time of the conviction, appoint, he may commit the offender to any gaol or place of confinement other than a Penitentiary, there to be imprisoned for any term not exceeding two months, unless such fine and costs be sooner paid.—24–25 Vict., ch. 100, s. 42, Imp.

Sect. 44.—If the Justice upon the hearing of any case of assault or battery upon the merits, where the complaint was preferred by or on behalf of the party aggrieved, under the last preceding section, deems the offence not to be proved, or finds the assault or battery to have been justified or so trifling as not to merit any punishment, and accordingly dismisses the complaint, he shall forthwith make out a certificate under his hand, stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred.—24–25 Vict., ch. 100, s. 44, Imp.

Sect. 45.—If any person against whom any such complaint, as in either of the last two preceding sections mentioned, has been preferred, by or on behalf of the party aggrieved, has obtained such certificate, or having been convicted, has paid the whole amount adjudged to be paid, or has suffered the imprisonment, or imprisonment with hard labour awarded, in every such case he shall be released from all further or other proceedings, *civil* or criminal, for the same cause.—24–25 Vict., ch. 100, s. 45, Imp.

Sect. 46.—Provided that in case the Justice finds the assault or battery complained of to have been accompanied by an attempt to commit felony, or is of opinion that the same is, from any other circumstance, a fit subject for prosecution by indictment, he shall abstain from any adjudication thereupon, and shall deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same. Provided also that nothing herein contained shall authorize any Justice to hear and determine any case of assault or battery, in which any question shall arise as to the title to any lands, tenements, hereditaments or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency or any execution under the process of any Court of Justice.—24–25 Vict., ch. 100, s. 46, Imp.

The words *praying him to proceed summarily on the complaint* in section 43, are not in the English Statute. There does not seem to exist any other way of interpreting them than to say that the complainant, by his complaint, must have prayed the Justice to proceed summarily upon it to authorize him to do so. If there is no such prayer, the Justice has no jurisdiction to proceed summarily, and hear and determine the case. He must then treat the case, as one on an indictable offence, and

proceed under chap. 30, instead of under chap. 31, 32 33 Vict. For, it must not be forgotten that a common assault remains an indictable offence. Sect. 1 of chap. 31, 32–33 Vict. it is true, authorizes the Justice of the Peace who receives an information concerning an offence for which the offender is *liable by law* to be summarily tried and punished, to issue his summons and proceed to trial. But, the defendant, accused of an assault, is *not liable by law* to be so tried and punished, where by his complaint or information, his accuser has not prayed the Justice of the Peace to proceed summarily, and the Justice in such a case must proceed under chap. 30. He has no power, no authority to do otherwise.

If he could proceed summarily, without the complainant's consent and demand, there would be no means for a party aggrieved, then, to bring a case of assault before a Jury, if the Justice of the Peace had only to say: "I will decide this case, and whether you like it or not, it will not go before a jury." He could force the complainant to give his evidence, he could summon the witnesses, hear the evidence, and give his judgment; and, perhaps all this to protect the defendant; because, it must be remembered that by sect. 45, this judgment would be a bar to any other proceeding.

A decision contrary to these views is cited dy Mr. Clarke, in his treatise of the Criminal Law of Canada. It is the case of Reg. vs. Shaw, 23 Upper Canada, Q. B. 616. It is hard to conceive how a want of jurisdiction appearing on the face of the proceedings must be shewn on affidavit, as is reported to have been held in that case. See *Paley*, on *Convictions*, 55, 56.

The words *by or on behalf*, in sect. 4 enable parents and others to complain on the part of an injured child.

Sect. 80, *post*, regulates the procedure in prosecutions in these clauses.

Sect. 45, as will be seen, enacts that a conviction or certificate of dismissal, under ss. 43 and 44, shall be a bar to any other proceedings, *civil* or criminal, for the same cause. Is the word *civil* therein not *ultrà vires* of the federal Parliament? Does not the Constitutional Act give exclusive jurisdiction to the local legislatures over civil rights?

The above provisions do not prevent the prosecutor from preferring an indictment, if he chooses, in the first instance, for it is clear law that a party assaulted has several remedies. He may proceed by indictment or by action, or he may apply for a summary conviction under the above clauses.—1 Burn's Justice, 319.

The certificate mentioned in sect. 44 must be given *forthwith*: that is to say, forthwith upon demand of the party entitled to it: the magistrate is obliged to deliver it, *when* asked for, and it is immaterial whether the prosecutor was present or not when the certificate is demanded.—Hancock vs. Somer, 1 E. & E. 795; Costar vs. Hetherington, 1 E. & E. 802.

Under sect. 44, the case must have been heard *upon the merits*, to authorize the magistrate to grant his certificate of dismissal. Sect. 42, ch. 91, Cons. Stat. Canada (repealed Act) had not those words.

As the certificate of dismissal is only to have the effect of a release from other proceedings when the dismissal takes place by reason of one of the three grounds specified, it ought therefore to show upon the face of it the ground upon which it is given, otherwise neither party can know whether it is a bar or not.—Skuse vs. Davis, 10 A. & E. 635.

If the charge is before the magistrate on a legal com-

plaint, and the evidence goes to prove an offence committed, over which he has no jurisdiction to hear and determine, as if, on a complaint of an assault, the evidence go to show that a rape or assault with intent to commit a felony has been committed, he may, if he disbelieves the evidence as to the rape or intent, convict as to the residue of it of an assault.—Wilkinson vs. Dutton, 3 B. & S. 821; Anon, 1 B. & Ad. 382.

In this last case Lord Tenterden held that the magistrate had *found* that the assault was not accompanied by any attempt to commit felony, and that, *quoàd hoc*, his decision was final.

In Reg. vs. Walker, 2 M. & Rob. 446, Coltman, J., gave the same interpretation to the clause.

In Reg. vs. Elrington, 1 B. & S. 688, it was held that the magistrate's certificate of dismissal is a bar to an indictment for an unlawful assault occasioning actual bodily harm, arising out of the same circumstances.

In R. vs. Stanton, 5 Cox, 324, Erle, J., said that in his opinion, a summary conviction before Justices of the Peace (in England, the law requires two) is a bar to an indictment for a felonious assault, arising out of the same facts.

But a summary conviction for assault is no bar to a subsequent indictment for manslaughter, upon the death of the man assaulted, consequent upon the same assault. —Reg. vs. Morris, 10 Cox, 480; Reg. vs. Basset, Greaves, Cons. Acts, 72.

Where an assault charged in an indictment and that referred to in a certificate of dismissal by a magistrate appear to have been on the same day, it is *primâ facie* evidence that they are one and the same assault, and it is incumbent on the prosecutor to show that there was a second assault

on the same day if he alleges that such is the case. The defendant having appeared before the magistrate, the recital in the certificate of the fact of a complaint having been made and of summons having been issued is sufficient evidence of those facts.—Reg. vs. Westley, 11 Cox 139.

When a question of title to lands arises before him, the magistrate's jurisdiction is at an end, and he cannot inquire into or adjudicate upon an excess of force or violence which may be used in the assertion of a title to lands.—Reg. vs. Pearson, 11 Cox, 493.

See 32–33 Vict., ch. 32, for the trial, under certain circumstances, of assaults upon females, or upon males not exceeding fourteen years of age.

COMMON ASSAULT.—ASSAULT OCCASIONING BODILY HARM.

Sect. 47.—Whosoever is convicted upon an indictment of any assault occasioning actual bodily harm, shall be liable to be imprisoned in the Penitentiary for any term not exceeding three years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour; and whosoever is convicted upon an indictment for a common assault, shall be liable to be imprisoned in any gaol or place of confinement other than a Penitentiary, for any term not exceeding one year, with or without hard labour. — 24–25 Vict., ch. 100, s. 47, Imp.

Indictment for an assault occasioning actual bodily harm. —..... That J. S. on ..... in and upon one J. N. did make an assault, and him the said J. N. did then beat, wound and ill-treat, thereby then occasioning to the said J. N. actual bodily harm, and other wrongs

to the said J. N. then did, to the great damage of the said J. N. against the form.....—Archbold, 657.

Indictment for a common assault.—..... That C. D. on the ..... at .....in and upon one A. B. an assault did make, and him the said A. B. then and there did beat, wound and illtreat, and then and there to him other wrongs and injuries did, against the form.....

The defendant may be convicted of a common assault upon an indictment for occasioning actual bodily harm.—R. vs. Oliver, Bell, 287; R. vs. Yeadon, L. & C. 281.

The intent to do bodily harm, or premeditation, is not necessary to convict upon an indictment, under this section: thus a man who commits an assault the result of which is to produce bodily harm is liable to be convicted under this section, though the jury find that the bodily harm formed no part of the prisoner's intention, and was done without premeditation, under the influence of passion.—R. vs. Sparrow, Bell 298.

An assault is an attempt or offer, with force and violence, to do a corporal hurt to another, whether from malice or wantonness; as by striking at him with or without a weapon, though the party striking misses his aim; so drawing a sword, throwing a bottle or glass, with intent to wound or strike, presenting a loaded gun or pistol at a person within the distance to which the gun or pistol will carry, or pointing a pitchfork at a person standing within reach; holding up one's fist at him, in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against his person, will amount to an assault.—1 Burn's Justice 308.

It had been said that the presenting a gun or pistol at a person within the distance to which it will carry, though in fact not loaded, was an assault, but later authorities

have held that if it be not loaded it would be no assault to present it and pull the trigger.—1 Burn's Justice, loc. cit.

One charged with an assault and battery may be found guilty of the assault, and yet acquitted of the battery; but every battery includes an assault; therefore on an indictment for assault and battery, in which the assault is ill-laid, if the defendant be found guilty of the battery it is sufficient.—1 Hawk. 110.

Mere words will not amount to an assault, though perhaps they may in some cases serve to explain a doubtful action.—1 Burn's Justice 309.

If a man strike at another, but at such a distance that he cannot by possibility touch him, it is no assault. But if A advances in a threatening attitude with his fists clenched towards B, with an intention of striking him, so that his blow would have almost immediately reached B, if he had not been stopped by a third person; this would be an assault in point of law, though at the particular moment when A was stopped, he was not near enough for his blow to take effect.—Stephen vs. Meyers, 4 C. & P. 349.

To collect a number of workmen round a person who tuck up their sleeves and aprons and threaten to break his neck, if he did not go out of the place, through fear of whom he did go out, amounts to an assault. There is the intention and present ability and a threat of violence causing fear.—Read vs. Coker, 13 C. B. 850.

So riding after a person and obliging him to run away into a garden to avoid being beaten is an assault.—Martin vs. Shoppee, 3 C. & P. 373.

Any man wantonly doing an act of which the direct consequence is that another person is injured commits an

assault at common law, though a third body is interposed between the person doing the act and the person injured. Thus to drive a carriage against another carriage in which a person is sitting, or to throw over a chair on which a person is sitting, whereby the person in the carriage or on the chair, as the case may be, is injured, is an assault. So by encouraging a dog to bite, or by wantonly riding over a person with a horse, is an assault.—1 Burn's Justice 309; 1 Russ. 1021.

Where an act is done with the consent of the party it is not an assault; for in order to support a charge of assault, such an assault must be proved as could not be justified if an action were brought for it, and leave and licence pleaded; attempting therefore to have connection with a girl between the ages of ten and twelve, or under ten years of age, if done with the girl's consent, is not an assault. If the girl is between ten and twelve, the indictment in such a case should be for an attempt to commit a misdemeanor: if the girl is under ten, the indictment should be for an attempt to commit a felony.—1 Russell, 933. 1023; Reg. vs. Martin, 9 C. & P. 213; Reg. vs. Meredith, 8 C. & P. 589; Reg. vs. Cockburn, 3 Cox 543; Reg. vs Mehegan, 7 Cox 145; Reg. vs. Read, 1 Den. C. C. 377; Reg. vs. Johnston, 10 Cox 114, L. & Cave 632; Reg. vs. Ryland, 11 Cox 101; Reg. vs. Guthrie, 11 Cox 523. By s. 49 of the Procedure Act of 1869, the defendant may be convicted of the attempt to commit the offence charged upon any indictment for any felony or misdemeanor, if the evidence warrants it, and the fact that the girl consented is immaterial, upon an indictment for an attempt to commit the felony or the misdemeanor.—Reg. vs. Beale, 10 Cox, 157.

In Reg. vs. Wollaston, 12 Cox 182, Kelly, C. B. said:

"If anything is done by one being upon the person of another, to make the act an assault it must be done without the consent and against the will of the person upon whom it is done. Mere submission is not consent, for there may be submission without consent, and while the feelings are repugnant to the act being done. Mere submission is totally different from consent. But in the present case, there was actual participation by both parties in the act done, and complete mutuality:" and the defendant was acquitted as the boys, aged above fourteen, upon whom he was accused of having indulged in indecent practices, had been willing and assenting parties to what was done.

But if resistance be prevented by fraud, it is an assault. If a man, therefore, have connection with a married woman, under pretence of being her husband, he is guilty of an assault.—Reg. vs. Williams, 8 C. & P. 286; Reg. vs. Saunders, 8 C. & P. 265.

In Reg. vs. Mayers, 12 Cox, 311, it was held that if a man has or attempts to have connection with a woman while she is asleep, it is no defence that she did not resist, as she is then incapable of resisting.

In Reg. vs. Lock, 12 Cox 244, upon a case reserved, it was held, that the definition of an assault that the act must be *against the will* of the patient implies the possession of an active will on his part, and therefore, the mere submisson by a child of tender years (eight years old) to an indecent assault, without any active sign of dissent, the child being ignorant of the nature of the assault, does not amount to consent so as to take the offence out of the operation of criminal law.

In Reg. vs. Woodhurst, 12 Cox, 443, on an indictment for carnal knowledge of a girl above ten years of age and under twelve, and also for an assault, it was held on

the latter count that although consent would be a defence, consent extorted by terror or induced by the influence of a person in whose power the girl feels herself, is not really such consent as will have that effect; following R. vs. Day, 9 C. & P. 722; R. vs. Nicholl, Russ. & Ry. 130; R. vs. Rosinski, 1 Mood 19; R. vs. Case, 1 Den. 580.

An unlawful imprisonment is also an assault; for it is a wrong done to the person of a man, for which, besides the private satisfaction given to the individual by action, the law also demands public vengeance, as it is a breach of the King's Peace, a loss which the State sustains by the confinement of one of its members, and an infringement of the good order of society.—4 Blackstone, 518.—It has been supposed that every imprisonment includes a battery, but this doctrine was denied in a recent case, where it was said by the Court that it was absurd to contend that every imprisonment included a battery.—1 Russell, 1025.

A battery in the legal acceptation of the word includes beating and wounding.—Archbold, 659.—Battery seemeth to be, when any injury whatsoever, be it ever so small, is actually done to the person of a man in an angry or revengeful, or rude, or insolent manner, as by spitting in his face, or throwing water on him, or violently jostling him out of the way.—1 Hawkin ch. 15, sec. 2.—For the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stages of it, every man's person being sacred and no other having a right to meddle with it in any the slightest manner.—1 Russell, 1021.

The touch or hurt must be with a hostile intention, and therefore, a touch given by a constable's staff for the purpose of engaging a person's attention only is not a battery.—1 Burn, 312.

Whether the act shall amount to an assault must in every case be collected from the intention, and if the injury committed were accidental and undesigned it will not amount to a battery.—1 Russell, 1025.

Striking a horse whereon a person is riding and whereby he is thrown, is a battery on him, and the rider is justified in striking a person who wrongfully seizes the reins of his horse, and in using all the violence necessary to make him loose his hold. A wounding is where the violence is such that the flesh is opened: a mere scratch may constitute a wounding.—1 Burn, loc. cit.

The actual bodily harm mentioned in this section would include any hurt or injury calculated to interfere with the health or comfort of the prosecutors; it need not be an injury of a *permanent* character, nor need it amount to what would be considered to be *grievous* bodily harm.—Archbold, 660.

Even a mayhem is justifiable if committed in a party's own defence. But a person struck has merely a right to *defend* himself, and strike a blow in his defence, but he has no right to revenge himself; and, if, when all the danger is past, he strikes a blow not necessary, he commits an assault and battery. Aud in no case should the battery be more than necessary for self defence.—1 Burn's Justice, 312.

The mere offer of a person to strike another is sufficient to justify the latter's striking him: he need not stay till the other has actually struck him.

A husband may justify a battery in defence of his wife, a wife in defence of her husband, a parent in defence of his child, a child in defence of his parent, a master in defence of his servant and a servant in defence of his master, but in all these cases the battery must be such only as was necessary to the defence of the party

or his relation, for it were excessive, if it were greater than was necessary for mere defence, the prior offence will be no justification. So a person may lay hands upon another to prevent him from fighting, or committing a breach of the peace, using no unnecessary violence. If a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose.

Churchwardens and private persons are justified in gently laying their hands on those who disturb the performance of any part of divine service and turning them out of church.—1 Burn's Justice, 314.

A parent may in a reasonable manner chastise his child, or a master his servant, or a schoolmaster his scholar, or a gaoler his prisoner, and a captain of a ship, any of the crew who have mutinously or violently misconducted themselves.—1 Burn's Justice, loc. cit.

So might a military officer order a moderate correction for disobedience of orders.—1 Burn's Justice, loc. cit.

A party may justify a battery by showing that he committed it in defence of his possession, as for instance, to remove the prosecutor out of his close or house,—or to remove a servant, who, at night, is so misconducting himself as to disturb the peace of the household,—or to remove a person out of a public house, if the party be misconducting himself, or to prevent him from entering the defendant's close or house,—to restrain him from taking or destroying his goods,—from taking or rescuing cattle, &c., &c., &c., in his custody upon a distress,— or to retake personal property improperly detained or taken away,— or the like.

In the case of a trespass in law merely *without actual*

force, the owner of the close, or house, &c., &c., &c., must first request the trespasser to depart, before he can justify laying his hands on him for the purpose of removing him; and even if he refuse, he can only justify so much force as is necessary to remove him. But if the trespasser use force, then the owner may oppose force to force; and in such a case, if he be assaulted or beaten, he may justify even a wounding or mayhem in self-defence, as above mentioned. In answer to a justification in defence of his possession, it may be shown that the battery was excessive, or that the party assaulted, or some one by whose authority he acted, had a right of way or other easement over the close, or the like.—1 Burn, 313; Archbold, 661. On this part of the subject, 1 Russell, 1028 has the following remarks: "It should be observed with respect to an assault by a man on a party endeavouring to dispossess him of his land, that where the injury is a mere breach of a close, in contemplation of law, the defendant cannot justify a battery without a request to depart; but it is otherwise where any actual violence is committed, as it is lawful in such a case to oppose force by force; therefore if a person break down the gate, or come into a close *vi et armis*, the owner need not request him to be gone, but may lay hands on him immediately; for it is but returning violence with violence. If a person enters another's house with force and violence, the owner of the house may justify turning him out, using no more force than is necessary, without a previous request to depart; but if the person enters quietly, the other party cannot justify turning him out without previous request."

It appears to have been formerly holden that a person could not be prosecuted upon one indictment for assaulting two persons, each assault being a distinct offence;

but a subsequent decision has established the contrary.—1 Russell, 1030.

See *ante* remarks on sects. 43, 44, 45, 46.

By sect. 77, *post*, when any person is convicted of any misdemeanor punishable under this Act, the Court *may* in addition to or *in lieu* of any punishment authorized by this Act fine the offender, and require him to enter into his own recognizances, and to find sureties, *both or either*, for keeping the peace, and being of good behaviour, and sects. 78 and 79, *post*, provide that, when any person is convicted on any indictment of any assault, the Court may order payment by the defendant of the prosecutor's costs, and enact how such costs shall be levied.

See 32–33 Vict., ch. 32, for assaults upon any male child aged not more than fourteen, or upon any female, not amounting to an assault with intent to commit rape, and the trial of persons charged thereof in certain cases. —24–25 Vict., ch. 100, s. 43 Imp.

COURT OF QUARTER SESSIONS NOT TO TRY CERTAIN OFFENCES.

Sect. 48.—This section has been noticed, *ante*, under sections 27, 28 and 29.

RAPE.

Sect. 49 as amended by 36 Vict., ch. 50.—Whosoever commits the crime of rape is guilty of felony, and shall be liable to suffer death as a felon, or to be imprisoned in the Penitentiary for life, or for any term not less than seven years; and whosoever assaults any woman or girl with intent to commit rape is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not

less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour.—24–25 Vict., ch. 100, sect. 48, Imp.

Sect. 65.— *Carnal knowledge defined.* — Whenever, upon the trial of any offence, punishable under this Act, it is necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete on proof of any degree of penetration only.—24-25 Vict., ch. 100, sect. 63, Imp.

Indictment.—..... That A. B., on..... in the year ..... in and upon one C. D. in the peace of God and Our Lady the Queen then and there being, violently and feloniously did make an assault, and her, the said C. D., violently and against her will feloniously did ravish and carnally know; against the form of the Statute in such case made and provided, and against the peace of Our Lady the Queen, her crown and dignity.—Archbold, 704.

Not triable at Quarter Sessions; sect. 12, Procedure Act of 1869.

Rape has been defined to be the having unlawful and carnal knowledge of a woman, by force, and against her will. 1 Russell, 904. *Against her will means without her consent.*—1 Russell 906, 908; Roscoe, 805.

To constitute the offence there must be a penetration, or *res in re*, in order to constitute the "carnal knowledge" which is a necessary part of this offence. But a very slight penetration is sufficient, though not attended with the deprivation of the marks of virginity.—1 Russell, 912.

A boy under fourteen years of age is presumed by law

incapable to commit a rape, and therefore he cannot be guilty of it, nor of an assault with intent to commit it; and no evidence is admissible to show that, in point of fact, he could commit the offence of rape.—A husband cannot be guilty of a rape upon his wife.—The offence of rape may be committed, though the woman at last yielded to the violence, if such her consent was forced by fear of death or by duress.

It will not be any excuse that the woman was first taken with her own consent if she were afterwards forced against her will; nor will it be an excuse that she consented after the fact, or that she was a common strumpet, or the concubine of the ravisher. Circumstances of this kind, however, though they do not necessarily prevent the offence from amounting to a rape, yet are material to be left to the jury, in favour of the party accused especially in doubtful cases. The notion that if the woman conceived it could not be a rape, because she must, in such case, have consented, appears to be quite exploded.—1 Russell, 905.

Having carnal knowledge of a woman by a fraud which induces her to suppose it is her husband does not amount to a rape. Reg. vs. Williams, 8 C. & P. 286; Reg. vs. Clarke, Dearsly 397; 1 Russell, 908; Reg. vs. Barrow, 11 Cox, 191.

In this last case, the woman, with her baby in her arms, was lying in bed between sleeping and waking, and her husband was asleep beside her. She was completely awakened by a man having connection with her, and pushing the baby aside. Almost directly she was completely awakened, she found the man was not her husband, and awoke her husband. The Court of Criminal Appeal, composed of Bovill, C. J., and Channell,

Byles, Blackburn and Lush, J.J., held that a conviction for a rape upon this evidence could not be sustained. See also Rex vs. Jackson, Russ. & Ry. 487.

Upon the trial of an indictment for rape upon an idiot girl, the proper direction to the jury is that if they are satisfied that the girl was in such a state of idiotcy as to be incapable of expressing either consent or dissent, and that the prisoner had connection with her without her consent, it is their duty to find him guilty.—Reg. vs. Barratt, 29 L. T. N. S. 409: 12 Cox, 498. In Reg. vs. Fletcher, 10 Cox, 248, the law was so given, but the evidence of non-consent was declared insufficient.

If a woman is incapable of resisting, it is no defence that she did not resist. Reg. vs. Fletcher, 8 Cox, 131: Bell C. C. 63; R. vs. Camplin, 1 Den. 89. If a man has or attempts to have connection with a woman while she is asleep, it is no defence that she did not resist, as she is then incapable of resisting. The man can therefore be found guilty of a rape, or of an attempt to commit a rape.—Reg. vs. Mayers, 12 Cox C. C. 311.

It is clear that the party ravished is a competent witness. But the credibility of her testimony must be left to the jury, upon the circumstances of fact which concur with that testimony. Thus if she be of good fame: if she presently discovered the offence, and made search for the offender: if she showed circumstances and signs of the injury, whereof many are of that nature that women only are proper examiners: if the place where the fact was done were remote from inhabitants or passengers: if the party accused fled for it: these, and the like, are concurring circumstances, which give greater probability to her evidence. But if, on the other hand, the witness be of evil fame, and stand unsupported by

others: if without being under the control or the influence of fear, she concealed the injury for any considerable time after she had the opportunity of complaining: if the place where the fact is alleged to have been committed was near to persons by whom she might probably have been heard, and yet she made no outcry: if she has given wrong descriptions of the place: these, and the like circumstances, afford a strong, though not conclusive presumption that her testimony is feigned.—1 Russell, 692.

The character of the prosecutrix, as to general chastity, may be impeached by *general* evidence, as by showing her general light character, etc., etc., but evidence of connection with other persons than the prisoner cannot be received.

In Reg. vs. Hodgson, Russ. & Ry. 211, the woman in the witness box was asked: Whether she had not before had connection with other persons, and whether she had not before had connection with a particular person (named.) The Court ruled that she was not obliged to answer the question. In the same case, the prisoner's counsel offered a witness to prove that the woman had been caught in bed about a year before this charge with a young man. The Court ruled that this evidence could not be received. These rulings were subsequently maintained by all the judges.

Although you may cross-examine the prosecutrix as to particular acts of connection with other men; (and she need not answer the question, unless she likes,) you cannot, if she deny it, call witnesses to contradict her.—Reg. vs. Cockcroft, 11 Cox, 410.

On the trial of an indictment for an indecent assault, the defence being consent on the part of the prosecutrix,

she denied on cross-examination having had intercourse with a third person, S. *Held* that S. could not be examined to contradict her upon this answer. This rule applies to cases of rape, attempt to commit a rape, and indecent assaults in the nature of attempts to commit a rape.—Reg. vs. Holmes and Furness, 12 Cox C. C. 137.

This decision is by the Court of Criminal Appeal, composed of five judges, confirming Rex. vs. Hodgson, and Reg. vs. Cockcroft. The case of Reg. vs. Robins, 2 Moo. and Rob. 512, is now overruled. Taylor, Evidence, par. 336.

It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death, but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.—1 Hale 634.

Upon an indictment under the first part of this section the jury may find the prisoner guilty of an attempt to commit a rape.—Reg. vs. Hapgood, 11 Cox, 471; Procedure Act of 1869, sect. 49—or may find a verdict of common assault, sect. 51 of the same Act.

Under the second part of the section, for an assault with intent to commit rape (misdemeanor) the indictment can be as follows:.....in and upon one A. B., a woman, (or girl) unlawfully did make an assault, with intent her, the said A. B., violently and against her will, feloniously, to ravish and carnally know, against the form.....Add a count for a common assault.—Archbold, 684.

See sect. 77, *post*, for fine and sureties.

If upon trial for this misdemeanor, the felony under the first part of the section be proved, the defendant is

not therefore entitled to an acquittal.—Procedure Act of 1869, sect. 50.

On an indictment for an assault with intent to commit a rape, Pateson J., held that the evidence of the prisoner, having, on a prior occasion, taken liberties with the prosecutrix, was not receivable to show the prisoner's intent; also, that in order to convict of assault with intent to commit rape, the jury must be satisfied not only that the prisoner intended to gratify his passion on the person of the prosecutrix, but that he intended to do so at all events, and notwithstanding any resistance on her part.—R. vs. Loyd, 7 Car. & P. 318.

PROCURING THE DEFILEMENT OF A WOMAN OR GIRL UNDER TWENTY-ONE YEARS OF AGE.

Sect. 50. Whosoever by false pretences, false representations, or other fraudulent means, procures any woman or girl under the age of twenty-one years, to have illicit carnal connection with any man other than the procurer, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement, other than the penitentiary, for any term less than two years, with or without hard labour. 24-25 Vic., ch. 100, sect. 49, Imp.

Indictment. ....That J. S. on the first day of June, in the year of our Lord....by falsely pretending and representing unto one A. B., that....*(here set out the false pretences or representations)* did procure the said A. B. to have illicit carnal connection with a certain man named....*(or to the jurors aforesaid unknown)* she, the said A. B., at the time of such procurement, being then a woman (*or girl*) under the age of twenty-one years, to wit, of the age of....whereas in truth

and in fact *(negative the pretences or representations)* against..... Archbold, 707.

The pretences and representations made by the defendant must be proved, as well as their falsehood. Also, that by means of these false pretences or representations, the defendant induced the woman, or girl, to have carnal connection with the man named in the indictment, and that she was then under twenty-one. A boy must not be under fourteen years of age to be indictable under this clause.—See section 77, *post*, as to fine and sureties.—On the trial of an indictment under this section, the prisoner may be convicted of an attempt to commit the offence, under sect. 49 of the Procedure Act of 1869.

CARNALLY ABUSING CHILDREN UNDER TEN YEARS OF AGE.

Sect. 51. Whosoever unlawfully and carnally knows and abuses any girl under the age of ten years, is guilty of felony, and shall suffer death as a felon.—24-25 Vic., ch. 100, sect. 50, Imp.

Indictment. ....in and upon one A. N., a girl under the age of ten years, to wit, of the age of nine years, feloniously did make an assault, and her, the said A. N., then and there feloniously did unlawfully and carnally know and abuse, against the form..... Archbold, 708.

Not triable at Quarter Sessions; sect. 12, Procedure Act of 1869.

Sect. 77, *post*, does not apply to this clause, as the crime provided for is a capital felony.

The evidence is the same as in rape, with the exception that the consent or non-consent of the girl is immaterial.—Archbold, 709.

Upon the trial of an indictment under this clause, the jury may, under sect. 51 of the Procedure Act of 1869 find the defendant guilty of a common assault, in certain

cases. But no such verdict can be returned, if the girl assented. Reg. vs. Read, 1 Den. 377.

Under sect. 49 of the Procedure Act of 1869, the defendant may be convicted of an attempt to commit the offence charged, if the evidence warrants it. A boy under fourteen years of age cannot be convicted of this offence, nor of the attempt to commit it.—1 Russell 931.

CARNALLY ABUSING A GIRL ABOVE TEN AND UNDER TWELVE YEARS OF AGE.

Sect. 52.—Whosoever unlawfully and carnally knows and abuses any girl being above the age of ten years and under the age of twelve years is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour.—24–25 Vict., ch. 100, s. 51, Imp.

Indictment.—..... in and upon one A. N., a girl above the age of ten years and under the age of twelve years, to wit, of the age of eleven years, unlawfully did make an assault, and her the said A. N. did then unlawfully and carnally know and abuse, against the form..... —Archbold, 709.

Same evidence as in rape; but it will be no defence that the girl consented.

Remarks under preceding section are applicable here; but section 77. *post*, of this same Act applies.

An indictment charged that G in and upon D, a girl above the age of ten, and under the age of twelve, unlawfully did make an assault, and her, the said D, did then unlawfully and carnally know and abuse. *Held* by the Court of Criminal Appeal, that the indictment contained

two charges, one of common assault, and the other of the statutable misdemeanor (under this section), and that the prisoner might be convicted of a common assault upon it, *as no consent* on the part of the girl had been proved.—Reg. vs. Guthrie, 11 Cox, 522.

On an indictment for carnal knowledge of a girl above ten years of age and under twelve, and also for an assault: *Held*, Lush, J., on the count for assault, that "although consent would be a defence, consent extorted by terror or induced by the influence of a person in whose power she feels herself, is not really such consent as will have that effect.—Reg. vs. Woodhurst, 12 Cox, 443; Reg. vs. Lock, 12 Cox 244.

Upon an indictment for unlawfully assaulting and having carnal knowledge of a girl between ten and twelve years of age, the prisoner may be convicted of the attempt to commit that offence.—Court of Criminal Appeal, 11 Cox, 101; Reg. vs. Ryland.

The punishment would then be under section 53.

If the girl has consented, there can be no verdict of assault.—Reg. vs. Johnston, 1 Leigh & Cave 632; 1 Russell 934; Reg. vs. Cockburn, 3 Cox C. C. 543. Reg. vs. Martin, 2 Moo. C. C. 123. Reg. vs. Wollaston, 12 Cox, 180.

But there is a difference between consent and submission.—1 Russell, 934; Reg. vs. Lock, 12 Cox 244.

If upon an indictment for having a carnal knowledge of a girl between ten and twelve years of age, it appear that in fact the girl was under ten, the indictment cannot be amended to make it agree *quoad hoc* with the proof, and, notwithstanding sect. 50 of the Procedure Act of 1869, the prisoner must be acquitted.—1 Russell 935.—Reg. vs. Shott, 3 C & K. 206.

INDECENT ASSAULT ON FEMALES. ATTEMPT TO ABUSE GIRL UNDER TWELVE.

Sect. 53.—Whosoever shall be convicted of any indecent assault upon any female, or of any attempt to have carnal knowledge of any girl under twelve years of age, shall be liable to be imprisoned in any gaol or place of confinement, other than a Penitentiary, for any term less than two years, with or without hard labour, and with or without whipping.—24–25 Vict., ch. 100, s. 52, Imp. —Misdemeanor.

Indictment.—. . . .One A. D. unlawfully and indecently did assault, and her, the said A. D., did then beat, wound and ill-treat, and other wrongs to the said A. D. did, to the great damage of the said A. D., against the form. . . . . Archbold 710.

No indictment can be preferred for any indecent assault, unless one or other of the preliminary steps required by sect. 28 of the Procedure Act of 1869 has been taken.

As to fining the offender, and requiring sureties, see section 77, *post.*

As to the whipping, see sect. 95 of the Procedure Act of 1869. The consent is immaterial upon an indictment for the attempt to have carnal knowledge of a girl under twelve, but upon an indictment for indecent assault, if the girl, although under twelve, consented, the prisoner must be acquitted, as there can be no assault on a person consenting. See *ante* cases under sections 49 and 52, and Reg. vs. Holmes & Furness, 12 Cox, 137.

ABDUCTION OF A WOMAN FROM MOTIVES OF LUCRE.

Sect. 54.—Where any woman of any age has any interest, whether legal or equitable, present or future, absolute, conditional or contingent, in any real or personal estate, or is a presumptive heiress or co-heiress or presumptive next of kin, or one of the presumptive next of kin to any one having such interest, whosoever, from motives of lucre, takes away or detains such woman against her will with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; and whosoever fraudulently allures, takes away or detains such woman, being under the age of twenty-one years, out of the possession and against the will of her father and mother or of any other person having the lawful care or charge of her, with intent to marry or carnally know her or to cause her to be married or carnally known by any other person, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour; and whosoever is convicted of any offence against this section shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she has any such interest, or which shall come to her as such heiress, co-heiress or next of kin as aforesaid; and if any such marriage as aforesaid shall have taken place, such property shall, upon such conviction, be settled in such manner as the Court of Chancery in Ontario, the Supreme Court in Nova Scotia or New Brunswick, or the Superior Court in Quebec, shall appoint, upon any information at the suit of the

Attorney-General for the Province in which the property is situate.—24-25 Vict., ch. 100, s 53, Imp.

It is not necessary that an actual marriage or defilement should take place. Under the first part of this section, the taking or detaining must be *from motives of lucre* and *against the will of the woman*, coupled with an intent to marry or carnally know her or cause her to be married or carnally known by another person.

Indictment under first part of this section.—..... feloniously and from motives of lucre did take away and detain (" *take away* OR *detain*") one A. N. against her will, she, the said A. N., then having a certain present and absolute interest in certain real estate (*any interest, whether legal or equitable, present or future, absolute, conditional or contingent in any real or personal estate*) with intent her, the said A. N., to marry *(or carnally know her, or cause her to be married or carnally known by....)* against the form..... Add a count stating generally the nature of some part of the property, and if the intent be doubtful, add counts varying the intent.—Archbold, 699. The value of the property should be stated. See another form, in Chitty, C. L. 3rd V., 818.

Indictment under the second part of this section.—..... feloniously and fraudulently allured *(took away or detained)* one A. B. out of the possession and against the will of C. D., her father, she, the said A. B., then being under the age of twenty-one years, and having a certain present interest in ..... with intent, her, the said A. B., to marry *(or carnally know, or cause to be married or, etc., etc., etc.,)* contrary to the Statute, etc., etc., etc. (Add counts, if necessary, varying the statements as to the property, possession, or intents.)

Under the second part of the section, the offence consists in the fraudulent allurement of a woman under twenty-one out of the possession of or against the will of her parent or guardian, coupled with an intent to marry or carnally know her, or cause her to be married or carnally known by another person, but, for this offence, no motives of lucre are mentioned, nor should it have been committed against the will of the woman, though she must be an heiress, or such a woman as described in the first lines of this section.

The taking under the first part of this section must be against the will of the woman; but it would seem that, although it be with her will, yet, if that be obtained by fraud practised upon her, the case will be within the Act; for she cannot whilst under the influence of fraud be considered to be a free agent.—*R. vs. Wakefield*, Lancaster Assizes, 1827.

If the woman be taken away in the first instance with her own consent, but afterwards refuse to continue with the offender, the offence is complete, because if she so refuse, she may from that time as properly be said to be taken against her will as if she had never given her consent at all, for, till the force was put upon her, she was in her own power.—1 Burn's Justice 8.

Moreover the *detaining against* her will is by itself an offence.

It seems, also, it is not material whether a woman so taken contrary to her will at last consents thereto or not, for if she were in force at the time, the offence is complete at the time of the taking, and the offender is not to escape from the provisions of the Statute by having prevailed over the weakness of the woman by such means.—*Loc. cit.*

The second part of this section expressly contemplates the case of a girl, under twenty one, whose co-operation has been obtained by influence over her mind,

and who has been taken out of the possession of her parent or guardian by means of a fraud practised upon them and against their will, or by force, against their will, but with her consent. If a girl, under twenty-one, is taken away or detained against her own will, or her consent is obtained through fear, that case would be within the first part of this section.

The woman, though married, may be a witness against the offender —*Archbold* 700.

" If therefore," says Taylor, on Evidence, No. 1236, "a " man be indicted for the forcible abduction of a woman " with intent to marry her, she is clearly a compe- " tent witness against him, if the force were continuing " against her till the marriage. Of this last fact also she is " a competent witness, and the better opinion seems to be " that she is still competent, notwithstanding her subse- " quent assent to the marriage and her voluntary coha- " bitation : for otherwise, the offender would take advan- " tage of his own wrong." —Also, 1 Russ. 709.

The last part of the clause relating to the property of the woman married as aforesaid, seems unconstitutional; the Local Legislatures have exclusive jurisdiction in the matter.

Under sect. 77, *post*, the Court may require sureties to keep the peace in addition to the punishment.

Under sect. 49 of the Procedure Act of 1869, the prisoner charged with the felony aforesaid may be found guilty of an attempt to commit the same, which is a misdemeanor at common law, Roscoe 283, and punishable by fine, or imprisonment, or both.—Archbold 174.—The Court may also, in misdemeanors, require the defendant to find sureties to keep the peace and be of good behaviour, at common law, and may order him to be imprisoned until such security is found.—Reg. vs. Dunn, 12 Q. B. 1026.—Greaves, Cons. Acts, 7.

Under sect. 51 of the Procedure Act of 1869, the prisoner may be acquitted of the felony, and found guilty of an assault, if the evidence warrants such finding.

ABDUCTION OF ANY WOMAN.

Sect. 55.—Whosoever by force takes away or detains against her will any woman of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding fourteen years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour.—24-25 Vict., ch. 100, s. 54, Imp.

The observations upon the last section will apply for the most part to this, which provides a very proper protection to women who happen to have neither any present nor future interest in any property.—*Greaves, Consol. Acts*, 80.

It may be that manual force may not in all cases be necessary, and, that though no actual force was used, yet, if the taking away was accomplished under the fear and apprehension of a *present immediate threatened* injury, depriving the woman of freedom of action, the Statute would be satisfied.—1 *Burn's Justice* 9.

Indictment.—.....feloniously and by force did take away (*or detain*) one A B. against her will, with intent her, the said A. B., to marry ... (*or* .....) against the form of the Statute....If the intent is doubtful, add a count stating it to be to " carnally know," or to cause

her to be married to one N. S., or to some persons to the jurors unknown, or to cause her to be carnally known by, &c., &c., &c. 1 Burn's Justice, 12.

A verdict for assault or for an attempt to commit the offence charged, may be given, and sureties for the peace may be required by the Court, as under the next preceding section.

ABDUCTION OF GIRLS UNDER SIXTEEN.

Sect. 56.—Whosoever unlawfully takes or causes to be taken any unmarried girl being under the age of sixteen years out of the possession and against the will of her father or mother or of any other person having the lawful care or charge of her, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement, other than a Penitentiary, for any term less than two years, with or without hard labour.—24-25 *Vict., ch.* 100, *s.* 55, *Imp.*

The intent to marry, or carnally know is not an ingredient of this offence. The only intent which is material is the intent to deprive the parent or legal guardian of the possession of the child.—Roscoe, 248. No motives of lucre are necessary. A woman may be guilty of this offence.

It is immaterial whether the girl consents or not, and the taking need not be by force, actual or constructive. *Reg. vs. Mankletow*, 1 *Russell* 954; Dearsly, 159—Where a parent countenances the loose conduct of the girl, the jury may infer that the taking is not against the parent's will. Ignorance of the girl's age is no defence.—1 Russell 952.—It is not necessary that the taking away should be for a permanency: it is sufficient if for the temporary keeping of the girl.—Reg. vs Timmins, Bell C. C. 276.

To pick up a girl in the streets and take her away is not to take her out of the possession of any one. The prisoner met a girl under sixteen years of age in a street, and induced her to go with him to a place at some distance, where he seduced her and detained her for some hours. He then took her back to where he met her and she returned home to her father. In the absence of any evidence that the prisoner knew, or had reason for knowing, or that he believed that the girl was under the care of her father at the time, *held* by the Court of Criminal Appeal that a conviction under this section could not be sustained.—Reg. vs. Hibbert. 11 Cox C. C. 246.

One who takes an unmarried girl under the age of sixteen years out of the possession and against the will of her father or mother is guilty of this offence, although he may not have had any bad motive in taking her away, nor means of ascertaining her age, and although she was willing to go.—Reg. vs. Booth, 12 Cox C. C. 231. The defence in this case was that the prisoner, actuated by religious and philanthropic motives, had taken the girl from her parents in order to save her from seclusion in a convent. He was found guilty and sentenced.

A girl who is away from her home is still in the custody or possession of her father, if she intends to return; it is not necessary to prove that the prisoner knew the girl to be under sixteen; the fact of the girl being a consenting party cannot absolve the prisoner from the charge of abduction; this section is for the protection of parents.—*Willes, J.*, Reg. vs. Mycock. 12 Cox C. C. 28,

Indictment.—....unlawfully did take (*or cause to be taken*) one A. B. out of the possession and against the will of E. F., her father, she, the said A. B., being then an unmarried girl, and under the age of sixteen years, to wit, of the age of....against the form, &c., (if neces-

sary add a count stating E. F. to be a person having the lawful care and charge of the said A. B., or that the defendant unlawfully did cause to be taken one ....) —Archbold, 700.

As to fining the offender, and requiring him to give sureties for good behaviour, see sect. 77, *post.*

As to verdict for an attempt to commit this offence, on a prosecution for the offence itself, as above, under section 54.

STEALING CHILDREN LESS THAN FOURTEEN YEARS OF AGE.

Sect. 57.—Whosoever unlawfully, either by force or fraud, leads, or takes away, or decoys, or entices away, or detains any child under the age of fourteen years, with intent to deprive any parent, guardian or other person having the lawful care or charge of such child of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong, and whosoever, with any such intent, receives or harbours any such child, knowing the same to have been by force or fraud, led, taken, decoyed, enticed away or detained, as in this section before mentioned, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour; Provided that no person who has claimed any right to the possession of such child, or is the mother, or has claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of the getting possession of such child, or taking such child out of the

possession of any person having the lawful charge thereof.—24–25 Vict., ch. 100, sect. 56, Imp.

Indictment.—.... feloniously and unlawfully did by force (*or fraud*) leadand take away (*lead or take away, or decoy, or entice away, or detain*) one A. N., a child then under the age of fourteen years, to wit, of the age of seven years, with intent thereby then to deprive one A. S., the father of the said A. N.,of the possession of the said A.N., his said child, against..... And the jurors .....that the said.....afterwards, to wit on the day and year aforesaid, feloniously and unlawfully did by force (*or fraud*) lead and take away, (*or &c.,*) the said A. N., a child then under the age of fourteen years, to wit, of the age of seven years, with intent thereby then feloniously to steal, take and carry away divers articles, that is to say..... then being upon and about the person of the said child, against..... (Add counts stating that the defendent did by *fraud entice away,* or *did by fraud detain,* or *did by force detain,* if necessary).—Archbold, 703.

As to requiring the prisoner to enter into recognizances and find sureties for keeping the peace, in addition to any other punishment, see sect. 77, *post.*

Upon the trial of any offence contained in this section, the defendant may under sect. 49 of the Procedure Act of 1869, be convicted of an attempt to commit the same. —1 Russell, 966.

All those claiming a right to the possession of the child are specially exempted from the operation of this section, by the proviso.

BIGAMY.

Sect. 58.—Whosoever, being married, marries any other person during the life of the former husband or wife,

whether the second marriage has taken place in Canada, or elsewhere, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour; and any such offence may be dealt with, enquired of, tried, determined and punished in any district, county or place in Canada, where the offender is apprehended or is in custody, in the same manner in all respects as if the offence had been actually committed in that district, county or place; provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in Canada by any other than a subject of Her Majesty resident in Canada and leaving the same with intent to commit the offence, or to any person marrying a second time whose husband or wife has been continually absent from such person for the space of seven years then last past, and was not known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, was divorced from the bond of the first marriage, or to any person whose former marriage has been declared void by the sentence of any Court of competent jurisdiction. —24-25 Vict., ch. 100, s. 57, Imp.

Indictment.— The Jurors for Our Lady the Queen upon their oath present, that J. S. on..... in the year of Our Lord..... at the parish of..... in the..... did marry one A. C., spinster, and her the said A. then and there had for his wife; and that the said J. S. afterwards, and whilst he was so married to the said A., as aforesaid, to wit, on the..... day..... at ..... feloniously and unlawfully did marry and take

to wife one M. Y., and to her the said M. Y. was then and there married, the said A., his former wife, being then alive; against the form..... And the jurors aforesaid, upon..... that the said J. S. afterwards, to wit, on at in the district of within the jurisdiction of the said Court, was apprehended (or is now in custody in the common gaol of the said district of at within the jurisdiction of the said court) for the said felony.—Archbold, 883.

Bigamy is the felonious offence of a husband or wife marrying again during the life of the first wife or husband. It is not strictly correct to call this offence *bigamy*; it is more properly denominated *polygamy*, i. e. having a plurality of wives or husbands at once, while bigamy according to the canonists consists in marrying two virgins successively, one *after* the death of the other, or in once marrying a widow.—Wharton's Law Lexicon *verbo* Bigamy.

Upon an indictment for bigamy, the prosecutor must prove: 1st, the two marriages; 2d, the identity of the parties.—Roscoe, 294.

The law will not, in cases of bigamy, presume a marriage valid to the same extent as in civil cases.—R. vs. Jacob, 1 Moo. C. C. 140.

The first wife or husband is not a competent witness to prove any part of the case, but the second wife or husband is, after the first marriage is established, for she or he is not legally a wife or husband.—1 Russell, 319.

The first marriage must be a valid one. The time at which it was celebrated is immaterial, and whether celebrated in this country or in a foreign country is also immaterial.—Archbold, 883.

If celebrated abroad, it may be proved by any person

who was present at it; and circumstances should also be proved from which the jury may presume that it was a valid marriage according to the laws of the country in which it was celebrated. Proof that a ceremony was performed by a person appearing and officiating as a priest, and that it was understood by the parties to be the marriage ceremony, according to the rites and customs of the foreign country, would be sufficient presumptive evidence of it, so as to throw upon the defendant the *onus* of impugning its validity.—Archbold, 884.

In the case of Reg. vs. McQuiggan, 2 Low. Canada Rep. *Note*, 346, the proof of the first marriage was attempted to be made by the voluntary examination of the accused, taken before Thomas Clancy, the committing magistrate, but this being irregular and defective, its reception was successfully objected to by the counsel for the prisoner. The Crown then tendered the evidence of Mr. Clancy as to the story the prisoner told him when taken before him after his arrest. This the Court held to be good evidence, and allowed to go to the jury: this was the only evidence of the first marriage, the prisoner having on that occasion, as Mr. Clancy deposed, confessed to him that he was guilty of the offence, as charged, and at the same time expressed his readiness to return and live with his first wife. The second marriage was proved by the evidence of the clergyman who solemnized it.—Rolland and Aylwin, J. J.

In Reg. vs. Creamer, 10 Low. Can. Rep. 404, upon a case reserved, the Court of Queen's Bench, composed of Lafontaine, C. J., Aylwin, Duval, Meredith and Mondelet, J.J., unanimously ruled that upon the trial of an indictment for bigamy, the admission of the first marriage by the prisoner unsupported by other testimony, is sufficient to support a conviction.

In R. vs. Newton, 2 Moody C.C. 503, and R. vs. Simmonds, 1 C. & K. 164, Wightman, J., held that the prisoner's admissions, deliberately made, of a prior marriage in a foreign country are sufficient evidence of such marriage, without proving it to have been celebrated according to the law of the country where it is stated to have taken place.

A first marriage, though *voidable*, if not absolutely *void* will support an indictment for bigamy.—Archbold, 886.

As to the second marriage, it is immaterial whether it took place in Canada, or elsewhere, provided, if it took place out of Canada, the defendant be a subject of Her Majesty resident in Canada, whence he had left to commit the offence.—32-33 Vict., ch. 20, s. 58.

It seems that the offence will be complete, though the defendant assume a fictitious name at the second marriage.—R. vs. Allison, R. & Ryan, 109.

The same ruling was lately maintained, on a case reserved, in Reg. vs. Rea, 12 Cox, 190.

Though the second marriage would have been void, in any case, as for consanguinity or the like, the defendant is guilty of bigamy.—R. vs. Brown, 1 C. & K. 144.

In R. vs. Fanning, 10 Cox, 411, a majority of the judges of the Irish Court of Criminal Appeal held, contrary to R. vs. Brown, that to constitute the offence of bigamy, the second marriage must have been one which, but for the existence of the previous marriage, would have been a valid marriage, but the English Court of Criminal Appeal, by sixteen judges, unanimously overruled R. vs. Fanning, in Reg. vs. Allen, 12 Cox, 193, and decided, as in Reg. vs. Brown, that the invalidity of

the second marriage, on account of relationship, does not prevent its constituting the crime of bigamy.

It must be proved that the first wife was living at the time the second marriage was solemnized; which may be done by some person acquainted with her and who saw her at the time or afterwards.—Archbold, 887. On a prosecution for bigamy, it is incumbent on the prosecutor to prove that the husband or wife, as the case may be, was alive at the date of the second marriage. There is no presumption of law of the continuance of the life of the party for seven years after the date at which he or she was proved to have been alive. The existence of the party at an antecedent period may or may not afford a reasonable inference that he or she was alive at the date of the second mariage; but it is purely a question of fact for the jury.—Reg. vs. Lumley, 11 Cox, 274.

On the trial of a woman for bigamy, whose first husband had been absent from her for more than seven years, the jury found that they had no evidence that at the time of her second marriage, she knew that he was alive; but that she had the means of acquiring knowledge of that fact, had she chosen to make use of them. It was held that upon this finding, the conviction could not be supported.—R. vs. Briggs, Dears. and Bell 98.

On this last case, Greaves, 1 Russell 270, note l, remarks:—"The case was argued only on the part of the prisoner, and the Court studiously avoided determining on which side the onus of proof as to the knowledge of the first husband being alive lay, and yet the point seems very clear. It is plain that the latter part of the section in the 9 Geo. 4, ch. 31, s. 22, and in the new Act is in the nature of proviso. (32–33 Vict., ch. 20, s. 58, Canada.) Now no rule is better settled than that if an exception comes by way of proviso, whether it occurs in a

subsequent part of the Act, or in a subsequent part of the same section containing the enactment of the offence, it must be proved in evidence by the party relying upon it. Hence it is that no indictment for bigamy ever negatives the exceptions as retained in the proviso, and hence it follows that the proof of those exceptions lies on the prisoner; if it was otherwise, the prosecutor would have to prove more than he has alleged. Then the proviso in terms requires proof both of the absence of the party for seven years, *and* that the party shall not have been known by the prisoner to have been living within that time, and consequently it lies on the prisoner to give evidence of *both*; and as the Legislature has required proof of both, it never could have been intended that proof of the one should be sufficient evidence of the other. When, however, the prisoner has given evidence to negative his knowledge that the party is alive, the onus may be thrown on the prosecutor to show that he had that knowledge; and in accordance with this view is the dictum of Willes, J, in Reg. vs. Ellis, 1 F. and F. 309, that 'if the husband has been living apart from his wife for seven years, under such circumstances as to raise a probability that he supposed that she was dead when he was re-married, evidence may be necessary that he knew his first wife was alive.' As to the manner in which the case should be left to the jury, it should seem that the proper course is to ask them whether they are satisfied that the prisoner was married twice, and that the person whom he first married was alive at the time of the second marriage; and, if they are satisfied of these facts, to tell them that it then lies upon the prisoner to satisfy them that there was an absence for seven years, and also that during the whole of those seven years he was ignorant that his first wife was alive, and that unless he has proved

both those facts to their satisfaction they ought to convict him. It is perfectly clear that the question is not whether he knew that his first wife was alive *at the time of the second marriage,* for he may have known that she was alive within the seven years, and yet not know that she was alive at the time of the second marriage, and, if he knew that she was alive *at any time within the seven years,* he ought to be convicted."

On Reg. vs. Turner, 9 Cox 145, Greaves, 1 Russell, 273, note w, says: "This is the first case in which it has ever been suggested that the belief of the death of the first husband or wife was a defence, and the case is probably misreported. The proviso that requires absence for seven years *and* ignorance of the first husband or wife being alive during the whole of that time, clearly shows that this case cannot be supported."

If it appears that the prisoner and his first wife had lived apart for seven years before he married again, mere proof that the first wife was alive at the time of the second marriage will not warrant a conviction, but some affirmative evidence must be given to show that the accused was aware of this fact.—R. vs. Curgerwen, 10 Cox, C. C. 152; Reg. vs. Fontaine, 15 Low. Can. Jur. 141, Drummond, J.

In 1863, the prisoner married Mary Anne Richards, lived with her about a week and then left her. It was not proved that he had since seen her. In 1867, he married Elizabeth Evans, his first wife being then alive. The Court left it to the jury to declare if they were satisfied that the prisoner knew his first wife was alive at the time of the second marriage, and ruled that positive proof on that point was not absolutely necessary. The prisoner was found guilty, and, on a case reserved the conviction was affirmed.—Reg. vs. Jones, 11 Cox, 358.

In Reg. vs. Horton, 11 Cox, 670, Cleasby, B., summed up as follows: "It is submitted that, although seven years had not passed since the first marriage, yet if the prisoner reasonably believed (which pre-supposes proper grounds of belief) that his first wife was dead, he is entitled to an acquittal. It would press very hard upon a prisoner if under such circumstances he could be convicted, when it appeared to him as a positive fact that his first wife was dead. The case of Reg. vs. Turner, 9 Cox, 145, shows that this was the view of Baron Martin, a judge of as great experience as any on the bench now, and I am not disposed to act contrary to his opinion. You must find the prisoner guilty, unless you think that he had fair and reasonable grounds for believing and did honestly believe, that his first wife was dead." The jury returned a verdict of guilty, and the judge sentenced the prisoner to imprisonment for three days, remarking that he was quite satisfied with the verdict, and that he should inflict a light sentence, as he thought the prisoner really believed his first wife was dead, although he was not warranted in holding that belief. See, *ante,* Greaves' remarks on Reg. vs. Turner.

But in a later case,—Reg. vs. Gibbons, 12 Cox 237, (July 30, 1872),— it was held, Brett and Willes, J. J., that *bonâ fide* belief that the first husband was dead was no defence by a woman accused of bigamy, unless he has been continuously absent for seven years.

On an indictment for bigamy, a witness proved the first marriage to have taken place eleven years ago, and that the parties lived together some years, but could not say how long, it might be four years, Wightman, J., said: "How is it possible for any man to prove a nega-

tive ? How can I ask the prisoner to prove that he did not know that his wife was living ? There is no evidence that the prisoner knew that his wife was alive, and there is no offence proved.— Reg. vs. Heaton, 3 F. & F. 819.

The 32-33 Vict., ch. 20, s. 58, provides that the offender may be tried in the district, county or place, where he is apprehended or is in custody. But this provision is only cumulative, and the party may be indicted where the second marriage took place, though he be not apprehended; for in general where a statute directs that the offender may be tried in the county, district or place in which he is apprehended, but contains no negative words, he may be tried where the offence was committed.—1 Russell, 274.

The averment of the prisoner's apprehension as in the form given *ante*, is only necessary where the second marriage took place in another district than where the defendant is indicted.—Archbold, 883.

In Reg. vs. McQuiggan, 2 Low. Can. Rep., p. 340, the Court ruled that in an indictment for bigamy, under the Canadian Statute, it is absolutely necessary, when the second marriage has taken place in a foreign country, that the indictment should contain the allegations that the accused is a British subject, that he is or was resident in this Province, and that he left the same with intent to commit the offence.

See sect. 77, *post*, as to requiring sureties from the offender in addition to any other punishment.

ATTEMPTS TO PROCURE ABORTION.

Sect. 59.—Every woman, being with child, who, with the intent to procure her own miscarriage, unlawfully

administers to herself any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent, and whosoever with intent to procure the miscarriage of any woman, whether she be or be not with child, unlawfully administers to her, or causes to be taken by her any poison or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent, is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for life or for any term not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour, and with or without solitary confinement.—24-25 Vic., ch. 100, sect. 58, Imp.

Indictment for woman administering poison to herself with intent or, &c.....That C. D. late of..on... at.... and being then with child, with intent to procure her own miscarriage, did unlawfully and feloniously administer to herself one drachm of a certain poison (or *noxious thing*) called..... (or *did unlawfully and feloniously use a certain instrument* (or *means*) *to wit*..... contrary to the Statute..... 1 Burn's Justice, 16.

Indictment for administering poison to a woman, with intent to procure abortion.—..... That C. D. on..... unlawfully and feloniously did administer to (or *cause to be taken by*) one S. P. one ounce weight of a certain poison, called.....(or *noxious thing called*.....) with intent then and thereby to cause the miscarriage of the said S. P. contrary to the Statute... 1 Burn's Justice, 16.

Indictment for using instrument with the like intent.— ..... unlawfully and feloniously did use a certain instrument called a..... upon the person of one S. P., with intent then and thereby to cause the miscarriage of the said S. P..... 1 Burn's Justice, 16.

In order to constitute an offence under the first part of section 59, the woman must be with child, though not necessarily quick with child. The poison or other noxious thing must have been administered, or the instrument used with the intent to procure the miscarriage. It must be proved, according to the fact stated in the indictment, that the woman administered to herself, etc., or that the defendant administered, etc., or caused to be taken, etc., the drug, as therein stated, and that the drug was noxious, or that the defendant used the instrument, *or other means*, mentioned in the manner described in the indictment.—1 Burn's Justice 14.

Where the prisoner gave the prosecutrix the drug for the purpose of procuring abortion and the prosecutrix takes it for that purpose in the prisoner's absence, this was held to be a causing of it to be taken within the Statute.—R. vs. Wilson, R. vs. Farrow, 127, 164, Dears. & Bell.

A man and woman were jointly indicted for feloniously administering to C a noxious thing to the jurors unknown with intent to procure miscarriage. C, being in the family way, went to the male prisoner, who said he would give her some stuff to put her right, and gave her a light coloured medicine and told her to take two spoonsful till she became in pain. She did so and it made her ill. She then went to him again, and he said the safest course would be to get her a place to go to. He told her that he had found a place for her at L and gave her some more of the stuff, which he said would take effect when she got there. They went together to L, and met the female prisoner, who said she had been down to the station several times the day before to meet them. C then began to feel pain and told the female prisoner.

Then the male prisoner told what he had given C. They all went home to the female prisoner's, and the male prisoner then gave C another bottle of similar stuff, in the female prisoner's presence, and told her to take it like the other. She did so and became very ill, and the next day had a miscarriage, the female prisoner attending her and providing all things: *held*, that there was evidence that the stuff administered was a noxious thing within the 24–25 Vict., ch. 100, s. 58, Imp. Also that there was evidence of the female being an accessory before the fact, and a party, therefore, to the administration of the noxious thing.—Reg. vs. Hollis, 12 Cox 463.

Under the second part of this section, the fact of the woman being pregnant is immaterial. But, the prisoner must have believed her to be pregnant; otherwise there could be no intent under the Statute. Under an indictment for this offence, the prisoner may be convicted of an attempt to commit it, under sect. 49 of the Procedure Act of 1869.

See sect. 77, *post*, as to sureties.

As to solitary confinement, see s. 94 of the Procedure Act of 1869.

PROCURING DRUGS TO CAUSE ABORTION.

Sect. 60.—Whosoever unlawfully supplies or procures any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, *whether she be or be not with child*, is guilty of a misdemeanor, and shall be liable to be imprisoned in the Penitentiary for the term of two

years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour.—24–25 Vict. ch. 100, s. 59, Imp.

Indictment.—..... unlawfully did procure (*supply or procure*) a large quantity, to wit, two ounces of a certain noxious thing called savin, he the said (*defendant*) then well knowing that the same was then intended to be unlawfully used and employed with intent to procure the miscarriage of one A. N. against the form..... Archbold, 713.

The drug supplied must be a poison or noxious thing, and the supplying an innoxious drug, whatever may be the intent of the person supplying it, is not an offence against this enactment.—Reg. vs. Isaacs, Leigh & Cave 220.

In order to constitute the offence within the meaning of this section, it is not necessary that the intention of employing the noxious drug should exist in the mind of the woman: it is sufficient, if the intention to procure abortion exists in the mind of the defendant.—Reg. vs. Hillman, L. & C. 343.

Under sect. 77, *post*, the prisoner may be fined and required to give sureties.

The prisoner may be convicted of an attempt to com mit this offence, upon an indictment under this section, sect. 49 of the Procedure Act of 1869.

CONCEALING THE BIRTH OF A CHILD.

Sect. 61.—If any woman is delivered of a child, every person who by any secret disposition of the dead body of the said child, whether such child died before, at or after its birth, endeavours to conceal the birth thereof, is guilty

of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement other than the Penitentiary, for any term less than two years, with or without hard labour; Provided that if any person tried for the murder of any child be acquitted thereof, it shall be lawful for the jury, by whose verdict such person is acquitted, to find, in case it so appears in evidence, that the child had recently been born, and that such person did, by some secret disposition *of such child* or of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the Court may pass such sentence as if such person had been convicted upon an indictment for the concealment of birth.—24–25 Vict., ch. 100, s. 60, Imp.

Sect. 62.—No part of the Act passed in the twenty-first year of the reign of King James the First, intituled: *An Act to prevent the destroying and murdering of bastard children*, shall extend to or be in force in Canada, and the trial of any woman charged with the murder of any issue of her body, male or female, which being born alive would by law be bastard, shall proceed and be governed by such and like rules of evidence and presumption, as are by law used and allowed to take place in respect to other trials for murder, and as if the said Act passed in the reign of King James the First had never been made.

Indictment.—..... That A. S. on..... was delivered of a child; and that the A. S. being so delivered of the said child as aforesaid, did then unlawfully endeavour to conceal the birth of the said child by secretly burying (*by any secret disposition of*) the dead body of the said child, against the form, etc.,..... State the means of concealment specially, when it is otherwise than by secret burying.—Archbold, 714.

The words in Italics "*of such child*" in the proviso of section 61 are not to be found in the Imperial Statute.

Section 62 repeals 21 Jac. 1, ch. 27, repealed in England by 43 Geo. 3, ch. 58. By the repealed Act, if the mother of an illegitimate child endeavoured privately to conceal his birth and death, she was presumed to have murdered it, unless she could prove that the child was born dead. Taylor, on Evidence, Note 7, p. 128, justly says that this rule was barbarous and unreasonable.

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

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

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

What is a secret disposition of the dead body of a child within the Statute is a question for the jury, depending on the circumstances of the particular case: where the dead body of a child was thrown into a field, over a wall 4½ feet high, separating the yard of a public house from the field, and a person looking over the wall

from the yard might have seen the body, but persons going through the yard or using it in the ordinary way would not, it was held, on a case reserved, by five judges, that this was an offence within the Statute.—Reg. vs. Brown, 11 Cox C. C. 517.

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

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

A., being questioned by a police-constable about the

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

By sect. 1, par. 1, of the Procedure Act of 1869, the word indictment includes *inquisition*, and a coroner's inquisition is a charge, so that the proviso of section 61 of ch. 20, and section 62 of the same chapter, extend to a trial on a coroner's inquisition as well as to a trial on a bill of indictment by the grand-jury.—Rex vs. Cole, 2 Leach C. C. 1095. Rex vs. Maynard, Russ. & Ryan 240. 1 Russell 780, note G, by Greaves.

As to fining the offender and requiring sureties for good behaviour, see section 77, *post*.

SODOMY.

Sect. 63.—Whosoever is convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable to be imprisoned in the Penitentiary for life, or for any term not less than two years.—24-25 Vict., ch. 100, s. 61, Imp.

Indictment.—.....in and upon one J. N. feloniously did make an assault, and then feloniously, wickedly, and against the order of nature had a venereal affair with the said J. N., and then feloniously carnally knew him, the said J. N., and then feloniously, wickedly, and against the order of nature, with the said J. N., did commit and perpetrate that detestable and abominable crime of buggery (not to be named among Christians); against the form.....—Archbold 716.

Sodomy or Buggery is a detestable and abominable sin, amongst Christians not to be named, committed by carnal knowledge against the ordinance of the Creator and order of nature by mankind with mankind, or with brute and beast, or by womankind with brute beast.—3 Inst. 58.

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

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

In Rex. vs. Jacobs, Russ. and Ry. 331, it was proved that the prisoner had prevailed upon a child, a boy of

seven years of age, to go with him in a back-yard; that he, then and there, forced the boy's mouth open with his fingers, and put his private parts into the boy's mouth, and emitted in his mouth; the judges decided that this did not constitute the crime of sodomy.

In one case, the majority of the judges were of opinion that the commission of the crime with a woman was indictable; also by a man with his wife.—1 Russell 939.

As in the case of rape, penetration alone is sufficient to constitute the offence.—32–33 Vict., ch. 20, s. 65.

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

Upon an indictment under this section, the prisoner may be convicted of an attempt to commit the same.—Sect. 49 of the Procedure Act of 1869.

The punishment would then be under section 64 of this chapter 20.

The defendant may be convicted of the assault, if the evidence warrants it. sect. 51, Procedure Act of 1869.

See sect. 77, *post*, as to sureties for the peace.

Indictment for bestiality.—.....with a certain *cow* (*any animal*) feloniously, wickedly and against the order of nature had a venereal affair, and then feloniously, wickedly and against the order of nature, with the said cow did commit and perpetrate that detestable and abominable crime of buggery (not to be named among Christians); against the form.....—Archbold, 717.

ASSAULT WITH INTENT TO COMMIT SODOMY. INDECENT ASSAULT ON MALES.

Sect. 64.—Whosoever attempts to commit the said abominable crime, or is guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, is guilty of a misdemeanor, and shall be

liable to be imprisoned in the Penitentiary for any term not exceeding ten years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years, with or without hard labour.—24-25 Vict., ch. 100, s. 62, Imp.

Indictment. .....in and upon one J N did make an assault, and him, the said J N did then beat, wound and ill-treat, with intent that detestable and abominable crime called buggery with the said J N feloniously, wickedly, diabolically, and against the order of nature to commit and perpetrate against the form, &c., &c., &c.—Archbold, 718.

If the idictment be for an indecent assault, one or other of the preliminary steps required by sect 28 of the Procedure Act of 1869 must be taken.

As to fining the offender and requiring sureties to keep the peace and be of good behaviour, see section 77, *post*.

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

But the definition of an assault that the act must be *against the will* of the patient implies the possession of an active will on his part, and, therefore, mere submission by a boy eight years old to an indecent assault and immoral practices upon his person, without any active sign of dissent, the child being ignorant of the nature of

the assault, does not amount to consent so as to take the offence out of the operation of criminal law.—Reg. vs Lock, 12 Cox C. C. 244.

CARNAL KNOWLEDGE DEFINED.

Sect. 65.—See *ante*, under sect 49, as to this section.

MAKING OR HAVING GUNPOWDER, ETC., ETC., ETC., WITH INTENT TO COMMIT ANY FELONY. WARRANT TO SEARCH FOR THE SAME; DISPOSAL OF THE SAME.

Sect. 66.— Whosoever *knowingly* has in his possession, or makes or manufactures any gunpowder, or explosive substance or any dangerous or noxious thing, or any machine, engine, instrument or thing, with intent by means thereof to commit, or for the purpose of enabling any other person to commit any of the felonies in this Act, *or in any other Act* mentioned, is guilty of a misdemeanor, and shall be liable to be imprisoned in any gaol or place of confinement, other than a Penitentiary, for any term less than two years, with or without hard labour, and with or without solitary confinement.— 24-25 V., ch. 100, s. 54, Imp.

Sect. 67.— Any justice of the peace for any district county or place in which any such gunpowder, or other explosive, dangerous or noxious substance or thing, or any such machine, engine, instrument or thing is suspected to be made, kept or carried for the purpose of being used in committing any of the felonies in this Act, *or in any other Act mentioned*, upon reasonable cause assigned upon oath by any person, may issue a warrant under his hand and seal for searching *in the day-time*, any house, mill,

magazine, storehouse, warehouse, shop, cellar, yard, wharf or other place or any carriage, waggon, cart, ship, boat or vessel, in which the same is suspected to be made, kept or carried for such purpose, as herein before mentioned; and every person acting in the execution of any such warrant may seize any gunpowder or explosive substance or any dangerous or noxious thing or any machine, engine or instrument or thing which he has good cause to suspect is intended to be used in committing or enabling any other person to commit any offence against this Act, and with all convenient speed after the seizure shall remove the same to such proper place as he thinks fit, and detain the same until ordered by a Judge of one of Her Majesty's Superior Courts of Criminal jurisdiction to restore it to the person who may claim the same.—24-25 V., ch. 100, s. 65, Imp.

Sect. 68.— Any gunpowder, explosive substance or dangerous, or noxious thing, or any machine, engine, instrument or thing intended to be used in committing or enabling any other person to commit any offence against this Act, and seized and taken possession of under the provisions hereof, shall in the event of the person in whose possession the same is found, or of the owner thereof being convicted for an offence under this Act, be forfeited; and the same shall be sold under the direction of the Court before which any such person may be convicted, and the proceeds thereof shall be paid into the hands of the Receiver-General, to and for the use of the Dominion.

The words, *or in any other act*, in sections 66 and 67 are not in the Imperial Statute. Their object is to extend these provisions to the possession or manufacture of gunpowder, etc., with intent to commit *any felony*, instead of *any of the felonies in this Act mentioned*, only.

Sects. 62 and 63 of ch. 22, 32–33 Vict., are almost in the same terms as sects. 66 and 67 of chap. 20.

Sect. 65 of ch. 22 is also identical with sect. 68 of ch. 20, with this difference, that by the former the proceeds of the sale of the articles forfeited is to be paid to the Government of the Province, in which the conviction takes place, and by the latter such proceeds are to be paid to the Federal Government.

The reason of this distinction is not quite apparent.

See sect. 77, *post*, as to fining the offender, and requiring him to give sureties for keeping the peace and to be of good behaviour. As to solitary confinement, see sect. 94 of the Procedure Act of 1869.

Indictment.—.... unlawfully did make and manufacture (*or knowingly have in his possession*) a large quantity, to wit..... pounds of gunpowder (*any explosive substance or noxious thing, or instrument*, etc.,) with intent by means thereof feloniously to..... (*here state the act intended to be committed according to the words of the Statute which declares such act to be a felony*) against the form.....

KIDNAPPING.

Sect. 69.—Whosoever, without lawful authority, forcibly seizes and confines or imprisons any other person within Canada, or kidnaps any other person, with intent: 1st. To cause such other person to be secretly confined or imprisoned in Canada against his will; or 2d, to cause such other person to be unlawfully sent or transported out of Canada against his will; or 3d, to cause such other person to be sold or captured as a slave, or in any way held to service against his will, is guilty

of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement for any term less than two years.

Sect. 70.—Upon the trial of any offence under the next preceding section, the non-resistance of the person so kidnapped or unlawfully confined thereto, shall not be a defence, unless it appears to the satisfaction of the Court and Jury that it was not caused by threats, duress, or force, or exhibition of force.

Sect. 71.—Every offence against the next preceding section but one may be tried either in the district, county or place in which the same was committed or in any district, county or place into or through which any person so kidnapped or confined was carried or taken while under such confinement; but no person who has been once duly tried for any such offence shall be liable to be again indicted or tried for the same offence.

At common law, kidnapping is a misdemeanor punishable by fine and imprisonment.—1 Russell, 962.

The above sections are taken from the 29 Victoria, ch. 14, (1865).

The forcible stealing away of a man, woman or child from their own country, and sending them into another was capital by the Jewish and also by the civil law. This is unquestionably a very heinous crime, as it robs the sovereign of his subjects, banishes a man from his country, and may, in its consequences, be productive of the most cruel and disagreeable hardships.—Blackstone, 4, 219; Stephen's Com. 4, 93.

By our Statute, transportation to a foreign country is not necessarily an ingredient in this offence.

See sect. 77, *post*, as to requiring the offender to give sureties for good behaviour.

Under sect. 49 of the Procedure Act of 1869, the defendant may be found guilty of an attempt to kidnap, upon an indictment for kidnapping.

A verdict of assault may also be given, if the evidence warrants it.—Procedure Act of 1869, sect. 51.

Indictment.—....with force and arms unlawfully and feloniously an assault did make on one A. B., and did then and there, without lawful authority, feloniously and forcibly seize and imprison the said A. B. within the Dominion of Canada (*or confine or kidnap*) with intent the said A. B. unlawfully, forcibly and feloniously to cause to be unlawfully transported out of Canada, against his will....against the form.....—2 Bishop, Crim. Law 750; 2 Bishop, Crim. Proced. 690.

CARRYING BOWIE-KNIVES, ETC., ETC., ABOUT THE PERSON.

Sect. 72.—Whosoever carries about his person any bowie-knife, dagger or dirk, or any weapons called or known as iron knuckles, skull-crackers or slung shot, or other offensive weapon of a like character, or secretly carries about his person any instrument loaded at the end, or sells or exposes for sale publicly or privately any such weapon, shall be liable, on conviction thereof, before any Justice of the Peace, to a fine of not less than ten, nor more than forty dollars, and in default of payment thereof, to be imprisoned in any gaol or place of confinement for a term not exceeding thirty days.

Sect. 73.—Whosoever is found in any of the seaport towns or cities of Canada carrying about his person any sheath-knife, shall be liable on conviction thereof before

any Justice of the Peace, to the like pains and penalties as in the next preceding section; provided, however, that nothing herein contained shall apply to seamen or riggers when occupied or engaged in their lawful trade or calling.

Sect. 74.—Whosoever is charged with having committed any offence against the provisions of the two last preceding sections of this Act, may be tried and dealt with in pursuance of the Act of the present session (1869) respecting the prompt and summary administration of criminal justice in certain cases.

Sect. 75.—It shall be the duty of the Court or Justice before whom any person is convicted under the three last preceding sections of this Act to impound the weapon for carrying which such person is convicted, and to cause the same to be destroyed.

Sect. 76. All prosecutions under the four next preceding sections of this Act shall be commenced within one month from the commission of the offence charged.

Offences against these sections are to be tried summarily, under 32–33 Vict., ch. 31.

Carrying any bowie-knife, dagger or dirk, or any weapon called or known as iron knuckles, skull-crackers or slung-shot, or other offensive weapons of a like character, is an offence under sect. 72, whether the bowie-knife be *concealed about* the person or carried openly.

Carrying any instrument loaded at the end is not an offence against this section, if not *carried secretly*, and concealed about the person.—Bishop, Statutory Crimes, 790.

It is not clear what weapons cannot be sold or exposed for sale publicly or privately, under this clause. Is it only instruments loaded at the end? The word *weapon* is mentioned in the first part of the section only, so that

the prohibition seems to extend to bowie-knives, daggers, iron knuckles, etc., etc.

Under section 73, the carrying of a sheath-knife is an offence, whether done openly or secretly, but applies only to the seaport towns and cities, and then, not to seamen or riggers, occupied or engaged in their lawful trade or calling.

GENERAL CLAUSES.

Sect. 77.—When any person is convicted of any indictable misdemeanor punishable under this Act, the Court may, if it think fit, in addition to or in lieu of any punishment by this Act authorized, fine the offender and require him to enter into his own recognizances and to find sureties, both or either, for keeping the peace and being of good behaviour; *and such fine may be proportioned to the means of the offender;* and in case of any felony punishable under this Act, otherwise than with death, the Court may, if it think fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized; provided that no person shall be imprisoned for not finding sureties under this section, for any period exceeding one year.—24-25 Vict., ch. 100, s. 71, Imp.

The words in *italics* are not in the English Act: nor are they to be found in the corresponding clauses, (in other respects, all similar to this one,) of the *Coin, Larceny, Forgery,* and *Malicious Injuries to Property Acts,* of 1869. Why were they inserted in this one? They are more than superfluous: they are grossly erroneous, in the sense that they give to understand that such fine may *not* be proportioned to the means of the offender. A judge, if

such was the law, might in each case that a fine can be imposed, indirectly condemn a man to imprisonment for life. But no judge, under English rule, has or ever had that power. "However unlimited the power of the Court may seem, says Blackstone, Vol. IV, p. 378, it is far from being wholly arbitrary; but its discretion is regulated by law. For the Bill of rights (1 W. & M, st. 2, ch. 2,) has particularly declared that excessive fines ought not to be imposed...and the reasonableness of fines in criminal cases has also been usually regulated by the determination of *magna carta,* c. 14, concerning amercements for misbehaviour by the suiters in matters of civil right." By this passage of the Great Charter, the amercement must always be imposed according to the personal estate of the offender, and so as to leave *to the landholder, his land, to the trader, his merchandize, and to the countryman, his wainage, or team and instruments of husbandry*: "sit in misericordiâ." This is the guide which *must* be followed in the imposition of fines. And one wonders how the words "such fine *may* be proportioned to the means of the offender" have found their way in the above statutory enactment. They are a blot on the Statute Book.

See remarks under section 74 of chap. 22, *post, an Act respecting malicious injuries to propriety.*

Sect. 78.—When any person is convicted on any indictment of any assault whether with or without battery and wounding, or either of them, such person may, if the Court thinks fit, in addition to any sentence which the Court may deem proper for the offence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for loss of time as the Court shall, by affidavit or other inquiry and examination, ascertain to be reasonable; and

unless the sums so awarded are sooner paid, the offender shall be imprisoned in any gaol or place of confinement other than a Penitentiary, for any term the Court shall award, not exceeding three months, in addition to the term of imprisonment, if any, to which the offender may be sentenced for the offence.—24-25 Vict., ch. 100, sect. 74, Imp.

Sect. 79.—The Court may, by warrant in writing, order such sum as shall be so awarded to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and that the surplus, if any, arising from such sale shall be paid to the owner; and in case such sum shall be so levied, the imprisonment awarded until payment of such sum shall thereupon cease. —24-25 Vict., ch. 100, sect. 75, Imp.

Sect. 80.—Every offence hereby made punishable on summary conviction may be prosecuted in the manner directed by the Act of the present session, intituled: *An Act respecting the duties of Justices of the Peace, out of Sessions, in relation to summary convictions and orders,* (32-33 Vict., ch. 31), or in such other manner as may be directed in any Act that may be passed for like purposes and all provisions contained in such Acts shall be applicable to such prosecutions in the same manner as if they were incorporated in this Act.

Sect. 81.—This Act shall commence and take effect on the first day of January, one thousand eight hundred and seventy.