
TASCHEREAU'S
CANADA
CRIMINAL ACTS
1888

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1883.

THE

CRIMINAL STATUTE LAW

OF THE

DOMINION OF CANADA,

RELATING TO INDICTABLE OFFENCES,

WITH FULL TEXT AS REVISED IN 1886, AND PUT INTO FORCE BY ROYAL PROCLAMATION ON THE 1ST DAY OF MARCH, 1887,

AND

Cases, Notes, Commentaries, Forms, etc., etc.

BY

HENRI ELZÉAR TASCHEREAU,

One of the Judges of the Supreme Court of Canada.

SECOND EDITION,

REVISED, RE-ARRANGED AND ENLARGED.

Toronto:

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1888.

PREFACE.

THE passing into law, by Royal Proclamation, on the 1st day of March last, of the Revised Statutes of Canada, has rendered necessary the publication of a new edition of this work, adapting the references, notes, commentaries and forms contained in the previous edition to each section they respectively apply to of the Criminal Statutes as they now stand consolidated and revised.

The occasion could not be lost of bringing the collection of the English Crown cases down to the latest possible date, and this will be found to have been done, as completely as the character of the book would permit, down to the 1st day of January last.

To these have also been added a large number of cases from all the Provinces of the Dominion, principally selected, for obvious reasons, from those determined since the Criminal Statute Law was made uniform throughout the Dominion, in 1869.

The profession may judge, by the number of these additional references to the cases, of the extent of the enlargement of the book in this respect alone. The first edition contained 1984 references; this one has 800 more: in all 2784.

Another most important addition to the work, and one which, it is confidently believed, must greatly enhance its value, are Mr. Greaves' MSS. notes, on various subjects, which the author, at different times, has been

favored with, and which are now, for the first time, published, with the eminent writer's kind permission. These will be found scattered throughout the book under the sections of the Statutes upon which they respectively bear. Special attention is called, in this respect, to the note on new trials and *venire de novo*, page 991, and to the note on section 37 of the *Offences against the person* Act, page 1081.

A number of statutes, with full text, notes and cases, not comprised in the first edition, will also be found in this one. It was at first intended to give it a still wider scope, and to include, with notes, commentaries and the cases relating thereto from England and all the Provinces of the Dominion, the penal clauses comprised in the *Customs* Act, the *Inland Revenue* Act, the *Indian* Act, the *Government Railways* Act, the *Trade Marks* Act, the *Postal Service* Act, the *Banks and Banking* Act, the *Wrecks and Salvage* Act, and various other federal acts, throughout which are to be found enactments creating not only a large number of penalties recoverable under the *Summary Convictions* Act, but, also, in many instances, misdemeanors and felonies of a grave nature.

This would, however, have necessitated the publication of the work in two volumes, and would have added so much to its cost that, on the advice of the publishers, this intention had to be abandoned.

Limited as must necessarily be, in Canada, the circulation of any book on Criminal Law, it is obvious that, for a volume on that class of statutory offences, it would

be still more so, and consequently, altogether inadequate to its cost. Should the Federal Government deem it advisable to give any assistance towards defraying the disbursements, the volume may be published separately.

The present one as it is may, it is hoped, be of some use to the profession, and this will be a full reward for the no small amount of labor necessarily bestowed upon it.

To C. H. MASTERS, Esq., of the New Brunswick Bar, Assistant Reporter to the Supreme Court, I am indebted for much valuable assistance, and for the Index, Tables of Cases, Statutes, etc.

OTTAWA, February 16, 1888.

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11 *Blandford Square,*
March 7, 1878.

Dear Mr. Justice Taschereau,

. . . . . *I send you by book post my notes.*

. . . . . .

They have been thrown together at intervals, and are rudis et indigesta moles, *and far from what I would have wished; indeed, so much so, that I have doubted about sending them; but, on the whole, feeling that you will be kind enough to look with an indulgent eye upon them, I think it better to send them, as they may suggest some points that have not been apparently so fully considered as they deserve.* . . . . .

I wrote these papers in order that they might as far as I could clear up these questions, and you are perfectly at liberty to make any use of them you may think fit; and should you deem them worthy of a place in your valuable work, I shall indeed deem it a very high honour in every way. . . . . . .

. . . . . .

C. S. GREAVES.

A TABLE OF REGNAL YEARS.

FOR CONVENIENCE OF REFERENCE TO THE ENGLISH STATUTES AND LAW REPORTS.

Sovereigns.	Commencement of Reign.	Length of Reign.
William I.	December 25, 1066	21
William II	September 26, 1087	13
Henry I.	August 5, 1100	36
Stephen	December 26, 1135	19
Henry II.	December 19, 1154	35
Richard I.	September 3, 1189	10
John	May 27, 1199	18
Henry III.	October 28, 1216	57
Edward I	November 20, 1272	35
Edward II.	July 8, 1307	20
Edward III.	January 25, 1327	51
Richard II.	June 22, 1377	23
Henry IV.	September 30, 1399	14
Henry V.	March 21, 1413	10
Henry VI.	September 1, 1422	39
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Edward V.	April 9, 1483	...
Richard III.	June 26, 1483	3
Henry VII.	August 22, 1485	24
Henry VIII.	April 22, 1509	38
Edward VI.	January 28, 1547	7
Mary	July 6, 1553	5
Philip and Mary	July 25, 1554	4
Elizabeth	November 17, 1558	45
James I.	March 24, 1603	23
Charles I.	March 27, 1625	24
The Commonwealth	January 30, 1649	11
Charles II.*	May 29, 1660	37
James II.	February 6, 1685	4

*Although Charles II. did not ascend the throne until 29th May, 1660, his regnal years were computed from the death of Charles I., January 13, 1649, so that the year of his restoration is styled the twelfth of his reign.

Sovereigns.	Commencement of Reign.	Length of Reign.
William and Mary	February 13, 1689	14
Anne	March 8, 1702	13
George I	August 1, 1714	13
George II	June 11, 1727	34
George III	October 25, 1760	60
George IV	January 29, 1820	11
William IV	June 26, 1830	7
Victoria	June 20, 1837	...

1831.....1 & 2 Wm. IV.	1859 .....22 & 23 Vic.
1832.....2 & 3 "	1860.....23 & 24 "
1833.....3 & 4 "	1861.....24 & 25 "
1834.....4 & 5 "	1862 .....25 & 26 "
1835.....5 & 6 "	1863.....26 & 27 "
1836.....6 & 7 "	1864.....27 & 28 "
1837.....7 Wm. IV. and 1 Vic.	1865.....28 & 29 "
1838.....1 & 2 Vic.	1866.....29 & 30 "
1839.....2 & 3 "	1667.....30 & 31 "
1840.....3 & 4 "	1868.....31 & 32 "
1841.....4 & 5 "	1869.....32 & 33 "
1841.....5 "	1870.....33 & 34 "
1842.....5 & 6 "	1871.....34 & 35 "
1843.....6 & 7 "	1872.....35 & 36 "
1844.....7 & 8 "	1873 .....36 & 37 "
1845.....8 & 9 "	1874.....37 & 38 "
1846.....9 & 10 "	1875 .....38 & 39 "
1847.....10 & 11 "	1876.....39 & 40 "
1848.....11 & 12 "	1877.....40 & 41 "
1849.....12 & 13 "	1878 .....41 & 42 "
1850.....13 & 14 "	1879.....42 & 43 "
1851.....14 & 15 "	1880.....43 & 44 "
1852.....15 & 16 "	1881.....44 & 45 "
1853.....16 & 17 "	1882.....45 & 46 "
1854.....17 & 18 "	1883.....46 & 47 "
1855.....18 & 19 "	1884.....47 & 48 "
1856.....19 & 20 "	1885.....48 & 49 "
1857.....20 "	1886.....49 & 50 "
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FORGERY ACT—(*Continued.*)

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COIN ACT—(*Continued.*)

MALICIOUS INJURIES ACT.

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MALICIOUS INJURIES ACT—(*Continued.*)

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PROCEDURE ACT—(*Continued.*)

PROCEDURE ACT—(*Continued.*)

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PUNISHMENTS AND PARDONS ACT—(*Continued.*)

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LIST OF ABBREVIATIONS.

A. & E.	Adolphus and Ellis, Reports
And.	Anderson's King's Bench Reports
B. & A.	Barnewall and Adolphus' "
B. & Ald.	Barnewall and Alderson's "
B. & C.	Barnewall and Cresswell's "
B. & P.	Bosanquet and Puller's "
B. & S.	Best and Smith's "
Beav.	Beavan's Chancery "
Bing.	Bingham's K. B. "
Brod. & B.	Broderip and Bingham's "
Burr.	Burrows' "
C. B.	Common Bench "
C. & F.	Clark and Finelly's "
C. & K.	Carrington and Kirwan's N. P. Reports
C. & M.	Carrington and Marshman " "
C. & P.	Carrington and Payne's " "
Ca. Temp. H.	Cases *tempore* Hardwicke
Cald.	Caldecott's Reports
Camp.	Campbell's Reports
Carr. Supp.	Carrington's Criminal Law
Chit.	Chitty's " "
C. L. J	Canada Law Journal, Ont.
C. L. T.	Canadian Law Times, Ont.
C. M. & R.	Crompton, Meeson & Roscoe's Reports
Co.	Coke's Reports
C. P. D.	Law Reports, Common Pleas Division
Cro. El.	Croke's Reports, Elizabeth
Cro. Jac.	Croke's Reports, James
C. S. C.	Consolidated Statutes of Canada
C. S. L. C.	Consolidated Statutes of Lower Canada
C. S. U. C.	Consolidated Statutes of Upper Canada
D. & L.	Dowling and Lowndes' Reports
D. & M.	Davison and Merivale's "
D. & R.	Dowling and Ryland's "
D. C. C.	Deacon's Crown Cases
Dears.	Dearsley's " "
Dears. & B.	Dearsley and Bell's Crown Cases

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

Mod.	Modern Reports
Moo. C. C.	Moody's Crown Cases
N. B. Rep.	New Brunswick Reports
O. R.	Ontario Reports
P. & B.	Pugsley and Burbidge, New Brunswick Reports
Plow.	Plowden's K. B. Report
P. R. (Ont.)	Practice Reports, Ontario
Pugs.	Pugsley's New Brunswick Reports
P. Wms.	Peere Williams, K. B. Reports
Q. B.	Queen's Bench "
Q. B. D.	Law Reports, Queen's Bench division
Q. B. R.	Dorion's Queen's Bench Report, Montreal
Q. L. R.	Quebec Law Reports
R. & C.	Russell & Chesley's Nova Scotia Reports
R. & M.	Ryan and Moody's Reports
R. & M. C. C. R.	Moody's Crown Cases
R. & R.	Russell and Ryan's Reports
Rep.	Coke's Reports
R. L.	Revue Legale, P. Q.
R. S. B. C.	Revised Statutes of British Columbia
R. S. N. B.	Revised Statutes of New Brunswick
R. S. N. S.	Revised Statutes of Nova Scotia
Russ.	Russell on Crimes
Russ. & Geld.	Russell and Gelderts Nova Scotia Reports
Salk.	Salkeld's Reports
S. C. R.	Supreme Court of Canada Reports
Show.	Shower's Reports
St. Tr.	State Trials
Str.	Strange's Reports
Taun.	Taunton's "
T. R.	Term "
T. Raym.	T. Raymond's "
Tyr.	Tyrwhitt's "
U. C. C. P.	Upper Canada Common Pleas
U. C. Q. B.	Upper Canada Queen's Bench
W. R.	Weekly Reporter
Wils.	Wilson's K. B. Reports.

THE

CRIMINAL STATUTE LAW

OF THE

DOMINION OF CANADA.

CHAPTER 141.

AN ACT RESPECTING EXTRA-JUDICIAL OATHS.

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

1. Every justice of the peace, or other person who administers, or causes or allows to be administered, or receives or causes, or allows to be received, any oath, affidavit, or solemn affirmation, touching any matter or thing whereof such justice or other person has not jurisdiction or cognizance by some law in force at the time being, or authorized or required by any such law, is guilty of a misdemeanor, and liable to a fine not exceeding fifty dollars, or to imprisonment for any term not exceeding three months.—37 *V., c. 37, s. 1, part, and s. 2.*

2. Nothing herein contained shall be construed to extend to any oath, affidavit or solemn affirmation, before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial or punishment of any offence, or to any oath, affidavit or affirmation required or authorized by any law of Canada, or by any law of the Province wherein such oath, affidavit or affirmation is received or administered, or is to be used, or to any oath, affidavit or affirmation which is required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively.—37 *V., c. 37, s. 1, part.*

was *(or is)* to be used"); nor being an oath required by the laws of any foreign country to give validity to any instrument in writing, designed to be used in such foreign country; that is to say, a certain oath touching and concerning *(state the subject-matter of the oath or affidavit so as to show that it was not one of which the Justice had jurisdiction or cognizance, and was not within the exceptions)* 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*, 829.

A county magistrate complained to the bishop of the diocese of the conduct of two of his clergy; and to substantiate his charge, he swore witnesses before himself, as magistrate, to the truth of the facts: *held*, that the matter before the bishop was not a judicial proceeding, and therefore that the magistrate had brought himself within the Statute against voluntary and extra-judicial oaths, and that he had unlawfully administered voluntary oaths, contrary to the enactment of the Statute.—*R.* v. *Nott*, *Car. & M.* 288; 9 *Cox*, 301.

In the same case, on motion in arrest of judgment, it was held, that an indictment under this Statute (5 and 6 Will. 4, c. 62, s. 13) is bad, if it does not so far set out the deposition, that the Court may judge whether or not it is of the nature contemplated by the Statute, that the deposition and the facts attending it should have been distinctly stated, and the matter or writing relative to which the defendant was said to have acted improperly should have been stated to the Court in the indictment, so that the Court might have expressed an opinion whether the defendant had jurisdiction, the question whether the defendant had jurisdiction to administer the oath being one

of law, and to be decided by the Court; but the majority of the Court thought that it was not necessary to set out the whole oath. Greaves nevertheless thinks it prudent to set it out at full length, if practicable, in some counts.—1 *Russell*, 193, *note*.

Upon the trial, to establish that the defendant is a Justice of the Peace, or other person authorized to receive oaths or affidavits, evidence of his acting as such will, *primâ facie*, be sufficient.—*Archbold*, 830.

And it is not necessary to show that he acted wilfully in contravention of the Statute: the doing so, even inadvertently, is punishable.—*Idem*.

ACCESSORIES, AIDERS, ABETTORS, ETC.

THE general definition of a principal in the first degree is one who is the actor or actual perpetrator of the fact. But it is not necessary that he should be actually present when the offence is consummated; for if one lay poison purposely for another who takes it and is killed, he who laid the poison, though absent when it was taken, is a principal in the first degree. *Vaux's case*, 4 *Rep.* 44 *b*; *Fost.* 349; *R.* v. *Harley*, 4 *C. & P.* 369. So, it is not necessary that the act should be perpetrated with his own hands; for if an offence be committed through the medium of an innocent agent, the employer, though absent when the act is done, is answerable as a principal in the first degree. *See R.* v. *Giles*, 1 *Mood. C. C.* 166; *R.* v. *Michael*, 2 *Mood. C. C.* 120; 9 *C. & P.* 356; *R.* v. *Clifford*, 2 *C. & K.* 202. Thus, if a child, under the age of discretion, or any other instrument excused from the responsibility of his actions by defect of understanding, ignorance of the fact, or other cause, be incited to the commission of murder or any other crime, the inciter, though absent when the fact was committed, is, *ex necessitate*, liable for the act of his agent, and a principal in the first degree. *Fost.* 349; 1 *Hawk. c.* 31, *s.* 7; *R.* v. *Palmer*, 1 *N. R.* 96; 2 *Leach*, 978; *R.* v. *Butcher, Bell*, 6; 28 *L. J. (M. C.)* 14. But if the instrument be aware of the consequences of his act, he is a principal in the first degree, and the employer, if he be absent when the fact is committed, is an accessory before the fact. *R.* v. *Stewart*, *R. & R.* 363; *R.* v. *Williams*, 1 *Den.* 39; 1 *C. & K.* 589;

or, if he be present, as a principal in the second degree. *Fost.* 349; unless the instrument concur in the act merely for the purpose of detecting and punishing the employer, in which case he is considered as an innocent agent.—*R.* v. *Bannen*, 2 *Mood. C. C.* 309; 1 *C. & K.* 295.

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

Presence, in this sense, is either actual or constructive. It is not necessary that the party should be actually present, an ear or eye-witness of the transaction; he is, in construction of law, present, aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should the occasion arise. Thus, if he be outside the house, watching, to prevent surprise, or the like, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make him a principal in the second degree. *Fost.* 347, 350. *See R.* v. *Borthwick*, 1 *Dougl.* 207; 1 *Leach*, 66; 2 *Hawk. c.* 29, *ss.* 7, 8; 1 *Russ.* 31; 1 *Hale*, 555; *R.* v. *Gogerly*, *R. & R.* 343; *R.* v. *Owen*, 1 *Mood. C. C.* 296. But he must be sufficiently near to give assistance. *R.* v. *Stewart*, *R. & R.* 363; and the mere circumstance of a party going towards a place where a felony is to be committed, in order to assist to carry off the property, and assisting in carrying it off, will not make him a principal in the second degree, unless, at the time of the felonious taking, he were within such a distance as to be *able* to assist in it. *R.* v. *Kelly*, *R. & R.* 421; 1 *Russ.* 27. So, where two persons broke open a warehouse, and stole thereout a quantity of butter, which they carried along the street thirty yards, and then fetched the prisoner, who, being apprised of the robbery, assisted in carrying away the property, it was holden that he was

not a principal, but only an accessory. *R.* v. *King*, *R. & R.* 332. *See R.* v. *M'Makin*, *Id.*; *R.* v. *Dyer*, 2 *East*, *P. C.* 767. And although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not principals, but accessories before the fact. *R.* v. *Soares*, *R. & R.* 25; *R.* v. *Davis*, *Id.* 113; *R.* v. *Else*, *Id.* 142; *R.* v. *Badcock*, *Id.* 249; *R.* v. *Manners*, 7 *C. & P.* 801; *R.* v. *Howel*, 9 *C. & P.* 437; *R.* v. *Tuckwell*, *C. & Mar.* 215. So, if one of them have been apprehended before the commission of the offence by the other, he can be considered only as an accessory before the fact. *R.* v. *Johnson*, *C. & Mar.* 218. But presence during the whole of the transaction is not necessary; for instance, if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, neverthless, all guilty as principals. *R.* v. *Bingley*, *R. & R.* 446. *See* 2 *East*, *P. C.* 768. As, if A. counsel B. to make the paper, C. to engrave the plate, and D. to fill up the names of a forged note, and they do so, each without knowing that the others are employed for that purpose, B., C., and D. may be indicted for the forgery, and A. as an accessory; *R.* v. *Dade*, 1 *Mood. C. C.* 307; for, if several make distinct parts of a forged instrument, each is a principal, though he do not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others.—*R.* v. *Kirkwood*, 1 *Mood. C. C.* 304. *See R.* v. *Kelly*, 2 *C. & K.* 379.

There must also be a participation in the act; for although a man be present whilst a felony is committed, if he take no part in it and do not act in concert with

those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony, or apprehend the felon. 1 *Hale*, 439; *Fost.* 350. It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law, he was present aiding and abetting. So, a participation, the result of a concerted design to commit a specific offence, is sufficient to constitute a principal in the second degree. Thus, if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them, in the presence of the others, with the possession of the goods, and then another of the party entice the owner away, that he who has the goods may carry them off, all are guilty as principals. *R.* v. *Standley, R. & R.* 305; 1 *Russ.* 29; *R.* v. *Passey*, 7 *C. & P.* 282; *R.* v. *Lockett, Id.* 300. So, it has been holden, that to aid and assist a person to the jurors unknown, to obtain money by ring-dropping, is felony, if the jury find that the prisoner was confederate with the person unknown to obtain the money by means of the practice. *R.* v. *Moore*, 1 *Leach*, 314. So, if two persons driving carriages incite each other to drive furiously, and one of them run over and kill a man, it is manslaughter in both. *R.* v. *Swindall*, 2 *C. & K.* 230. If one encourage another to commit suicide, and be present abetting him while he does so, such person is guilty of murder as a principal; and if two persons encourage each other to self-murder, and one kills himself, but the other fails in the

attempt, the latter is a principal in the murder of the other. *R.* v. *Dyson*, *R. & R*, 523. *See R.* v. *Russell*, 1 *Mood. C. C.* 356; *R.* v. *Alison*, 8 *C. & P.* 418, *R.* v. *Jessop*, 16 *Cox*, 204. So, likewise, if several persons combine for an unlawful purpose to be carried into effect by unlawful means. *See Fost.* 351, 352; particularly, if it be to be carried into effect notwithstanding any opposition that may be offered against it; *Fost.* 353, 354; and one of them, in the prosecution of it, kill a man, it is murder in all who are present, whether they actually aid or abet or not. (*See the Sessinghurst-house case*, 1 *Hale*, 461), provided the death were caused by the act of some one of the party in the course of his endeavours to effect the common object of the assembly. 1 *Hawk. c.* 31, *s.* 52; *Fost.* 352; *R.* v. *Hodgson*, 1 *Leach*, 6; *R.* v. *Plummer*, *Kel.* 109. But it is not sufficient that the common purpose is merely unlawful; it must either be felonious, or, if it be to commit a misdemeanor, then there must be evidence to show that the parties engaged intended to carry it out at all hazards. *R.* v. *Skeet*, 4 *F. & F.* 931. *See also R.* v. *Luck*, 3 *F. & F.* 483; *R.* v. *Craw*, 8 *Cox*, 335. And the act must be the result of the confederacy; for, if several are out for the purpose of committing a felony, and, upon alarm and pursuit, run different ways, and one of them kill a pursuer to avoid being taken, the others are not to be considered as principals in that offence. *R.* v. *White*, *R. & R.* 99. Thus, where a gang of poachers, consisting of the prisoners and Williams, attacked a gamekeeper, beat him, and left him senseless upon the ground, but Williams returned, and whilst the gamekeeper was insensible upon the ground, took from him his gun, pocket-book and money, *Park*, J. held that this was robbery in Williams only. *R.* v. *Hawkins*, 3 *C. & P.* 392. The purpose must also be unlawful;

for, if the original object be lawful, and be prosecuted by lawful means, should one of the party in the prosecution of it kill a man, although the party killing, and all those who actually aid and abet him in the act, may, according to circumstances, be guilty of murder or manslaughter, yet the other persons who are present, and who do not actually aid and abet, are not guilty as principals in the second degree.—*Fost.* 354, 355; 2 *Hawk. c.* 29, *s.* 9.

A mere participation in the act, without a felonious, participation in the design, will not be sufficient. 1 *East, P. C.* 258; *R.* v. *Plummer, Kel.* 109. Thus, if a master assault another with malice prepense, and the servant ignorant of his master's felonious design, take part with him, and kill the other, it is manslaughter in the servant, and murder in the master. 1 *Hale*, 446. So, on an indictment under the statute 1 *V. c.* 85, *s.* 2, charging A. with the capital offence of inflicting a bodily injury dangerous to life, with intent to commit murder, and B. with aiding and abetting him, it was held to be essential, to make out the charge as against B., that he should have been aware of A's intention to commit murder.—*R.* v. *Cruse*, 8 *C. & P.* 541.

In the case of murder by duelling, in strictness both of the seconds are principals in the second degree; yet Lord *Hale* considers, that, as far as relates to the second of the party killed, the rule of law in this respect has been too far strained; and he seems to doubt whether such second should be deemed a principal in the second degree. 1 *Hale*, 422, 452. However, in a late case it was holden by *Patteson*, J., that all persons present at a prize-fight, having gone thither with the purpose of seeing the prize-fighters strike each other, were principals in the breach of the peace.—*R.* v. *Perkins*, 4 *C. & P.* 537. *See R.* v. *Murphy*,

6 *C. & P.* 103, and *R.* v. *Coney*, 15 *Cox*, 46, and upon the same principle, the seconds in a duel, being participators in an unlawful act, would both be guilty of murder, if death were to ensue; and so the law was laid down in *R.* v. *Young*, 8 *C. & P.* 644; and in *R.* v. *Cuddy*, 1 *C. & K.* 210. If the principal was insane at the commission of the act, no person can be convicted as an aider and abettor of his act.—*R.* v. *Tyler*, 8 *C. & P.* 616.

Aiders and abettors were formerly defined to be accessories at the fact, and could not have been tried until the principal had been convicted or outlawed. *Fost.* 347. But this doctrine is exploded; and it is now settled, that all those who are present aiding and abetting when a felony is committed are principals in the second degree, and may be arraigned and tried before the principal in the first degree has been found guilty; 2 *Hale*, 223; and may be convicted, though the party charged as principal in the first degree is acquitted.—*R.* v. *Taylor*, 1 *Leach*, 360; *Benson* v. *Offley*, 2 *Show.* 510; 3 *Mod.* 121: *R.* v. *Wallis*, *Salk.* 334; R. v. *Towle*, *R. & R.* 314; 3 *Price*, 145; 2 *Marsh.* 465.

In treason, and in offences below felony, and in all felonies in which the punishment of principals in the first degree and of principals in the second degree is the same, the indictment may charge all who are present and abet the fact as principals in the first degree; 2 *Hawk. c.* 25, *s.* 64 (*see Mackally's case*, 9 *Co.* 67 *b*), *R.* v. *Rogers*, 37 *L. J. (M. C.)* 83, provided the offence permit of a participation; *Fost.* 345; or specially as aiders and abettors. *R.* v. *Crisham*, *C. & Mar.* 187. But where by particular statutes the punishment was different, then principals in the second degree must have been indicted specially as aiders and abettors. 1 *East*, *P. C.* 348, 350; *R.* v. *Sterne*, 1

Leach, 473. If indicted as aiders and abettors, an indictment charging that A. gave the mortal blow, and that B., C. and D. were present aiding and abetting, would be sustained by evidence that B. gave the blow, and that A., C. and D. were present aiding and abetting; and even if it appeared that the act was committed by a person not named in the indictment, the aiders and abettors might nevertheless be convicted. *R.* v. *Borthwick, Doug.* 207; 1 *East, P. C.* 350. *See R.* v. *Swindall*, 2 *C. & K.* 230. And the same, though the jury say that they are not satisfied which gave the blow, if they are satisfied that one of them did, and that the others were present aiding and abetting. *R.* v. *Downing*, 1 *Den.* 52; 2 *C. & K.* 382. Where a prisoner was convicted upon an indictment which charged him with rape as a principal in the first count, and as an aider and abettor in the second, it was holden that the conviction upon the first count was good. *R.* v. *Folkes*, 1 *Mood. C. C.* 354; *R.* v. *Gray*, 7 *C. & P.* 164. *See R.* v. *Crisham, R.* v. *Downing, supra.* By *Sec.* 7, *c.* 145, *post*, "whosoever shall aid, abet, counsel or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law, or by virtue of any act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender."—*R.* v. *Burton*, 13 *Cox*, 71.

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

If the party be actually or constructively present when the felony is committed, he is an aider and abettor, and not an accessory before the fact; for it is essential, to constitute the offence of accessory, that the party should

be absent at the time the offence is committed.—1 *Hale*, 615; *R.* v. *Gordon*, 1 *Leach*, 515; 1 *East, P. C.* 352, *R.* v. *Brown*, 14 *Cox*, 144.

The procurement may be personal, or through the intervention of a third person; *Fost.* 125; *R.* v. *Earl of Somerset*, 19 *St. Tr.* 804; *R.* v. *Cooper*, 5 *C. & P.* 535; it may also be direct, by hire, counsel, command, or conspiracy; or indirect, by evincing an express liking, approbation, or assent to another's felonious design of committing a felony; 2 *Hawk. c.* 29, *s.* 16; but the bare concealment of a felony to be committed will not make the party concealing it an accessory before the fact; 2 *Hawk. c.* 29, *s.* 23; nor will tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute this offence. 1 *Hale*, 616. The procurement must be continuing; for if the procurer of a felony repent, and before the felony is committed, actually countermand his order, and the principal notwithstanding commit the felony, the original contriver will not be an accessory. 1 *Hale*, 618. So, if the accessory order or advise one crime, and the principal intentionally commit another; as, for instance, to burn a house, and instead of that he commit a larceny; or, to commit a crime against A., and instead of so doing he commit the same crime against B.—the accessory will not be answerable; 1 *Hale*, 617; but, if the principal commit the same offence against B. by mistake, instead of A., it seems it would be otherwise. *Fost.* 370, *et seq.*; *but see* 1 *Hale* 617; 3 *Inst.* 51. But it is clear that the accessory is liable for all that ensues upon the execution of the unlawful act commanded; as, for instance, if A. command B. to beat C., and he beat him so that he dies, A. is accessory to the murder. 4 *Bl. Com.* 37; 1 *Hale*, 617. Or if A. command B. to burn the house of C., and in doing so the

house of D. is also burnt, A. is accessory to the burning of D.'s house. *R.* v. *Saunders, Plowd.* 475. So, if the offence commanded be effected, although by different means from those commanded, as, for instance, if J. W. hire J. S. to poison A., and, instead of poisoning him, he shoots him, J. W. is, nevertheless, liable as accessory. *Fost.* 369, 370. Where the procurement is through an intermediate agent, it is not necessary that the accessory should name the person to be procured to do the act.—*R.* v. *Cooper*, 5 *C. & P.* 535.

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

It may be necessary to observe, that it is only in felonies that there can be accessories; in high treason, every instance of incitement, etc., which in felony would make a man an accessory before the fact, will make him a principal traitor. *Fost.* 341; and he must be indicted as such, 1 *Hale*, 235. Also, all those who in felony would be accessories before the fact, in offences under felony are principals, and indictable as such. 4 *Bl. Com.* 36; *R.* v. *Clayton*, 1 *C. & K.* 128; *R.* v. *Moland*, 2 *Mood. C. C.* 276; *R.* v. *Greenwood* 2 *Den.* 453; *Sec.* 7, c. 145 *post.* In manslaughter it has been said there can be no accessories before the fact, for the offence is sudden and unpremeditated; and therefore, if A. be indicted for murder, and B. as accessory, if the jury find A. guilty of manslaughter, they must acquit B. 1 *Hale*, 437, 466, 615; 1 *Hawk. P. C.*, *c.* 30, *s.* 2. Where, however, the prisoner procured and gave a woman poison in order that she might take it and so procure abortion, and she did take it in his absence, and died of its

effects, it was held that he mightb e convicted as an accessory before the fact to the crime of manslaughter. *R.* v. *Gaylor, Dears. & B.* 288. In the course of the argument in that case, *Bramwell, B.*, said: "Suppose a man for mischief gives another a strong dose of medicine, not intending any further injury than to cause him to be sick and uncomfortable, and death ensues, would not that be manslaughter? Suppose, then, that another had counselled him to do it, would not he who counselled be an accessory before the fact?"

Formerly an accessory could not, without his own consent, unless tried with the principal, be brought to trial until the guilt of his principal had been legally ascertained by conviction (1 *Anne, st.* 2, *c.* 9) or outlawry. *Fost.* 360; 1 *Hale*, 623. But now, whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law, or by virtue of any act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony if convicted as an accessory may be punished (Sec. 2, c. 145, post.). And "if any principal offender shall be in anywise *convicted* of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been *attainted* thereof, notwithstanding such principal felon shall die, or be pardoned, or otherwise delivered before attainder; and every such accessory shall upon

conviction suffer the same punishment as he would have suffered if the principal had been attainted." (Sec. 6, c. 145, post.) The 2nd section of this statute only applies where the accessory might at common law have been indicted with, or after the conviction of, the principal; and, therefore, where a defendant was indicted as an accessory before the fact to the murder of S. W., she having by his procurement killed herself, it was holden that a like statute did not apply. *R.* v. *Russell*, 1 *Mood. C. C.* 356; *R.* v. *Leddington*, 9 *C. & P.* 79. But by the 1st section it is enacted, that "whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted, tried, convicted and punished *in all respects* as if he were a principal felon;" so that the conviction of the principal is not now in any sense a condition precedent to the conviction of the accessory. *R.* v. *Hughes*, *Bell*, 242. In *R.* v. *Chadwick*, *Stafford Sum. Ass.* 1850, the prisoner was indicted as a principal for murder by arsenic, and the jury found that he procured the arsenic, and caused it to be administered by another person, but was absent when it was administered; and thereupon it was objected that the 11 & 12 *V.*, *c.* 46, *s.* 1, which is similar to the 24-25 *V.*, *c.* 94, *s.* 1, did not apply to murder, but Williams, J., overruled the objection, and refused to reserve the point. Where the principal and accessory are tried together, one being charged as principal and the other as accessory (which will now, probably, never occur), if the principal plead otherwise than the general issue, the accessory shall not be bound to answer until the principal's plea be first determined. 9 *H.* 7, *c.* 19; 1 *Hale*, 624; 2 *Inst.* 184. Where the principal was indicted for burglary and larceny in

a dwelling-house, and the accessory was charged in the same indictment as accessory before the fact to the said "*felony and burglary*," and the jury acquitted the principal of the burglary, but found him guilty of the larceny; it seems the judges were of opinion that the accessory should have been acquitted; for the indictment charged him as accessory to the burglary only, and the principal being acquitted of that, the accessory should have been acquitted also. *R.* v. *Donnelly and Vaughan*, *R. & R.* 310; 2 *Marsh.* 571. Where three persons were charged with a larceny, and two others as accessories, in one count, and the latter were also charged separately in other counts with substantive felonies, it was held that, although the principals were acquitted, the accessories might be convicted on the latter counts. *R.* v. *Pulham*, 9 *C. & P.* 280. And now by section 133 of the Procedure Act, it is enacted, that "any number of accessories at different times to any felony, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon shall not be included in the same indictment, or is not in custody or amenable to justice."

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

Accessories after the fact.]—An accessory after the fact is one who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. 1 *Hale*, 618; 4 *Bl. Com.* 37; 2 *Hawk. c.* 29, *s.* 1; 3 *P. Wms.* 475. Any assistance given to one known to be a felon, in order to hinder his apprehension, trial, or punishment, is sufficient to make a man an accessory

after the fact; as, for instance, that he concealed him in the house; *Dalt.* 530, 531; or shut the door against his pursuers, until he should have an opportunity of escaping; 1 *Hale*, 619; or took money from him to allow him to escape; 9 *H.* 4, *pl.* 1; or supplied him with money, a horse, or other necessaries, in order to enable him to escape; *Hale's Sum.* 218; 2 *Hawk. c.* 29, *s.* 26; or that the principal was in prison, and J. W. bribed the gaoler to let him escape, or conveyed instruments to him to enable him to break prison and escape.—1 *Hale*, 621.

But merely suffering the principal to escape will not make the party an accessory after the fact, for it amounts at most but to a mere omission. 9 *H.* 4 *pl.* 1; 1 *Hale*, 619. So, if a person supply a felon in prison with victuals or other necessaries for his sustenance; 1 *Hale*, 620; or relieve and maintain him if he be bailed out of prison; *Id.*; or if a physician or surgeon professionally attend a felon sick or wounded, although he know him to be a felon; 1 *Hale*, 332; or if a person speak or write in order to obtain a felon's pardon or deliverance; 26 *Ass.* 47; or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly; 3 *Inst.* 139; 1 *Hale*, 620; or even if he himself agree, for money, not to give evidence against the felon; *Moor*, 8; or know of the felony and do not discover it; 1 *Hale*, 371, 618; none of these acts would be sufficient to make the party an accessory after the fact. He must be proved to have done some act to assist the felon personally. *See R.* v. *Chapple*, 9 *C. & P.* 355. But if he employ another person to do so, he will be equally guilty as if he harboured or relieved him himself.—*R.* v. *Jarvis*, 2 *M. & Rob.* 40.

A wife is not punishable as accessory for receiving, etc.,

attempt, the latter is a principal in the murder of the other. *R.* v. *Dyson*, *R. & R*, 523. *See R.* v. *Russell*, 1 *Mood. C. C.* 356; *R.* v. *Alison*, 8 *C. & P.* 418, *R.* v. *Jessop*, 16 *Cox*, 204. So, likewise, if several persons combine for an unlawful purpose to be carried into effect by unlawful means. *See Fost.* 351, 352; particularly, if it be to be carried into effect notwithstanding any opposition that may be offered against it; *Fost.* 353, 354; and one of them, in the prosecution of it, kill a man, it is murder in all who are present, whether they actually aid or abet or not. (*See the Sessinghurst-house case*, 1 *Hale*, 461), provided the death were caused by the act of some one of the party in the course of his endeavours to effect the common object of the assembly. 1 *Hawk. c.* 31, *s.* 52; *Fost.* 352; *R.* v. *Hodgson*, 1 *Leach*, 6; *R.* v. *Plummer*, *Kel.* 109. But it is not sufficient that the common purpose is merely unlawful; it must either be felonious, or, if it be to commit a misdemeanor, then there must be evidence to show that the parties engaged intended to carry it out at all hazards. *R.* v. *Skeet*, 4 *F. & F.* 931. *See also R.* v. *Luck*, 3 *F. & F.* 483; *R.* v. *Craw*, 8 *Cox*, 335. And the act must be the result of the confederacy; for, if several are out for the purpose of committing a felony, and, upon alarm and pursuit, run different ways, and one of them kill a pursuer to avoid being taken, the others are not to be considered as principals in that offence. *R.* v. *White*, *R. & R.* 99. Thus, where a gang of poachers, consisting of the prisoners and Williams, attacked a gamekeeper, beat him, and left him senseless upon the ground, but Williams returned, and whilst the gamekeeper was insensible upon the ground, took from him his gun, pocket-book and money, *Park*, J. held that this was robbery in Williams only. *R.* v. *Hawkins*, 3 *C. & P.* 392. The purpose must also be unlawful;

accessories after the fact; 1 *Hale*, 613; although, if the act of the receiver amount to a rescue, or to obstructing an officer of justice in the execution of his duty; or the like, he would undoubtedly be indictable for it as for a misdemeanor. 2 *Hawk.*, *c.* 29, *s.* 4. Accessories after the fact could not, until the stat. 11 & 12 V., c. 46, be tried before the conviction of their principal, unless they consented to it. 1 *Hale*, 623; 2 *Hawk.*, *c.* 29, *s.* 45. But they might be tried with their principal; 1 *Hale*, 623; or separately, after the principal had been convicted; and having been once duly tried, they could not be again indicted or tried for the same offence. (7 G. 4, c. 64, s. 10.) And now, by Sec. 3, c. 145, post, whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished.

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

The receipt of stolen goods did not at common law constitute the receiver an accessory, but was a distinct misdemeanor, punishable by fine and imprisonment; 1 *Hale*, 620; and although, by several statutes, receivers were made accessories after the fact, and, by the (repealed)

stat. 7 & 8 G. 4, c. 29, ss. 54, 55, 60, might in certain cases be indicted either as accessories after the fact to felony, or for a susbtantive felony, or might be prosecuted for a misdemeanor, or punished upon summary conviction: *(see now secs.* 136, 137, 138 *of the Procedure Act :)* yet the receipt of stolen goods is still a distinct and separate offence.

CHAPTER 145.

AN ACT RESPECTING ACCESSORIES.

(IMPERIAL ACT, 24-25 V., c. 94.)

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

FELONIES.

1. Every one who becomes an accessory before the fact to any felony, whether the same is a felony at common law, or by virtue of any Act, may be indicted, tried, convicted and punished in all respects as if he were a principal felon.—31 *V., c.* 69, *s.* 9, *part, and c.* 72, *s.* 1; 32-33 *V., c.* 20, *s.* 8, *part, and c.* 21, *s.* 107, *part. Sec.* 1, *Imp.*

As to venue, see sec. 17, Procedure Act. As to joinder of offenders, see sec. 133, Procedure Act.

Note by Greaves.—"This clause is taken from the 11 & 12 V., c. 46, s. 1, upon which it was held, that it was no objection to an accessory before the fact being convicted that his principal had been acquitted. Hall and Hughes were jointly indicted for stealing certain cotton. Hall was acquitted and called as a witness against Hughes; and it clearly appeared that Hall had stolen the cotton at the instigation of Hughes, and in his absence. It was contended, that as Hall had been acquitted, Hughes must be so also; for the statute had only altered the form of pleading, and not the law, as to accessories before the fact; but it was held, that the statute had made the offence of the accessory before the fact a substantive felony, and that the old law, which made the conviction of the principal a condition precedent to the conviction of the accessory, was done away by that enactment.—*R.* v. *Hughes, Bell, C. C.* 242.

In every case where there may be a doubt whether a

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

It may be well to observe, however, that there are cases in which it is not clear that an indictment under this section would suffice. Suppose for instance that the offence of the principal be local; *e. g.*, a burglary committed in the county of Worcester, and that the accessory is indicted in the county of Stafford on the ground that the evidence shows that the acts, by which he became accessory were done in the latter county, it may be questionable whether the accessory could be indicted and tried under this section in that county; for it only authorises the accessory to be indicted and tried "as if he were a principal felon," and the principal could only be indicted and tried in Worcestershire. Possibly if such an objection were taken on the trial, it might be held that s. 7 of this Act authorised the indictment and trial in Staffordshire on the ground that the evidence showed the party to have become an accessory before the fact in that county. But supposing that to be so, the same question might be raised in arrest of judgment or on error, and on the face of the record all that would appear would be that the prisoner was indicted and tried as a principal in Staffordshire for a burglary committed in Worcestershire; but even here it might be held that the effect of the 11 & 12 V., c. 46, s. 1, is to make every indictment which charges a person as principal contain a charge of being accessory before the fact also, and consequently that there was nothing on the

face of the record inconsistent with the facts having proved that the prisoner was such an accessory in Staffordshire. However, in any such case, it would be prudent to insert a count framed under the next section.

In *R.* v. *Chadwick*, Stafford: Sum. Ass. 1850, MSS., C.S.G., the prisoner was indicted as a principal for murder by arsenic, and the jury found that he procured the arsenic, and caused it to be administered by another person but was absent when it was administered; and thereupon it was objected that the 11 & 12 V., c. 46, s. 1, did not apply to murder; but Williams, J., overruled the objection. The learned Judge afterwards communicated the decision to myself, and I pointed out that in the 7 Geo. 4, c. 64, ss. 9, 10, 11; 4 Geo. 4, c. 48, s. 1; 7 & 8 Geo. 4, c. 28, ss. 1, 2, 3, 5, 13; 4 & 5 V., c. 22, and other statutes, it was manifest that "felony" included murder; and the learned Judge having given the matter full consideration, refused to reserve the point.

My Lord Hale in commenting on the jurisdiction of Justices of the Peace, says (2 Hale, 45)—"By the Statutes of 18 Ed. 3, c. 2; 34 Ed. 3, c. 1; 17 Rich. 2, c. 10; though they do only mention felonies, and do not expressly mention murders and manslaughters, and although the Commission of the Peace mentions not murders by express name, but only felonies generally, yet by these general words, in these Statutes and this Commission, they have power to hear and determine murders and manslaughters, and thus it has been resolved, 5 Ed. 6, Dy. 69, a.; Pref. to 10 Co. Rep. against the opinion of Fitzherbert in his Justice of Peace, and 9 Hen. 4, 24, Coron. 437." This shows that the decision of Williams, J., was correct.

Mr. Archbold (Criminal Acts, 530) strongly objects to this clause. After treating the rule in treason and misde-

meanors that all are principals as absurd, he says, "But there is no reason why felonies should be involved in the same absurdity. Supposing a man has been guilty, and accused as accessory before the fact to a murder, and he is then, according to the above section, indicted for having committed murder, how are the jury, who are bound by their oath to give their verdict according to the evidence, to find a man guilty of the murder, when the evidence is that he was not present at the murder—that he did not aid or abet those who committed it, but had merely advised it some months before?" Now the answer to this is very plain; the objection rests merely on a legal distinction, which would never have entered into the head of any one but a lawyer, and was not finally settled till *Rex* v. *Birch-enough*, R. & M. C. C. R. 477; and there are old authorities the other way in Stamforde, which were recognised by Lord Hale, 1 Hale, 626; 2 Hale 224, and Foster, 361. The distinction is this: that if A. procures B. to murder C., and this murder is committed by B. in A's absence, A. is guilty of murder if B. is an innocent agent, but is only an accessory before the fact if B. is a guilty agent. Now, it is obvious that there is no more difficulty in a jury understanding that they may convict A. of murder, where B. is a guilty agent than where he is an innocent one. In either case all they have to try is whether A. caused B. to commit the murder. Juries are perfectly well able to understand that he who causes a thing to be done by another is just as much responsible as if he did that thing himself—*qui facit per alium facit per se*—and there is no more difficulty in satisfying them that a man ought to be convicted of a murder who causes it to be done by another in his absence, than in satisfying them that where one man inflicts a mortal wound in the presence of another,

that wound is as much his wound as if he had inflicted it, if they were both concurring in the act that caused it. In both cases the jury must be satisfied that the act of the killer was caused by the other, and the advantage of this clause is, that it reduces the question for the jury to that single issue, and gets rid of the difficulty, which often formerly arose, whether the evidence proved the prisoner to be a principal or accessory before the fact. In all civil cases, and in the ordinary affairs of life, he who causes an act to be done, though he be absent when it is done, is treated as having done that act, and the same has always been the rule in treason and misdemeanor, and felony was the only exception, which the 11 and 12 V., c. 46, s. 1, very properly removed.

Mr. Archbold also says, p. 530, that in treason and misdemeanor all are principals, and "of course those who advise treason or misdemeanor, and are not present when it is committed, must necessarily be indicted as principals, there is no other mode of indicting them." This is a mistake. It may be laid either way, viz., charging it as principal, or laying it special as it will appear by the evidence. If one conspires the death of the Queen, and is committed to prison for the same, and one procures him to escape or harbours him after such a time as he knows him charged with treason, or to have committed treason, you may indict him upon the special matter, that A. committed treason, that B. knew of it and received him.—*R.* v. *Tracy*, 6 *Mod.* 30, *per Holt C. J.*

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

2. Every one who counsels, procures or commands any other person to commit any felony, whether the same is a felony at common law, or by virtue of any Act, is guilty of felony, and may be indicted, and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon,—or may be indicted and convicted of a substantive felony, whether the principal felon has or has not been convicted, or is or is not amenable to justice,—and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished.—31 *V.*, *c.* 72, *s.* 2. *Sec.* 2, *Imp.*

Note by Greaves.—"The prosecutor may at his option prefer an indictment under this or the preceding section, and we have shown in the last note (under sec. 1, *ante.*) that there are cases in which it may be advisable to prefer an indictment under this section."

Notwithstanding this section, the soliciting and inciting a person to commit a felony, where no felony is in fact committed by the person so solicited, still remains a misdemeanor only.—*R.* v. *Gregory, L. R.*, 1 *C. C. R.* 77.

3. In every felony, every principal in the second degree shall be punishable in the same manner as the principal in the first degree is punishable.—31 *V.*, *c.* 69, *s.* 9, *part, and c.* 72, *s.* 3; 32-33 *V.*, *c.* 21, *s.* 107, *part.*

4. Every one who becomes an accessory after the fact to any felony, whether the same is a felony at common law or by virtue of any Act, may be indicted and convicted, either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon has or has not been convicted, or is or is not amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished. —31 *V.*, *c.* 72, *s.* 4; 32-33 *V.*, *c.* 29, *s.* 8, *part.* *Sec.* 3, *Imp.*

See secs. 136 and 138 of the Procedure Act.
As to venue, sec. 17 of Procedure Act.

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

5. Every accessory after the fact to any felony (except when it is otherwise specially enacted), whether the same is a felony at common law, or by virtue of any Act, shall be liable to imprisonment for any term less than two years.—31 *V.*, *c.* 69, *s.* 9, *part, and c.* 72, *s.* 5, *part*; 32–33 *V.*, *c.* 19, *s.* 57, *part. Sec.* 4, *Imp.*

6. If any principal offender is, in any wise, convicted of any felony, any accessory, either before or after the fact, may be proceeded against in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon dies or is pardoned or otherwise delivered before such attainder; and every such accessory shall, upon conviction, suffer the same punishment as he would have suffered if the principal had been attainted.—31 *V.*, *c.* 72, *s.* 6; 32–33 *V.*, *c.* 20, *s.* 8, *part. Sec.* 5, *Imp.*

MISDEMEANORS.

7. Every one who aids, abets, counsels or procures the commission of any misdemeanor, whether the same is a misdemeanor at common law, or by virtue of any Act, is guilty of a misdemeanor and liable to be tried, indicted and punished as a principal offender.—31 *V.*, *c.* 72, *s.* 9; 32–33 *V.*, *c.* 19, *s.* 57, *part, and c.* 21, *s.* 107, *part*; 35 *V.*, *c.* 32, *s.* 13; 40 *V.*, *c.* 32, *s.* 1, *part. Sec.* 8, *Imp. R.* v. *Burton*, 13 *Cox*, 71.

OFFENCES PUNISHABLE ON SUMMARY CONVICTION.

8. Every one who aids, abets, counsels or procures the commission of any offence punishable on summary conviction, either for every time of its commission, or for the first and second time only, or for the first time only, shall, on conviction, be liable for every first, second or subsequent offence, of aiding, abetting, counselling or procuring, to the same forfeiture and punishment to which a person guilty of a first, second or subsequent offence as a principal offender, is liable.—32–33 *V.*, *c.* 21, *s.* 108, *and c.* 22, *s.* 70, *and c.* 31, *s.* 15, *part*; 33 *V.*, *c.* 31, *s.* 5, *part.*

CHAPTER 146.

(11-12 V., c. 12, IMP.)

AN ACT RESPECTING TREASON AND OTHER OFFENCES AGAINST THE QUEEN'S AUTHORITY.

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

1. Every one who compasses, imagines, invents, devises, or intends death or destruction, or any bodily harm, tending to death or destruction, maiming or wounding, imprisonment or restraint of our Sovereign Lady the Queen, Her Heirs or Successors, and expresses, utters or declares such compassings, imaginations, inventions, devices or intentions, or any of them, by publishing any printing or writing, or by any overt act or deed, is guilty of treason and shall suffer death. 31 *V.*, *c.* 69, *s.* 2; 32-33 *V.*, *c.* 17, *s.* 1.

2. Every officer or soldier in Her Majesty's army, who holds correspondence with any rebel, or enemy of Her Majesty, or gives him advice or intelligence, either by letters, messages, signs or tokens, or in any manner or way whatsoever, or treats with such rebel or enemy, or enters into any condition with him without Her Majesty's license, or the license of the general, lieutenant general or chief commander, is guilty of treason and shall suffer death.—31 *V.*, *c.* 69, *s.* 3.

3. Every one who compasses, imagines, invents, devises or intends to deprive or depose Our Sovereign Lady the Queen, Her Heirs or Successors, from the style, honor or royal name of the imperial crown of the United Kingdom, or of any other of Her Majesty's dominions or countries,— or to levy war against Her Majesty, Her Heirs or Successors, within any part of the United Kingdom or of Canada, in order, by force or constraint, to compel her or them to change her or their measures or counsels, or in order to put any force or constraint upon, or in order to intimidate or overawe both Houses or either House of Parliament, of the United Kingdom or of Canada, or to move or stir any foreigner or stranger with force to invade the United Kingdom or Canada, or any other of Her Majesty's dominions or countries under the obeisance of Her Majesty, Her Heirs or Successors, and expresses, utters or declares such compassings, imaginations, inventions, devices or intentions, or any of them, by pub-

lishing any printing or writing, or by open and advised speaking, or by any overt act or deed, is guilty of felony, and liable to imprisonment for life.—31 *V.*, *c.* 69, *s.* 5; 32-33 *V.*, *c.* 17, *s.* 1.

4. Every one who confederates, combines or conspires with any person to do any act of violence, in order to intimidate, or to put any force or constraint upon any Legislative Council, Legislative Assembly or House of Assembly in any Province of Canada, is guilty of felony, and liable to fourteen years' imprisonment.—31 *V.*, *c.* 71, *s.* 5.

5. No person shall be prosecuted for any felony by virtue of this Act in respect of such compassings, imaginations, inventions, devices or intentions as aforesaid, in so far as the same are expressed, uttered, or declared by open and advised speaking only, unless information of such compassings, imaginations, inventions, devices and intentions and of the words by which the same were expressed, uttered or declared, is given upon oath to one or more justices of the peace, within six days after such words are spoken, and unless a warrant, for the apprehension of the person by whom such words were spoken is issued within ten days next after such information is given as aforesaid; and no person shall be convicted of any such compassings, imaginations, inventions, devices or intentions as aforesaid, in so far as the same are expressed, uttered or declared by open or advised speaking as aforesaid, except upon his own confession in open court, or unless the words so spoken are proved by two credible witnesses.—31 *V.*, *c.* 69, *s.* 6.

6. If any person, being a citizen or subject of any foreign state or country at peace with Her Majesty, is or continues in arms against Her Majesty, within Canada, or commits any act of hostility therein, or enters Canada with design or intent to levy war against Her Majesty, or to commit any felony therein, for which any person would, in Canada, be liable to suffer death, the Governor General may order the assembling of a militia general court martial for the trial of such person, under "*The Militia Act;*" and upon being found guilty by such court martial of offending against the provisions of this section, such person shall be sentenced by such court martial to suffer death, or such other punishment as the court awards.—31 *V.*, *c.* 14, *s.* 2.

7. Every subject of Her Majesty, within Canada, who levies war against Her Majesty, in company with any of the subjects or citizens of any foreign state or country then at peace with Her Majesty, or enters Canada in company with any such subjects or citizens with

intent to levy war on Her Majesty, or to commit any such act of felony as aforesaid, or who, with the design or intent to aid and assist, joins himself to any person or persons whomsoever, whether subjects or aliens, who have entered Canada with design or intent to levy war on Her Majesty, or to commit any such felony within the same, may be tried and punished by a militia court martial, in the same manner as any citizen or subject of a foreign state or country, at peace with Her Majesty, may be tried and punished under the next preceding section.—31 *V.*, *c.* 14, *s.* 3.

8. Every subject of Her Majesty, and every citizen or subject of any foreign state or country, who offends against the provisions of the two sections next preceding, is guilty of felony, and may, notwithstanding the provisions hereinbefore contained, be prosecuted and tried in any county or district of the Province in which such offence was committed, before any court of competent jurisdiction, in the same manner as if the offence had been committed in such county or district, and, upon conviction, shall suffer death as a felon.—31 *V.*, *c.* 14, *s.* 4.

9. Nothing herein contained shall lessen the force of or in any manner affect anything enacted by the statute passed in the twenty-fifth year of the reign of His Majesty King Edward the Third, intituled "*A declaration which offences shall be adjudged treason.*"—31 *V.*, *c.* 69, *s.* 1.

See Archbold, 779; Stephen's Crim. L., 32; Sir John Kelyng's Crown cases, p. 7 — and a treatise on treason, printed therein: Foster's Cr. Law, discourse on high Treason, 183.

Also, R. v. Gallagher, 15 Cox, 291; R. v. Deasy, 15 Cox, 334, for prosecutions under the Imperial Act. Secs. 106, 186 and 187 of the Procedure Act, are applicable to trials for offences under this Act; also, secs. 3 and 4 as to jurisdiction.

CHAPTER 147.

AN ACT RESPECTING RIOTS, UNLAWFUL ASSEMBLIES AND BREACHES OF THE PEACE.

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

1. Every sheriff, deputy sheriff, mayor or other head officer, and justice of the peace, of any county, city or town, who has notice that there are within his jurisdiction persons to the number of twelve or more unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace, shall resort to the place where such unlawful, riotous and tumultuous assembly is, and among the rioters, or as near to them as he can safely come, with a loud voice, command, or cause to be commanded, silence, and, after that, openly and with loud voice, make or cause to be made a proclamation in these words, or to the like effect:—

"Our Sovereign Lady the Queen charges and commands all persons "being assembled immediately to disperse and peaceably to depart "to their habitations or to their lawful business, upon the pain of "being guilty of an offence, on conviction of which they may be "sentenced to imprisonment for life.

"GOD SAVE THE QUEEN."

31 *V.*, *c.* 70, *s.* 1, *part, and ss.* 2 *and* 3.

2. All persons who,—

(*a.*) With force and arms willfully oppose, hinder or hurt any person who begins or is about to make the said proclamation, whereby such proclamation is not made, or—

(*b.*) Continue together to the number of twelve, for one hour after such proclamation has been made, or if they know that its making was hindered as aforesaid, continue together and do not disperse themselves within one hour after such hindrance,—

Are guilty of felony and liable to imprisonment for life.

2. No person shall be prosecuted for any offence under this section unless such prosecution is commenced within twelve months after the offence is committed.—31 *V.*, *c.* 70, *ss.* 1, *part*, 6, 7 *and* 8.

3. If the persons so unlawfully, riotously and tumultuously assembled together as aforesaid, or twelve or more of them, continue

together, and do not disperse themselves, for the space of one hour after the proclamation is made, or after such hindrance as aforesaid, every such sheriff, mayor, justice and other officer as aforesaid, and every constable or other peace officer, and all persons required by them to assist, shall cause such persons to be apprehended and carried before a justice of the peace; and if any of the persons so assembled is killed or hurt, in the apprehension of such persons or in the endeavor to apprehend or disperse them, by reason of their resistance, every person ordering them to be apprehended or dispersed, and every person executing such orders, shall be indemnified against all proceedings of every kind in respect thereof.—31 *V.*, *c.* 70, *ss.* 4 *and* 5.

4. All meetings and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms or for the purpose of practising military exercises, movements or evolutions, without lawful authority for so doing, are unlawful and prohibited.—31 *V.*, *c.* 15, *s.* 1, *part.*

5. Every one who is present at or attends any such meeting or assembly, for the purpose of training any other person or persons to the use of arms or to the practice of military exercises, movements or evolutions, or who, without lawful authority for so doing, trains or drills any other person or persons to the use of arms, or to the practice of military exercises, movements or evolutions, or who aids or assists therein, is guilty of a misdemeanor, and liable to two years' imprisonment.—31 *V.*, *c.* 15, *s.* 1, *part.*

6. Every one who attends or is present at any such meeting or assembly, for the purpose of being, or who, at any such meeting or assembly, is trained or drilled to the use of arms, or to the practice of military exercises, movements or evolutions, is guilty of a misdemeanor and liable to two years' imprisonment.—31 *V.*, *c.* 15, *s.* 1, *part.*

7. Any justice of the peace, constable or peace officer, or any person acting in his aid or assistance, may disperse any such unlawful meeting or assembly as in the three sections next preceding mentioned, and may arrest and detain any person present at or aiding, assisting or abetting any such assembly or meeting as aforesaid; and the justice of the peace who arrests any such person or before whom any person so arrested is brought, may commit such person for trial for such offence, unless such person gives bail for his appearance at the next court of competent jurisdiction, to answer to any indictment which is preferred against him for any such offence.—31 *V.*, *c.* 15, *s.* 2.

8. No one shall be prosecuted for any offence under the four sections next preceding, unless such prosecution is commenced within six months after the offence is committed.—31 *V.*, *c.* 15, *s.* 9.

9. All persons who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force demolish, pull down or destroy or begin to demolish, pull down or destroy, any church, chapel, meeting-house or other place of divine worship, or any house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel or fold, or any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof,—or any building other than such as are in this section before mentioned, belonging to Her Majesty, or to any county, municipality, riding, city, town, village, parish or place, or to any university or college or hall of any university, *or to any corporation, or to any unincorporated body of society or persons associated for any lawful purpose,* or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution,—or any machinery, whether fixed or movable, prepared for or employed in any manufacture or in any branch thereof,—or any steam engine or other engine for sinking, working, ventilating or draining any mine, or any staith, building or erection used in conducting the business of any mine, or any bridge, wagon-way or track for conveying minerals, from any mine, are guilty of felony, and liable to imprisonment for life.—32-33 *V.*, *c.* 22, *s.* 15; 24-25 *V.*, *c.* 97, *s.* 11, *Imp.*

10. All persons who, being riotously and tumultuously assembled together to the disturbance of the public peace, unlawfully and with force injure or damage any such church, chapel, meeting-house, place of divine worship, house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast, barn, granary, shed, hovel, fold, building, erection, machinery, engine, staith, bridge, wagon-way or track, as in the next preceding section mentioned, are guilty of a misdemeanor, and liable to seven years' imprisonment.—32-33 *V.*, *c.* 22, *s.* 16, *part*; *R. S. N. S.* (3*rd S.*), *c.* 162, *s.* 6; 24-25 *V.*, *c.* 97, *s.* 12, *Imp.*

11. Three or more persons who, having assembled, continue together with intent unlawfully to execute any common purpose with force and violence, or in a manner calculated to create terror and alarm, are guilty of an unlawful assembly, and liable to two years' imprisonment.—*R. S. N. S.* (3*rd S.*), *c.* 162, *s.* 5; 1 *R. S. N. B.*, *c.* 147, *s.* 6.

12. Three or more persons who, having assembled, continue together with intent unlawfully to execute any common purpose with force and violence, or in any manner calculated to create terror and alarm, and who endeavor to execute such purpose, are although such purpose is not executed, guilty of a rout, and liable to three years' imprisonment.—1 *R. S. N. B.*, *c.* 147, *s.* 7.

13. Three or more persons who, having assembled, continue together with intent unlawfully to execute any common purpose with force and violence, and who, wholly or in part, execute such purpose in a manner calculated to create terror and alarm, are guilty of a riot, and liable to four years' imprisonment.—1 *R. S. N. B.*, *c.* 147, *s.* 8.

14. Two or more persons who fight together in a public place, in a manner calculated to create terror and alarm, are guilty of an affray, and liable, on summary conviction, to three months' imprisonment. *R. S. N. S.* (*3rd S.*), *c.* 162, *s.* 7; 1 *R. S. N. B.*, *c.* 147, *s.* 9.

Secs. 1, 2, 3 are from the I Geo. 1, st. 2, c. 5. See Archbold, 902.

Secs. 4, 5, 6, 7, 8 are from 60 Geo. 3,—I Geo. 4, c. 1.

Secs. 11, 12, 13, 14 are enactments from Nova Scotia and New Brunswick, extended to all the Dominion on unlawful assemblies, routs, riots and affrays.

The words in *italics* in sec. 9 are not in the Imperial Act.

Indictment under Sect. 9.—That on ..... at ..... J. S., J. W. and E. W., together with divers other evil-disposed persons, to the jurors aforesaid unknown, unlawfully, riotously and tumultuously did assemble together, to the disturbance of the public peace; and being then and there so unlawfully, riotously and tumultuously assembled together as aforesaid, did then and there feloniously, unlawfully and with force begin to demolish and pull down the dwelling-house of one J. N., there situate, against the form.....

Local description necessary in the body of the indictment.—*R.* v. *Richards*, 1 *M. & Rob.* 177.

By sec. 206 of the Procedure Act, it is enacted that if upon the trial of any person, for any felony mentioned in the ninth section of "*Act respecting riots, unlawful assemblies, and breaches of the peace*," the jury is not satisfied that such person is guilty thereof, but is satisfied that he is guilty of any offence mentioned in the tenth section of such Act, they may find him guilty thereof, and he may be punished accordingly.—32-33 *V.*, *c.* 22, *s.* 16, *part*; 24-25 *V.*, *c.* 97, *s.* 11 and 12, *Imp.*

Indictment under Sect. 10.—That on ..... at ..... S., J. W. and E. W., together with divers other evil-disposed persons, to the said jurors unknown, unlawfully, riotously, and tumultuously did assemble together to the disturbance of the public peace, and being then and there so unlawfully, riotously and tumultuously assembled together as aforesaid, did then and there unlawfully and with force injure a certain dwelling-house of one J. N., there situate, against the form ..... Add a count stating *damage* instead of *injure*.

Local descriptions necessary as under sec. 9.

The riotous character of the assembly must be proved, It must be proved that these three or more, but not less than three, persons assembled together, and that their assembling was accompanied with some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as were calculated to inspire people with terror, such as being armed, using threatening speeches, turbulent gestures, or the like. It is a sufficient terror and alarm, if *any one* of the Queen's subjects be in fact terrified.—Archbold, 842. Then prove that the assembly began with force to demolish the house in question. It must appear that they began to demolish some part of the *freehold*; for instance, the demolition of moveable shutters

is not sufficient.—R. v. Howell, 9 C. & P. 437. A demolition by fire is within the Statute. Prove that the defendants were either active in demolishing the house, or present, aiding and abetting. To convict under sect. 9, the jury must be satisfied that the ultimate object of the rioters was to demolish the house, and that if they had carried their intention into effect, they would in point of fact have demolished it; for if the rioters merely do an injury to the house, and then of their own accord go away as having completed their purpose it is not a beginning to demolish within this section. But a total demolition is not necessary, though the parties were not interrupted, and the fact that the rioters left a chimney remaining will not prevent the Statute from applying.—*Archbold.* But if the demolishing or intent to demolish be not proved, and evidence of riot and injury or damage to the building is produced, the jury may find the defendant guilty of the misdemeanor created by sect. 10, by the proviso contained in the aforesaid sect. 206 of the Procedure Act.

Divers persons assembled in a room, entrance money being paid, to witness a fight between two persons. The combatants fought in a ring with gloves, each being attended by a second, who acted in the same way as the second at prize fights. The combatants fought for about 40 minute with great ferocity, and severely punished each other. The police interfered and arrested the defendants, who were among the spectators.

Upon the trial of an indictment against them for unlawfully assembling together for the purpose of a prize fight, the Chairman directed the jury that, if it was a mere exhibition of skill in sparring, it was not illegal; but, if the parties met intending to fight till one gave in from

exhaustion or injury received, it was a breach of the law and a prize fight, whether the combatants fought in gloves or not, and left it to the jury to say whether it was a prize fight or not.

Held, that the jury were properly directed.—*R.* v. *Orton*, 14 *Cox*, 226. *See R.* v. *McNaughton*, 14 *Cox*, 576.

The appellants with a considerable number of other persons, forming a body called "Salvation Army," assembled together in the streets of a town for a lawful object, and with no intention of carrying out their object unlawfully, or by the use of physical force, but knowing that their assembly would be opposed and resisted by other persons, in such a way as would in all probability tend to the committing of a breach of peace on the part of such opposing persons. A disturbance of the peace having been created by the forcible opposition of a number of persons to the assembly and procession through the streets of the appellants and the Salvation Army, who themselves used no force or violence, it was—

Held, by Field and Cave, J. J. (reversing the decision of the justices), that the appellants had not been guilty of "unlawfully and tumultuously assembling," etc., and could not therefore be convicted of that offence, nor be bound over to keep the peace.

Held, also, that knowledge by persons peaceably assembling for a lawful object, that their assembly will be forcibly opposed by other persons, under circumstances likely to lead to a breach of the peace on the part of such other persons, does not render such assembly unlawful.—*Beatty* v. *Gillbanks*, 15 *Cox*, 138.

A procession being attacked by rioters a person in it fired a pistol twice. He appeared to be acting alone and nobody was injured.

Held, that he could not be indicted for riot, and, on a case reserved, a conviction on such an indictement was quashed.—*R.* v. *Corcoran*, 26 *U. C. C. P.* 134.

On the trial of an indictment for riot and unlawful assembly on the 15th Jan., evidence was given on the part of the prosecution of the conduct of the prisoners on the day previous, for the purpose of showing (as was alleged) that B., in whose office one act of riot was committed, had reason to be alarmed when the prisoners came to his office. The prisoner's counsel thereupon claimed the right to show that they had met on the 14th to attend a school meeting, and to give evidence of what took place at the school meeting, but the evidence was rejected.

Held, per Allen, C. J., and Fisher and Duff, J. J., Weldon and Wetmore, J. J., dis., that the evidence was properly rejected because the conduct of the prisoners on the 14th could not qualify or explain their conduct on the following day.

It is no ground for quashing a conviction for unlawful assembly on one day that evidence of an unlawful assembly on another day has been improperly received, if the latter charge was abandoned by the prosecuting counsel at the close of the case, and there was ample evidence to sustain the conviction.

If a man knowingly does acts which are unlawful, the presumption of law is that the *mens rea* exists; ignorance of the law will not excuse him.—*The Queen* v. *Mailloux*, 3 *Pugs. (N. B.)* 493.

CHAPTER 154.

AN ACT RESPECTING PERJURY.

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

1. Every one who commits perjury or subornation of perjury is guilty of a misdemeanor, and liable to a fine in the discretion of the court and to fourteen years' imprisonment.—32-33 *V., c.* 23, *s.* 1.

2. Every one who,—

(*a.*) Having taken any oath, affirmation, declaration or affidavit in any case in which by any Act or law in force in Canada, or in any Province of Canada, it is required or authorized that facts, matters or things be verified, or otherwise assured or ascertained, by or upon the oath, affirmation, declaration or affidavit of any person, wilfully and corruptly, upon such oath, affirmation, declaration or affidavit, deposes, swears to or makes any false statement as to any such fact, matter or thing,—

(*b.*) Knowingly, wilfully and corruptly, upon oath or affirmation, affirms, declares, or deposes to the truth of any statement for so verifying, assuring or ascertaining any such fact, matter or thing, or purporting so to do, or knowingly, wilfully and corruptly takes, makes, signs or subscribes any such affirmation, declaration or affidavit, as to any such fact, matter or thing,—such statement, affidavit, affirmation or declaration being untrue, in the whole or any part thereof, or—

(*c.*) Knowingly, wilfully and corruptly omits from any such affidavit, affirmation or declaration, sworn or made under the provisions of any law, any matter which, by the provisions of such law, is required to be stated in such affidavit, affirmation or declaration,—

Is guilty of wilful and corrupt perjury, and liable to be punished accordingly:

2. Provided, that nothing herein contained shall affect any case amounting to perjury at common law, or the case of any offence in respect of which other or special provision is made by any Act.—32-33 *V., c.* 23, *s.* 2.

3. Every person who wilfully and corruptly makes any false affidavit, affirmation or declaration, out of the Province in which it is to be used, but within Canada, before any functionary authorized to

take the same for the purpose of being used in any Province of Canada, shall be deemed guilty of perjury, in like manner as if such false affidavit, affirmation or declaration had been made in the Province in which it is used, or intended to be used, before a competent authority. —33 *V.*, *c.* 26, *s.* 1, *part.*

4. Any judge of any court of record, or any commissioner, before whom any inquiry or trial is held, and which he is by law required or authorized to hold, may, if it appears to him that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, affirmation, declaration, deposition, examination, answer or other proceeding made or taken before him, direct such person to be prosecuted for such perjury, if there appears to such judge or commissioner a reasonable cause for such prosecution,—and may commit such person so directed to be prosecuted until the next term, sittings, or session of any court having power to try for perjury, in the jurisdiction within which such perjury was committed, or permit such person to enter into a recognizance, with one or more sufficient sureties, conditioned for the appearance of such person at such next term, sittings or session, and that he will then surrender and take his trial and not depart the court without leave,—and may require any person such judge or commissioner thinks fit, to enter into a recognizance conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid.—32-33 *V.*, *c.* 23, *s.* 6.

5. All evidence and proof whatsoever, whether given or made orally or by or in any affidavit, affirmation, declaration, examination or deposition, shall be deemed and taken to be material with respect to the liability of any person to be proceeded against and punished for wilful and corrupt perjury or for subornation of perjury.—32-33 *V.*, *c.* 23, *s.* 7.

Perjury, by the common law, appears to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a "*court*" of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not. 3 *Russell*, 1.

Hawkins, Vol. 1, p. 429, has the word "*course*" of justice, instead of "*court*" of justice.

Bishop, Cr. Law, Vol. 2, 1015, says a "*course*" of justice, and thinks that the word "*court*" in Russell is a

misprint for "course." Though Bacon's abridgement, verb: *perjury*, also has "*court*." Roscoe, 747, has also "*court*" of justice, but says the proceedings are not confined to courts of justice; and a note by the editor of the American sixth edition says a "*course*" of justice is a more accurate expression than a "*court*" of justice.

There is no doubt, however, that, according to all the definitions of this offence, by the common law, the party must be lawfully sworn, the proceeding in which the oath is taken must relate to the administration of justice, the assertion sworn to must be false, the intention to swear falsely must be wilful, and the falsehood material to the matter in question. Promissory oaths, such as those taken by officers for the faithful performance of duties, cannot be the subject of perjury.—*Cr. L. Comrs., 5th Report*, 51.

False swearing, under a variety of circumstances, has been declared by numerous Statutes to amount to perjury, and to be punishable as such. But at common law, false swearing was very different from perjury. The offence of perjury, at the common law, is of a very peculiar description, say the Cr. L. Comrs., 5th Rep. 23, and differs in some of its essential qualities from the crime of false testimony, or false swearing, as defined in all the modern Codes of Europe. The definition of the word, too, in its popular acceptation, by no means denotes its legal signification. Perjury, by the common law, is the assertion of a falsehood upon oath in a judicial proceeding, respecting some fact material to the point to be decided in such proceeding; and the characteristic of the offence *is not the violation of the religious obligation of an oath, but the injury done to the administration of public justice by false testimony.*

Here, in Canada, the above Statute declares to be perjury all oaths, &c., taken or subscribed in virtue of any law,

or required or authorized by any such law; and voluntary and extra-judicial oaths being prohibited by c. 141, Rev. Stat., it may perhaps be said that, with us, every false oath, *knowingly, wilfully and corruptly* taken amounts to perjury, and is punishable as such. The interpretation Act, c. 1, Rev. Stat., enacts moreover that the word "oath" includes a solemn affirmation whenever the context applies to any person and case by whom and in which a solemn affirmation may be made instead of an oath, and in like cases the word *sworn* shall include the word *affirmed* or *declared*.

Sect. 5 *supra* is an important alteration of the law on perjury as it stands in England. As stated before, by the Common Law, to constitute perjury, the false swearing must be, besides the other requisites, in *a matter material* to the point in question. The above section may be said to have abolished this necessary ingredient of perjury.

See R. v. Ross, I. M. L. R. Q. B., 227.

See Stephen's Digest of Criminal Law, XXXIII.

This clause 5 of our Perjury Act has been taken from clause 272 of the Criminal Laws of Victoria, Australia.

As our law now stands, perjury may be defined a false oath, knowingly, wilfully and corruptly given by one, in some judicial proceeding, or on some other occasion where an oath is imposed, required, or sanctioned by law.

1st. *There must be a lawful oath.* *R.* v. *Gibson*, 7 *R. L.* 574; *R.* v. *Martin*, 21 *L. C. J.*, 156, 7 *R. L.* 772; *R.* v. *Lloyd*, 16 *Cox*, 235. And, therefore, it must be taken before a competent jurisdiction, or before an officer who had legal jurisdiction to administer the particular oath in question. And though it is sufficient *primâ facie* to show the ostensible capacity in which the judge or officer acted when the

oath was taken, the presumption may be rebutted by other evidence, and the defendant, if he succeed, will be entitled to an acquittal.—2 *Chitty*, 304; *Archbold*, 815.—*R.* v. *Roberts*, 14 *Cox*, 101; *R. v. Hughes*, 14 *Cox*, 284.

2nd.—*The oath must be false.* By this, it is intended that the party must believe that what he is swearing is fictitious; for, it is said, that if, intending to deceive, he asserts of his own knowledge that which may happen to be true, without any knowledge of the fact, he is equally criminal, and the accidental truth of his evidence will not excuse him.—2 *Chitty*, 303. Bishop's first book of the law, 117. And a man may be indicted for perjury, in swearing that he *believes* a fact to be true, which he must know to be false.—*R.* v. *Pedley*, 1 *Leach*, 327.

3rd. *The false oath must be knowingly, wilfully, and corruptly taken.* The oath must be taken and the falsehood asserted with deliberation and a consciousness of the nature of the statement made, for if it seems rather to have been occasioned by inadvertency or surprise, or a mistake in the import of the question, the party will not be subjected to those penalties which a corrupt motive alone can deserve.—2 *Chitty*, 303. If an oath is false to the knowledge of the party giving it, it is, in law, wilful and corrupt.—2 *Bishop, Cr. L.* 1043, *et seq.*

It hath been holden not to be material, upon an indictment of perjury at common law, whether the false oath were at all credited, or whether the party in whose prejudice it was intended were, in the event, any way aggrieved by it or not; insomuch as this is not a prosecution grounded on the damage of the party but on the abuse of public justice.—3 *Burn's Justice*, 1227.

Indictment for Perjury.—The Jurors for Our Lady the

Queen, upon their oath present, that heretofore, to wit, at the *(assizes)* holden for the county (*or district*) of ..... on the ..... day of ..... in the year of Our Lord, one thousand ..... before ..... (*one of the judges of Our Lady the Queen*), a certain issue between one E. F. and one J. H. in a certain action of *covenant* was tried, upon which trial A. B. appeared as a witness for and on behalf of the said E. F., and was then and there duly *sworn* before the said ....., and did then and there, upon his *oath* aforesaid, falsely, wilfully and corruptly depose and *swear* in substance and to the effect following, "*that he saw the said G. H. duly execute the deed on which the said action was brought*," whereas, in truth, the said A. B. did not see the said G. H. execute the said deed, and the said deed was not executed by the said G. H., and the said A. B. did thereby commit wilful and corrupt *perjury*.

Sect. 107 of the Procedure Act enacts as follows, concerning the form of indictment in perjury: "In any indictment for perjury, or for unlawfully, illegally, falsely, fraudulently, deceitfully, maliciously or corruptly taking, making, signing or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what Court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing was taken, made, signed or subscribed, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding either in law or equity, and without setting forth the commission or authority of the Court or person before whom such offence was committed."

No indictment for perjury or subornation of perjury can

be preferred, unless one or other of the preliminary steps required by sec. 140 of the Procedure Act has been taken.

Perjury is not triable at Quarter Sessions.—2 *Hawkins*, *c.* 8, *s.* 38; *R.* v. *Bainton*, 2 *Str.* 1088; *R.* v. *Yarrington*, 1 *Salk.* 406; *Dickinson's*, *Quarter Sessions*, 156; *R.* v. *Higgins*, 2 *East.* 18; *R.* v. *Currie*, 31 *U. C. Q. B.* 582.

The indictment must allege that the defendants swore falsely, wilfully and corruptly; where the word *feloniously* was inserted instead of *falsely*, the indictment, though it alleged that the defendant swore wilfully, corruptly and maliciously, was held bad in substance, and not amendable.—*R.* v. *Oxley*, 3 *C. & K.* 317; *Archbold*, 812.

If the same person swears contrary at different times, it should be averred on which occasion he swore wilfully, falsely and corruptly.—*R.* v. *Harris*, 5 *B. & Ald.* 926.

As to assignments of perjury, the indictment must assign positively the manner in which the matter sworn to is false. A general averment that the defendant falsely swore, etc., etc., upon the whole matter is not sufficient; the indictment must proceed by special averment to negative that which is false.—3 *Burn's Justice*, 1235.

Proof.—It seems to have been formerly thought that in proof of the crime of perjury, two witnesses were necessary; but this strictness, if it was ever the law, has long since been relaxed; the true principle of the rule being merely this, that the evidence must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence. The oath of the opposing witness therefore will not avail, unless it be corroborated by material and independent circumstances; for otherwise there would be nothing more than the oath of one man against another, and the scale of evidence being

thus in one sense balanced, it is considered that the jury cannot safely convict. So far the rule is founded on substantial justice. But it is not precisely accurate to say that the corroborative circumstances must be tantamount to another witness; for they need not be such as that proof of them, standing alone, would justify a conviction, in a case where the testimony of a single witness would suffice for that purpose. Thus, a letter written by the defendant, contradicting his statement on oath, will render it unnecessary to call a second witness. Still, evidence confirmatory of the single accusing witness, in some slight particulars only, will not be sufficient to warrant a conviction, but it must at least be strongly corroborative of his testimony, or to use the quaint but energetic language of Chief Justice Parker, "a strong and clear evidence, and more numerous than the evidence given for the defendant." When several assignments of perjury are included in the same indictment, it does not seem to be clearly settled whether, in addition to the testimony of a single witness, corroborative proof must be given with respect to each; but the better opinion is that such proof is necessary; and that too, although all the perjuries assigned were committed at one time and place. For instance, if a person, on putting in his schedule in the Bankruptcy Court, or on other the like occasion, has sworn that he has paid certain creditors, and is then indicted for perjury on several assignments, each specifying a particular creditor who has not been paid, a single witness with respect to each debt will not, it seems, suffice, though it may be very difficult to obtain any fuller evidence. The principle that one witness, with corroborating circumstances, is sufficient to establish the charge of perjury, leads to the conclusion, that without any witness directly to disprove what is

sworn, circumstances alone, when they exist in a documentary shape, may combine to the same effect; as they may combine, though altogether unaided by oral proof, except the evidence of their authenticity, to prove any other fact connected with the declarations of persons or the business of life. In accordance with these views, it has been held in America, that a man may be convicted of perjury on documentary and circumstantial evidence alone, *first*, where the falsehood of the matter sworn to by him is directly proved by written evidence springing from himself, with circumstances showing the corrupt intent; *secondly*, where the matter sworn to is contradicted by a public record, proved to have been well known to the prisoner when he took the oath; and *thirdly*, where the party is charged with taking an oath contrary to what he must necessarily have known to be true, the falsehood being shown by his own letter relating to the fact sworn to, or by any other writings which are found in his possession, and which have been treated by him as containing the evidence of the fact recited in them.

If the evidence adduced in proof of the crime of perjury consists of two opposing statements by the prisoner, and nothing more, he cannot be convicted. For, if one only was delivered under oath, it must be presumed, from the solemnity of the sanction, that the declaration was the truth, and the other an error or a falsehood; though, the latter, being inconsistent with what he has sworn may form important evidence with other circumstances against him. And if both the contradictory statements were delivered under oath, there is still nothing to show which of them is false, when no other evidence of the falsity is given. If, indeed, it can be shown that before making the statement on which perjury is assigned

the accused had been tampered with, or if any other circumstances tend to prove that the statement offered as evidence against the prisoner was true, a legal conviction may be obtained, and provided the nature of the statement was such, that one of them must have been false *to the prisoner's knowledge*, slight corroborative evidence would probably be deemed sufficient. But it does not necessarily follow that because a man has given contradictory accounts of a transaction on two occasions he has therefore committed perjury. For cases may well be conceived in which a person might very honestly swear to a particular fact, from the best of his recollection and belief, and might afterwards from other circumstances be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Moreover, when a man merely swears to the best of his memory and belief, it of course requires very strong proof to show that he is wilfully perjured. The rule requiring something more than the testimony of a single witness on indictments for perjury, is confined to the proof of the falsity of the matter on which the perjury is assigned. Therefore the holding of the Court, the proceedings in it, the administering the oath, the evidence given by the prisoner, and, in short, all the facts, exclusive of the falsehood of the statement, which must be proved at the trial, may be established by any evidence that would be sufficient, were the prisoner charged with any other offence. For instance, if the false swearing be that two persons were together at a certain time, and the assignment of perjury be that they were not together at that time, evidence by one witness that at the time named the one person was at London, and by another witness that at the same time the other person was in York, will be sufficient proof of the as-

signment of perjury.—2 *Taylor on Evidence, par.* 876, *et seq.*

On an indictment for perjury alleged to have been committed at the Quarter Sessions, the chairman of the Quarter Sessions ought not to be called upon to give evidence as to what the defendant swore at the Quarter Sessions.—*R.* v. *Gazard*, 8 *C. & P.* 595.

But this ruling is criticized by Greaves, note *n*, 3 Russ. 86, and Byles, J., in R. v. Harvey, 8 Cox, 99, said that though the judges of Superior Courts ought not to be called upon to produce their notes, yet the same objection was not applicable to the judges of Inferior Courts, especially where the judge is willing to appear.—3 *Burn's Justice*, 1243.

In R. v. Hook, Dears & B. 606, will be found an interesting discussion on the evidence necessary upon an indictment for perjury.

By sect. 16 of the Procedure Act, every person accused of perjury may be dealt with, indicted, tried and punished in the district, county or place in which the offence is committed, or in which he is apprehended or is in custody.

The Imperial Statute, corresponding to sect. 4 of our revised Perjury Act, authorizes the judge to commit, *unless* such person shall enter into a recognizance and give sureties. Our statute gives power to commit *or* to permit such person to enter into a recognizance and give sureties.

Greaves remarks on this clause: "The crime of perjury has become so prevalent of late years, and so many cases of impunity have arisen, either for want of prosecution, or for defective prosecution, that this and the following sections were introduced to check a crime which so vitally affects the interests of the community.

"It was considered that by giving to every Court and

person administering oaths a power to order a prosecution for perjury at the public expense, coupled with a power of commitment in default of bail, many persons would be deterred from committing so detestable a crime, and in order to effectuate this object, the present clause was framed, and as it passed the Lords it was much better calculated to effect that object than as it now stands.

"As it passed the Lords it applied to any justice of the peace. The committee in the Commons confined it to justices in petty and special sessions,—a change much to be regretted, as a large quantity of business is transacted before a single justice or one metropolitan or stipendiary magistrate, who certainly ought to have power to commit under this clause for perjury committed before them.

"Again, as the clause passed the Lords, if an affidavit, etc., were made before one person, and used before another judge or Court, etc., and it there appeared that perjury had been committed, such judge or Court might commit. The clause has been so altered, that the evidence must be given, or the affidavit, etc., made before the judge, etc., who commits. The consequence is, that numerous cases are excluded; for instance, a man swears to an assault or felony before one justice, and on the hearing before two it turns out he has clearly been guilty of perjury, yet he cannot be ordered to be prosecuted under this clause. Again, an affidavit is made before a commissioner, the Court refer the case to the master, and he reports that there has been gross perjury, or the Court see on the hearing of the case before them that there has been gross perjury committed, yet there is no authority to order a prosecution under this clause. So, again, a man is committed for trial on the evidence of a witness which is proved on the trial to be false beyond all doubt, yet

if such witness be not examined, and do not repeat the same evidence on the trial, the Court cannot order him to be prosecuted.

"It is to be observed, that before ordering a prosecution under this clause, the Court ought to be satisfied, not only that perjury has been committed, but that there is a 'reasonable cause for such prosecution.' Now it must ever be remembered that two witnesses, or one witness and something that will supply the place of a second witness, are *absolutely essential* to a conviction for perjury. The Court, therefore, should not order a prosecution, unless it sees that such proof is capable of being adduced at the trial; and as the Court has the power, it would be prudent, in every case, if practicable, at once to bind over such two witnesses to give evidence on the trial, otherwise it may happen that one or both may not be then forthcoming to give evidence. It would be prudent also for the Court to give to the prosecutor a minute of the point on which, in its judgment, the perjury had been committed, in order to guide the framer of the indictment, who possibly may be wholly ignorant otherwise of the precise ground on which the prosecution is ordered. It is very advisable also that where the perjury is committed in giving evidence, such evidence should be taken down in writing by some person who can prove it upon the trial, as nothing is less satisfactory or more likely to lead to an acquittal than that the evidence of what a person formerly swore should depend entirely upon mere memory. Indeed, it may well be doubted whether it would be proper to order a prosecution in any case under this Act, where there was no minute in writing of the evidence taken down at the time.

"Again, it ought to be clear, beyond all reasonable doubt, that perjury has been *willfully* committed before

a prosecution is ordered."—*Lord Campbell's Acts, by Greaves*, 22.

See sect. 225 of the Procedure Act as to proof of trial for felony or misdemeanor in which perjury was committed.

It is to be observed that this section is merely remedial, and will not prevent a regular record from being still admissible in evidence, and care must be taken to have such record drawn up in any case where the particular averments in the former indictment may be essential.—*Lord Campbell's Acts, by Greaves*, 27.

SUBORNATION OF PERJURY.

Sec. 108 and second schedule of Procedure Act, as to form of indictment.—14-15 *V., c.* 100, *s.* 21, *Imp.*

Subornation of perjury is a misdemeanor, as perjury itself, and subject to the same punishment.—See remarks under sect. 1, *ante*.

Sect. 5, *ante*, declaring all evidence whatever material with respect to perjury, also applies to subornation of perjury.

Sect. 225 of the Procedure Act, *ante*, as to certificate of indictment and trial, applies also to subornation of perjury.

Sect. 16 of the Procedure Act, allowing perjury to be tried where the offender is apprehended or is in custody, does not appear to apply to subornation of perjury.

Subornation of perjury, by the common law, seems to be an offence in procuring a man to take a false oath, amounting to perjury, who actually taketh such oath.—1 *Hawkins*, 435.

But it seemeth clear that if the person incited to take such an oath do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury,

yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment.—1 *Hawkins, loc. cit.*

An attempt to suborn a person to commit perjury, upon a reference to the judges, was unanimously holden by them to be a misdemeanor.—1 *Russ.* 85.

And, upon an indictment for subornation of perjury, if it appears, at the trial, that perjury was not actually committed, but that the defendant was guilty of the attempt to suborn a person to commit the offence, such defendant may be found guilty of the attempt.—Sec. 183, Procedure Act.

In support of an indictment for subornation the record of the witness's conviction for perjury is no evidence against the suborners, but the offence of the perjured witness must be again regularly proved. Although several persons cannot be joined in an indictment for perjury, yet for subornation of perjury they may.—3 *Burn's Justice*, 1246.

Indictment, same as indictment for perjury to the end, and then proceed:—And the Jurors aforesaid upon their oath aforesaid further present, that before the committing of the said offence, by the said A. B., to wit, on the ....,.... day of ..,..... at ..... C. D. unlawfully, wilfully and corruptly did cause and procure the said A. B. to do and commit the said offence in the manner and form aforesaid.

No indictment can be preferred for subornation of perjury unless one or other of the preliminary steps required by sect. 140 of the Procedure Act has been taken.

As perjury, *see ante*, subornation of perjury is not triable at Quarter Sessions.

Indictment quashed (for perjury) none of the formalities required by sec. 140 of the Procedure Act having been complied with.—*R.* v. *Granger*, 7 *L. N.* 247.

A person accused of perjury cannot have accomplices, and is alone responsible for the crime of which he is accused.—*R.* v. *Pelletier*, 1 *R. L.* 565.

Including two charges of perjury in one indictment would not be ground for quashing it. An indictment that follows the form given by the Statute is sufficient.—*R.* v. *Bain*, *Ramsay's App. Cas.* 191.

The non-production by the prosecution, on a trial for perjury, of the plea which was filed in the civil suit wherein the defendant is alleged to have given false testimony, is not material when the assignment of perjury has no reference to the pleading, but the defendant may, if he wishes, in case the plea is not produced, prove its contents by secondary evidence. It is not essential to prove that the facts sworn to by the defendant, as alleged in the indictment, were material to the issue in the cause in which the defendant was examined.—*R.* v. *Ross*, 1 *M. L. R. Q. B.* 227; 28 *L. C. J.* 261.

CHAPTER 155.

AN ACT RESPECTING ESCAPES AND RESCUES.

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

1. Every one who is convicted of a felonious rescue is liable to seven years' imprisonment, when no special punishment is otherwise provided by statute.—32-33 *V., c.* 29, *s.* 84, *part.*

2. Every one who escapes from or rescues, or aids in rescuing any other person from lawful custody, or makes or causes any breach of prison, if such offence does not amount to felony, is guilty of a misdemeanor, and liable to imprisonment for any term less than two years.—32-33 *V., c.* 29, *s.* 84, *part.*

3. Every one who, being a prisoner ordered to be detained in any penitentiary, escapes from the person or persons having the lawful custody of him, when being conveyed thereto, or when being conveyed from one penitentiary to another, is guilty of felony, and liable to two years' imprisonment.—46 *V. c.* 37, *s.* 54, *part.*

4. Every one who, being a prisoner in a penitentiary, breaks prison or escapes, or attempts to escape from the custody of any officer, guard or other servant of the penitentiary while at work, or passing to or from work, either within or beyond the prison walls or penitentiary limits, is guilty of felony, and liable to three years' imprisonment.—46 *V., c.* 37, *s.* 54, *part.*

5. Every one who, being a prisoner in any penitentiary, at any time attempts to break prison, or who forcibly breaks out of his cell, or makes any breach therein with intent to escape therefrom, whether successful or not, is guilty of felony, and liable to one year's imprisonment.—46 *V., c.* 37, *s.* 55, *part.*

6. Every one who rescues or attempts to rescue any prisoner while being conveyed to any penitentiary, or while imprisoned therein, or while being conveyed from one penitentiary to another, or while passing to or from work at or near any penitentiary,—and every one who by supplying arms, tools or instruments of disguise, or otherwise, in any manner aids any such prisoner in any escape or attempt at escape, is guilty of felony, and liable to five years' imprisonment.—46 *V., c.* 37, *s.* 57.

7. Every one who, having the custody of any such prisoner as aforesaid, or being employed by the person having such custody, as a keeper, turnkey, guard or assistant, carelessly allows any such prisoner to escape, is guilty of a misdemeanor, and liable to fine or imprisonment, or to both, in the discretion of the court; and every such person as aforesaid, who knowingly and wilfully allows any such convict to escape, is guilty of felony, and liable to five years' imprisonment.—46 *V.*, *c.* 37, *s.* 58.

8. Every one who, knowingly and unlawfully, under color of any pretended authority, directs or procures the discharge of any prisoner not entitled to be so discharged, is guilty of misdemeanor, and liable to imprisonment for any term less than two years, and the person so discharged shall be held to have escaped.—32-33 *V.*, *c.* 29, *s.* 85.

9. Every one who, being sentenced to be detained in any reformatory prison or reformatory or industrial school, escapes therefrom, may at any time before the expiration of his term of detention, be apprehended without warrant, and brought before any justice of the peace or magistrate, who, on proof of his identity, shall remand him to such prison or school there to serve the remainder of his original sentence, with such additional term, not exceeding one year, as to such justice or magistrate seems proper.—32-33 *V.*, *c.* 34, *s.* 7; 33 *V.*, *c.* 32, *s.* 5; 43 *V.*, *c.* 41, *s.* 4; 47 *V.*, *c.* 45, *s.* 6.

10. Every one who,—

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

(*b.*) Directly or indirectly induces such an offender to escape from such prison or school,—

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

Shall be liable, on summary conviction before two justices of the peace, to a penalty not exceeding eighty dollars, or to imprisonment with or without hard labor for any term not exceeding two months. —32-33 *V.*, *c.* 34, *s.* 8.

11. Every one who escapes from imprisonment shall, on being retaken, undergo, in the prison he escaped from, the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape; and any imprisonment

awarded for such offence may be to the penitentiary or prison from which the escape was made.—32-33 *V., c.* 29, *s.* 87.

What is an escape; when is an escape a felony, and when a misdemeanor; what is a prison-breaking, and when is it a felony or a misdemeanor; what is a rescue, and when is it a felony or a misdemeanor?

What is an escape.—An escape is where one who is arrested gains his liberty without force before he is delivered by due course of law. The general principle of the law on the subject is that as all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it, those who, declining to undergo a legal imprisonment when arrested on criminal process, free themselves from it by any artifice, and elude the vigilance of their keepers, are guilty of an offence of the nature of a misdemeanor. It is also criminal in a prisoner to escape from lawful confinement, though no force or artifice be used on his part to effect such purpose. Thus, if a prisoner go out of his prison without any obstruction, the doors being opened by the consent or negligence of the gaoler, or if he escape in any other manner, without using any kind of force or violence, he will be guilty of a misdemeanor: *R.* v. *Nugent*, 11 Cox, 64. The officer by whose default a prisoner gains his liberty before he is legally discharged is also guilty of the offence of escape, divided in law, then, in two offences, a *voluntary* escape or a *negligent* escape. To constitute an escape, there must have been an actual arrest in a criminal matter.

A *voluntary* escape is where an officer, having the custody of a prisoner, knowingly and intentionally gives him his liberty, or by connivance suffers him to go free, either to save him from his trial or punishment, or to allow him a temporary liberty, on his promising to return, and, in fact,

so returning. *R.* v. *Shuttlework*, 22 *U. C. Q. B.* 372. Though, some of the books go to say that, in this last case, the offence would amount to a *negligent* escape only.

A *negligent* escape is where the party arrested or imprisoned escapes against the will of him that arrests or has him in charge, and is not freshly pursued and taken again before he has been lost sight of. And in this case, the law presumes negligence in the officer, till evident proof on his part to the contrary. The sheriff is as much liable to answer for an escape suffered by his officers, as if he had actually suffered it himself. A justice of the peace who bails a person not bailable by law is guilty of a negligent escape, and the person so discharged is held to have escaped.

When is an escape a felony, and when a misdemeanor. —An escape by a prisoner himself is no more than a misdemeanor, whatever be the crime for which he is imprisoned. Of course, this does not apply to prison-breaking, but simply to the case of a prisoner running away from the officer or the prison without force or violence. This offence falls under s. 2, c. 155, *ante*, and is punishable by imprisonment for any period less than two years. An officer guilty of a *voluntary* escape is involved in the guilt of the same crime of which the prisoner is guilty, and subject to the same punishment, whether the person escaping were actually committed to some gaol, or under an arrest only, and not committed, and whether the offence be treason, felony or misdemeanor, so that for instance, if a gaoler *voluntarily* allows a prisoner committed for larceny to escape he is guilty of a felonious escape, and punishable as for larceny; whilst if such prisoner so voluntarily by him allowed to escape was committed for obtaining money by false pretences, the gaoler is then guilty of a misdemeanor,

punishable under the common law by fine or imprisonment, or both, as c. 155, *ante* (except s. 7, for certain specified escapes), does not apply to escape as an offence by an officer or gaoler, either when a felony or a misdemeanor. Greaves, note *r*, 1 *Russ.* 587, says that the gaoler might also, in felonies, be tried as an accessory after the fact, for voluntary escape. A *negligent* escape is always a misdemeanor, and is punishable, at common law, by fine or imprisonment or both.

What is a prison-breaking, and when is it a felony or a misdemeanor. The offence of prison-breach is a breaking and going out of prison by force by one lawfully confined therein. Any prisoner who frees himself from lawful imprisonment, by what the law calls a breaking, commits thereby a felony or a misdemeanor, according as the cause of his imprisonment was of one grade or the other. *R.* v. *Haswell, R. & R.* 458. But a mere breaking is not sufficient to constitute this offence: the prisoner must have escaped. The breaking of the prison must be an actual breaking, and not such force and violence only as may be implied by construction of law. Any place where a prisoner is lawfully detained is a prison *quoad* this offence, so a private house is a prison if the prisoner is in custody therein. If the prison-breaking is by a person lawfully committed for a misdemeanor, it is, as remarked before, a misdemeanor, but if the breaking is by a person committed for felony, then his offence amounts to felony.

A prisoner was indicted for breaking out from the lock-up, being then in lawful custody for felony. It appeared that the prisoner and another man had been given into the custody of a police officer, without warrant, on a charge of stealing a watch from the person. They were taken before a magistrate. No evidence was taken upon oath, but the

prisoner was remanded for three days. The prisoner broke out of the lock-up and returned to his home. He appeared before the magistrate on the day to which the hearing of the charge had been adjourned, and on the investigation of the charge it was dismissed by the magistrate, who stated that in his opinion it was a lark, and no jury would convict. The prisoner contended that the charge having been dismissed by the magistrate, he could not be convicted of prison-breaking, citing 1 *Hale*, 610, 611, that if a man be subsequently indicted for the original offence and acquitted, such acquittal would be a sufficient defence to an indictment for breach of prison. But Martin, B., held that a dismissal by the magistrate was not tantamount to an acquittal upon an indictment, and that it simply amounted to this, that the justices did not think it advisable to proceed with the charge, but it was still open to them to hear a fresh charge against him. The prisoner was found guilty.—*R.* v. *Waters*, 12 *Cox*, 390.

What is a rescue, and when is it a felony or a misdemeanor.—Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment. A rescue in the case of one charged with felony is felony in the rescuer, and a misdemeanor, if the prisoner is charged with a misdemeanor. *R.* v. *Haswell*, *R. & R.*, 458. But though upon the principle that wherever the arrest of a felon is lawful the rescue of him is a felony, it will not be material whether the party arrested for felony, or suspicion of felony, be in the custody of a private person or of an officer; yet, if he be in the custody of a private person, it seems that the rescuer should be shown to have knowledge of the party being under arrest for felony. The 16 Geo. II, c. 31, makes it a felony to aid or assist a prisoner to attempt to make his escape from any gaol, although no escape is actually

made, if such prisoner is committed for a felony, expressed in the warrant of commitment, and a misdemeanor, if such prisoner is detained for a misdemeanor, or for a sum amounting to one hundred pounds; also, under the same circumstances, either a felony or a misdemeanor, to convey any disguise or instruments into any prison, to facilitate the escape of prisoners. A rescue, either when a felony or a misdemeanor, is now punishable under the above Act.

See 1 *Russ.* 581, *et seq.*; 4 *Stephen's Comm.* 227, *et seq.*; 1 *Hale, P. C.* 595; 2 *Hawkins, p.* 183; 5 *Rep. Cr. L. Com.* (1840), *p.* 53; 2 *Bishop, Cr. L.* 1066.

Under sec. 6 of the Act, see *R.* v. *Payne*, 1 *L. R. C. C.*, 27.

For forms of indictment, see *Archbold*, 795; 2 *Chitty, Cr. L.* 165; 5 *Burn's Just.* 137; 3 *Burn's Just.* 1332; 2 *Burn's Just.* 10; *R.* v. *Young*, 1 *Russ.* 291.

By sec. 183 of the Procedure Act, upon an indictment for any of these offences, the defendant may be found guilty of the attempt to commit the offence charged, if the evidence warrants it.

CHAPTER 156.

AN ACT RESPECTING OFFENCES AGAINST RELIGION.

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

1. Every one who, by threats or force, unlawfully obstructs or prevents, or endeavors to obstruct or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-house, school-house or other place used for divine worship, or in or from the performance of his duty in the lawful burial of the dead, in any church-yard or other burial place, or 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 mentioned, 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 liable to imprisonment for any term less than two years.—32-33 *V.*, *c.* 20, *s.* 36. 24-25 *V.*, *c.* 100, *s.* 36, *Imp.*

2. Every one who wilfully disturbs, interrupts or disquiets any assemblage of persons met for religious worship, or for any moral, social or benevolent purpose, by profane discourse, by rude or indecent behavior, or by making a noise, either within the place of such meeting or so near it as to disturb the order or solemnity of the meeting, is guilty of a misdemeanor and liable, on summary conviction, to a penalty not exceeding twenty dollars and costs, and, in default of payment, to imprisonment for a term not exceeding one month,—and may be arrested on view by any peace officer present at such meeting, or by any other person present, verbally authorized thereto by any justice of the peace present thereat, and detained until he can be brought before a justice of the peace.—32-33 *V.*, *c.* 20, *s.* 37.

The word *school-house* in the first section is 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 dis-

charge 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.*

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.*

The Imperial Statutes corresponding to the second clause are the 1 *W. & M. c.* 18; 52 *G.* 3, *c.* 155, *s.* 12; 15-16 *V., c.* 36; 23-24 *V., c.* 32.

The offences against the second clause are punishable by summary conviction. The clause seems to be based on c. 92, s. 18, C. S. Canada, and c. 22, s. 3, C. S. L. Canada.

CHAPTER 157.

AN ACT RESPECTING OFFENCES AGAINST PUBLIC MORALS AND PUBLIC CONVENIENCE.

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

1. Every one who commits the crime of buggery, either with a human being or with any other living creature, is guilty of felony, and liable to imprisonment for life. 32-33 *V.*, *c.* 20, *s.* 63. 24-25 *V.*, *c.* 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 agentonly.—1 Hale, 670. If by a boy under fourteen on a man over fourteen, it is felony in the patient only.—*Archbold*, 752.

The evidence is the same as in rape, with two exceptions: first, that it is not necessary to prove the offence to have been committed against the consent of the person upon whom it was perpetrated; and secondly, both agent and

patient (if consenting) are equally guilty.—5 *Burn's Justice*, 644.

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

In one case, the majority of the judges were of opinion that the commission of the crime with a woman was indictable; also by a man with his wife.—1 Russ. 939.

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

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

Upon an indictment under this section, the prisoner may be convicted of an attempt to commit the same.—Sect. 183 of the Procedure Act.

The punishment would then be under the next section.

The defendant may be convicted of an assault, if the evidence warrants it. Sect. 191, Procedure Act.

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 .....

2. Every one who attempts to commit buggery, or assaults any person with intent to commit buggery, or who, being a male, indecently assaults any other male, is guilty of a misdemeanor, and liable to ten years' imprisonment.—32-33 *V.*, *c.* 20, *s.* 64. 24-25 *V.*, *c.* 100, *s.* 62, *Imp.*

Indictment.— ..... in and upon one J. N. did make an assault, and him, the said J. N. did then beat, wound and ill-treat, with intent that detestable and abominable crime called buggery with the said J. N. feloniously, wickedly, diabolically, and against the order of nature to commit and perpetrate against the form, &c., &c., &c.—*Archbold*, 718.

If the indictment be for an indecent assault, one or other of the preliminary steps required by sect. 140 of the Procedure Act must be taken.

Where there is a consent there cannot be an assault in point of law.—R. v. 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.—*R.* v. *Wollaston*, 12 *Cox*, 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.—*R.* v. *Lock*, 12 *Cox*, 244.

The prisoner was indicted for an indecent assault upon a boy of about fourteen years of age. The boy had consented. *Held, on the authority of R.* v. *Wollaston*, 12 *Cox*, 180, that the charge was not maintainable, *R.* v. *Laprise*, 3 *L. N.* 139.

3. Every one who—

(*a.*) Seduces and has illicit connection with any girl of previously

chaste character, or who attempts to have illicit connection with any girl of previously chaste character, being in either case of or above the age of twelve years and under the age of sixteen years, or—

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

Is guilty of a misdemeanor, and liable to two years' imprisonment. —49 *V.*, *c.* 52, *s.* 1 *and s.* 8, *part.* 50-51 *V.*, *c.* 48.

4. Every one above the age of twenty-one years who, under promise of marriage, seduces and has illicit connection with any unmarried female of previously chaste character and under twenty-one years of age, is guilty of a misdemeanor, and liable to imprisonment for a term not exceeding two years.—50-51 *V.*, *c.* 48, *s.* 2.

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

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

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

Provided, that it shall be a sufficient defence to any charge under this section if it is made to appear to the court or jury before whom the charge is brought, that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years. —49 *V.*, *c.* 52, *s.* 4 *and s.* 8, *part.* 48-49 *V.*, *c.* 69, *Imp.*

6. No person shall be convicted of any offence under the three sections of this Act next preceding upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused:

2. In every case arising under the said sections, the defendant shall be a competent witness in his own behalf upon any charge or complaint against him;

3. No prosecution under the said sections shall be commenced after

the expiration of one year from the time when the offence was committed.—49 *V., c.* 52, *ss.* 5, 6 *and* 7, *parts.*

A mother may be convicted under sec. 5, of knowingly, suffering her daughter aged 14 to be in or upon premises for the purpose of prostitution, even if the premises are their home.—*R.* v. *Webster*, 15 *Cox*, 775.

Under sec. 5, the reasonable belief that the girl was over sixteen is a question for the jury.—*R.* v. *Parker*, 16 *Cox*, 57.

The jury may find the defendant guilty of the attempt to commit the offence charged: s. 183, Proc. Act, *R.* v. *Adams* 50 *J. P.* 136.

7. Every one who, by false pretences, false representations, or other fraudulent means,—

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

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

Is guilty of a misdemeanor, and is liable to two years' imprisonment;

2. Whenever there is reason to believe that any such woman or girl has been inveigled or enticed to a house of ill-fame or assignation, as aforesaid, then, upon complaint thereof being made under oath by the parent, master or guardian of such woman or girl, or in the event of such woman or girl having neither parent, master nor guardian in the province in which the offence is alleged to have been committed, by any other person, to any justice of the peace, or to a judge of any court authorized to issue warrants in cases of alleged offences against the criminal law, such justice of the peace or judge of the court may issue a warrant to enter, by day or night, such house of ill-fame or assignation, and to search for such woman or girl, and bring her, and the person or persons in whose keeping and possession she is, before such justice of the peace or judge of the court, who may, on examination, order her to be delivered to her parent, master or guardian, or to be discharged, as law and justice require.—48-49 *V., c.* 82, *s.* 1. 24-25 *V., c.* 100, *s.* 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)* ..... *Archbold.*

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. On the trial of an indictment under this section, the prisoner may be convicted of an attempt to commit the offence, under the sec. 183 of the Procedure Act.

In Howard *v.* R. 10 Cox, 54, held, that indictment bad, even after verdict, if it does not allege what were the false pretences.

8. All persons who,—

(*a*) Not having visible means of maintaining themselves, live without employment,—

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

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

(*d.*) Without a certificate signed, within six months, by a priest, clergyman or minister of the gospel, or two justices of the peace, residing in the municipality where the alms are being asked, that he or she is a deserving object of charity, wander about and beg, or go

about from door to door, or place themselves in any street, highway, passage or public place to beg or receive alms,—

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

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

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

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

(*i.*) Are common prostitutes or night walkers, wandering in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and not giving a satisfactory account of themselves,—

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

(*k.*) Have no peaceable profession or calling to maintain themselves by, but who do, for the most part, support themselves by gaming or crime, or by the avails of prostitution,—

Are loose, idle or disorderly persons or vagrants, within the meaning of this section :

2. Every loose, idle or disorderly person or vagrant shall, upon summary conviction before two justices of the peace, be deemed guilty of a misdemeanor, and shall be liable to a fine not exceeding fifty dollars or to imprisonment, with or without hard labor, for any term not exceeding six months, or to both.

3. Any stipendiary or police magistrate, mayor or warden, or any two justices of the peace, upon information before them made, that any person hereinbefore described as a loose, idle or disorderly person, or vagrant, is or is reasonably suspected to be harbored or concealed in any disorderly house, bawdy-house, house of ill-fame, tavern or boarding-house, may, by warrant, authorize any constable or other person to enter at any time such house or tavern, and to apprehend and bring before them or any other justices of the peace, every person found therein so suspected as aforesaid :

4. If provision is made therefor by the laws of the Province in which the conviction takes place, any such loose, idle or disorderly person may, instead of being committed to the common gaol or other public prison, be committed to any house of industry or correction, alms house, work house or reformatory prison.—32-33 *V.*, *c.* 28; 37 *V.*, *c.* 43; 44 *V.*, *c.* 31; *R. S. N. S.* (*3rd S.*), *c.* 162, *s.* 9.

No indictment can be preferred for keeping a disorderly house without one of the preliminaries required by sec. 140 of the Procedure Act.

On an indictment for indecent exposure of the person, Held, that the exposure must be in an open and public place, but not necessarily generally public and open; if a person indecently exposed his person in a private yard, so that he might be seen from a public road where there were persons passing, an indictment would lie. *R.* v. *Levasseur*, 9 *L. N.* 386. *See R.* v. *Wellard*, 15 *Cox*, 559, *Ex. parte Walter*, *Ramsay's App. cas.* 183, *R.* v. *Harris*, 11 *Cox*, 659.

A conviction under 32-33 V., c. 28, D. for that V. L. on ..... was a common prostitute, wandering in the public streets of the city of Ottawa, and not giving a satisfactory account of herself contrary to this Statute:—Held, bad, for not shewing sufficiently that she was asked, before or at the time of being taken, to give an account of herself and did not do so satisfactorily.—*R.* v. *Leveque*, 30 *U. C. Q. B.* 509. *See R.* v. *Arscott*, 9 *O. R.* 541, *and Arscott & Lilly*, 11 *O. R.* 153.

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

It is unlawful for men to bathe, without any screen or covering, so near to a public footway frequented by

females that exposure of their persons must necessarily occur, and they who so bathe are liable to an indictment for indecency.—*R.* v. *Reed*, 12 *Cox*, 1.

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

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

The charge against a prisoner, who was brought up on a writ of habeas corpus, was "for keeping a bawdy house for the resort of prostitutes in the City of Winnipeg." "Keeping a bawdy house" is, in itself, a substantial offence; so is "keeping a house for the resort of prostitutes."

Held, nevertheless, that there was but one offence charged and that the commitment was good.—*The Queen* v. *McKenzie*, 2 *Man. L. R.* 168.

CHAPTER 161.

AN ACT RESPECTING OFFENCES RELATING TO THE LAW OF MARRIAGE.

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

1. Every one who, —

(*a*) Without lawful authority, the proof of which shall lie on him, solemnizes or pretends to solemnize any marriage, or—

(*b.*) Procures any person to solemnize any marriage, knowing that such person is not lawfully authorized to solemnize such marriage, or knowingly aids or abets such person in performing such ceremony,—

Is guilty of a misdemeanor, and liable to a fine or to two years' imprisonment, or to both.—*C. S. U. C., c.* 102, *ss.* 1 *and* 2; *R. S. N. S.* 3*rd S*), *c.* 161, *s* 3; 1 *R. S. N. B., c.* 146, *s.* 2.

2. Every one who procures a feigned or pretended marriage between himself and any woman, and every one who knowingly aids and assists in procuring such feigned or pretended marriage, is guilty of a misdemeanor, and liable to two years' imprisonment:

2. No person shall be convicted of any offence under this section upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused;

3. In every case arising under this section the defendant shall be a competent witness in his own behalf upon any charge or complaint against him;

4. No prosecution under this section shall be commenced after the expiration of one year from the time when the offence was committed. —49 *V., c.* 52, *ss.* 3 *and* 5, 6, 7 *and* 8, *parts.*

3. Every one who, being lawfully authorized, knowingly and wilfully solemnizes any marriage in violation of the laws of the Province in which the marriage is solemnized, is guilty of a misdemeanor, and liable to a fine or to one year's imprisonment:

2. No prosecution for any offence against this section shall be commenced, except within two years after the offence is committed. —*C. S. U. C., c.* 102, *ss.* 3 *and* 4 *parts;* 1 *R. S. N. B., c.* 146, *s.* 3, *part; R. S. B. C., c.* 89, *s.* 14.

See form of indictment in 2*d* Schedule, Procedure Act.

See secs. 157 and 158 of the Civil Code as to Province of Quebec for offences covered by Secs. 1 and 3 of this Act.

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4. Every one who, being married, marries any other person during the life of the former husband or wife, whether the second marriage takes place in Canada, or elsewere, is guilty of felony, and liable to seven years' imprisonment:

2. Nothing in this section contained shall extend to,—

(*a*) 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;

(*b*) 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 who was not known by such person to be living within that time:

(*c*) Any person who, at the time of such second marriage, was divorced from the bond of the first marriage; or—

(*d*) Any person whose former marriage has been declared void by the sentence of any court of competent jurisdiction.—32-33 *V.*, *c.* 20, *s.* 58, *part.* 24-25 *V.*, *c.* 100, *s.* 57, *Imp.*

See sect. 16 of the Procedure Act as to venue.

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. C. then and there had for his wife; and that the said J. S. afterwards, and whilst he was so married to the said A. C., 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. C., 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.*

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; 2nd, 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.* v. *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.—*R.* v. *Ayley*, 15 *Cox*, 328.

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.* *R.* v. *Cresswell*, 13 *Cox*, 126. See *R.* v. *Savage* 13 *Cox* 178 *and R.* v. *Griffin*, 14 *Cox*, 308 ; *followed in R.* v. *Brierly* 14 *O. R.* 535.

In the case of R. v. McQuiggan, 2 L. C. R., *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 it 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.

In R. v. Creamer, 10 L. C. R. 404, upon a case reserved, the Court of Queen's Bench 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. v. Newton, 2 Moo. C. C. 503, and R. v. 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 accord-

ing to the law of the country where it is stated to have taken place.—*Contra, in R.* v. *Savage*, 13 *Cox*, 178.

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.

It seems that the offence will be complete, though the defendant assume a fictitious name at the second marriage.—*R.* v. *Allison*, *R. & R.*, 109.

Same ruling on a case reserved, in *R.* v. *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.* v. *Brown*, 1 *C. & K.* 144.

In R. v. Fanning, 10 Cox, 411, a majority of the judges of the Irish Court of Criminal Appeal held, contrary to R. v. 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, in R. v. Allen, 12 Cox, 193, since decided, as in R. v. 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 marriage; but it is purely a question of fact for the jury.—*R.* v. *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.* v. *Briggs, Dears. and B.*, 98.

On this last case, Greaves, 1 Russell, 270, note 1, 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, c. 31, s. 22, and in the new Act is in the nature of proviso. 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 contained 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 R. v. 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 R. v. 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.* v. *Curgerwen*, 10 *Cox*, 152; *R.* v. *Fontaine*, 15 *L. C. J.* 141. *See R.* v. *Jones*, 15 *Cox*, 284.

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.—*R.* v. *Jones*, 11 *Cox*, 358.

In R. v. 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 R. v. 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 R. v. Turner.*

But in a later case, R. v. Gibbons, 12 Cox, 237, 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. Same ruling, *R.* v. *Bennett*, 14 *Cox*, 45. *Contra*, *R.* v. *Moore*, 13 *Cox*, 544.

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 negative? 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.—*R.* v. *Heaton*, 3 *F. & F.* 819.

Sec 16 of the Procedure Act 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 *Russ.* 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 R. v. McQuiggan, 2 L. C. R., 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 also R.* v. *Pierce, post.*

On a trial for bigamy, the Crown having proved the prisoner's two marriages, it is for him then to prove the absence of his first wife during seven years preceding the second marriage; and when such absence is not proved, it is not incumbent on the Crown to establish the prisoner's knowledge that the first wife was living at the time of the second marriage.—*R.* v. *Dwyer*, 27 *L. C. J.* 201. *See R.* v. *Willshire*, 14 *Cox*, 541.

The prisoner was convicted of bigamy under 32-33 *V.*, *c.* 20, *s.* 58. The first marriage was contracted in Toronto and the second in Detroit. The judge at the trial directed the jury that if prisoner was married to his first wife in Toronto and to his second in Detroit, they should find him guilty.

Held, a misdirection, and that the jury should have been

told, in addition, that before they found him guilty they ought to be satisfied of his being, at the time of his second marriage, a subject of Her Majesty resident in Canada, and that he had left Canada with intent to commit the offence.

Held, also, that it was incumbent on the Crown to prove these facts.

Quaere, per Wilson, C. J., whether the trial should not have been declared a nullity. — *The Queen* v. *Pierce*, 13 *O. R.* 226.

OFFENCES AGAINST THE PERSON.

MURDER AND MANSLAUGHTER.

THE law takes no cognizance of homicide unless death result from bodily injury, occasioned by some act or unlawful omission, or contra-distinguished from death occasioned by any influence on the mind, or by any disease arising from such influence. 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. 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. A child in the womb is not a subject of homicide in respect of any injury inflicted in the womb, unless it afterwards be born alive; it is otherwise if a child die within a year and a day after birth of any bodily injury inflicted upon such child, whilst it was yet in the womb.—4 *Cr. L. Com. 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 a day, it is murder or other species of homicide as the case may be. And when a wound, not in itself mortal, for want of proper applications or from neglect, turns to a gangrene or a fever, and that gangrene or fever is the immediate cause of the death of the party wounded, the party by whom the wound is given is guilty of murder or manslaughter, according to the circumstances. For though the fever or gangrene, and not the wound, be the immediate cause of death, yet the wound being the cause of the gangrene or fever is the immediate cause of the death, *causa causati.* So if one gives wounds to another, who neglects the cure of them or is disorderly, and doth not keep that rule which a person wounded should do, yet if he die, it is murder or manslaughter, according to the circumstances: because if the wounds had not been, the man had not died; and therefore neglect or disorder in the person who received the wounds shall not excuse the person who gave them.—1 *Russ.* 700.

So if a man be wounded, and the wound become fatal from the refusal of the party to submit to a surgical operation.—R. v. Holland, 2 M. & Rob. 351; R. v. Pym, 1 Cox, 339; R. v. McIntyre, 2 Cox, 379; R. v. Martin, 5 C. & P. 128; R. v. Webb, 1 M. & Rob. 405. But it is otherwise if death results not from the injury done, but from unskilful treatment, or other cause subsequent to the injury.—*4th Rep. Cr. L. 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 act has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent upon mischief. And in general any formed design of doing mischief may be called malice. And, therefore, not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also, in many other cases, such killing as is accompanied with circumstances that show the heart to be perversely wicked is adjudged to be of *malice prepense* and consequently murder.—1 *Russ.* 667.

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

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

reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, then such killing will be murder.—1 *Russ.* 667.

If a man, after receiving a blow, feigns a reconciliation, and, after the lapse of a few minutes, invites a renewal of the aggression, with intent to use a deadly weapon, and on such renewal, uses such weapon with deadly effect, there is evidence of implied malice to sustain the charge of murder. But if, after such reconciliation, the aggressor renews the contest, or attempts to do so, and the other having a deadly weapon about him, on such sudden renewal of the provocation, uses it without previous intent to do so, there is evidence which may reduce the crime to manslaughter.—*R.* v. *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 harbored 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.—*R.* v. *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 *Russ.* 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. —*R.* v. *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.—*R.* v. *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 *Russ.* 725. But *Greaves*, note *d*, *loc. cit.*, questions this dictum, and refers to *R.* v. *Lynch*, 5 *C. & P.* 324, and *R.* v. *Maynard*, *supra*, 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. —*R.* v. *Noon*, 6 *Cox*, 137.

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

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

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

and a severe blow, something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act." Verdict: Guilty of murder.

So also if a man be greatly provoked, as by pulling his nose or other great indignity, and immediately kills the aggressor, though he is not excusable *se defendendo*, since there is no absolute necessity for doing it to preserve himself, yet neither is it murder for there is no previous malice: but it is manslaughter. But in this and every other case of homicide upon provocation, if there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kill the other, this is 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 savored of cruelty. —*Foster*, 292.

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

Though the general rule of law is that provocation by words will not reduce the crime of murder to that of manslaughter, special circumstances attending such a provocation might be held to take the case out of the general rule. In R. v. Rothwell, 12 Cox, 147, Blackburn, J.,

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

In Sherwood's case, 1 C. & K. 556, Pollock, C. B., in summing up said: "It is true that no provocation by words only will reduce the crime of murder to that of manslaughter; but it is equally true that every provo-

cation 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 *malâ mens*, the heart bent upon mischief, which enter into the true notion of malice in the legal sense of the word. Moir having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length discharged a pistol at a person who was trespassing, and wounded him in the thigh, which led to erysipelas, and the man died. Moir was convicted of murder and executed. 1 *Russ.* 718.

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 C. 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 beforehand, and need at no time have intented 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 v. Daniels, 10 B. & C. 272, and approved of by Cresswell, J., in R. v. Noon, 6 Cox, 137.

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

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

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

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

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, 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 excuted 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.—*R.* v. *Campbell*, 11 *Cox*, 323.

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