PART XI.

ESCAPES AND RESCUES.

SECT.

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159. Being at large while under sentence of imprisonment.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, having been sentenced to imprisonment, is afterwards, and before the expiration of the term for which he was sentenced, at large within Canada without some lawful cause, the proof whereof shall lie on him.

The fact of the sentence being in force when the defendant was found at large is sufficiently proved by the certificate of the conviction and sentence, if the judgment remains unreversed, and this although it appears on the face of the certificate that the sentence was one which could not legally have been inflicted on the defendant for the offence of which according to the certificate he had been convicted. R. v. Finney, 2 C. & K. 274.

Escapes.]—See secs. 163 and 164.

Ticket of Leave.]—It may be proved as a defence that the prisoner is at large conditionally under a license or ticket of leave or otherwise and that the conditions have been observed. 62-63 Vict. (Can.), ch. 49. The license issued under the authority of that statute and the amending statute of 1900 (63-64 Vict., ch. 48), known as the Ticket of Leave Acts, may be revoked by the Governor-General either with or without cause assigned. R. v. Johnson, 4 Can. Cr. Cas. 178 (Que.). The revocation by the Crown without cause assigned does not interrupt the running of the sentence, and the latter terminates at the same time as if no license had been granted. Ibid.

Pardon.]—A pardon is a good defence. R. v. Miller, W.Bl. 797, 1 Leach C.C. 74; but the sentence revives if the terms of a conditional pardon are not observed. R. v. Madan, 1 Leach C.C. 223; Aickles' Case, 1 Leach C.C. 390.

160. Assisting escape of prisoners of war.—Every one is guilty of an indictable offence and liable to five years' imprisonment who knowingly and wilfully—

(*a.*) assists any alien enemy of His Majesty, being a prisoner of war in Canada, to escape from any place in which he may be detained; or

(*b.*) assists any such prisoner as aforesaid, suffered to be at large on his parole in Canada or in any part thereof, to escape from the place where he is at large on his parole.

This offence is also covered by the Imperial Statute, 52 Geo. III., ch. 156, known as the Prisoners of War Escape Act. That statute in terms applies to His Majesty's dominions and is consequently still in force in Canada. See Code sec. 5.

Section 1 of that Act as varied by 54 & 55 Vict. (Imp.), ch. 69, sec. 1, provides that every person who shall from and after the passing thereof knowingly or wilfully assist any alien enemy of His Majesty being a prisoner of war in His Majesty's dominions, whether such prisoner shall be confined as a prisoner of war in any prison or other place of confinement or shall be suffered to be at large in His Majesty's dominions or any part thereof on his parole, to escape from such prison or other place of confinement or from His Majesty's dominions if at large on parole, shall, upon being convicted thereof, be adjudged guilty of felony and be liable to be transported as a felon for life or for such term not less than three years and not exceeding either five years or any greater period authorized by the enactment, at the discretion of the court. The same section also provides that where under any Act now in force or under any future Act a court is empowered or required to award a sentence of penal servitude, the court may in its discretion, unless such future Act otherwise provides, award imprisonment for any term not exceeding two years with or without hard labour.

161. Breaking prison.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, by force or violence, breaks any prison with intent to set at liberty himself or any other person confined therein on any criminal charge.

Evidence.]—The proof required is:—(1) the nature of the offence for which the prisoner was imprisoned; (2) the imprisonment and the nature of the prison; and (3) the breaking of the prison. Roscoe Crim. Evid., 11th ed., 837.

Any prison.]—The expression "prison" includes any penitentiary, common gaol, public or reformatory prison, lock-up, guard room or other place in which persons charged with the commission of offences are usually kept or detained in custody. Sec. 3 (*u*).

Prison breach.]—An actual breaking of the prison with force, and not merely a constructive breaking, must be proved. If a gaoler sets open the prison doors and the prisoner escapes the latter is not guilty of prison breach. 1 Hale P.C. 611; and if the prison be fired and he escapes to save his life, this is not prison breach unless the prisoner himself set fire to the prison or procured it to be done. Hale P.C. 611.

If other persons without the prisoner's privity or consent break the prison and he escapes through the breach so made he is not guilty of breaking but only of the escape. 2 Hawk., ch. 18, sec. 10.

Force essential to the offence.]—Where a prisoner made his escape over the prison walls and in doing so threw down some bricks from the top of the wall which had been placed there loose without mortar in the form of pigeon holes for the purpose of preventing escapes, it was held that he was properly convicted of prison breach. R. v. Haswell, Russ. & Ry. 458.

Retaking prisoner.]—See note to sec. 163.

Escape.—See secs. 163 and 164.

162. Attempting to break prison.—Every one is guilty of an indictable offence and liable to two years' imprisonment who attempts to break prison, or who forcibly breaks out of his cell, or makes any breach therein with intent to escape therefrom. R.S.C., c. 155, s. 5.

163. Escape from custody after conviction or from prison.—Every one is guilty of an indictable offence and liable to two years' imprisonment who—

(*a.*) having been convicted of any offence, escapes from any lawful custody in which he may be under such conviction; or

(*b.*) whether convicted or not, escapes from any prison in which he is lawfully confined on any criminal charge.

It is laid down by the late Mr. Justice Stephen, in his Digest of the Criminal Law, Article 199, that the intentional infliction of death or bodily harm is not a crime when it is done by any person in order to retake or keep in lawful custody a traitor, felon, or pirate who has escaped or is about to escape from custody, although such traitor, felon or pirate offers no violence to any person, provided that the object for which death or harm is inflicted cannot be otherwise accomplished. See also Code secs. 32-37, inclusive.

Lord Hale (1 Hale P.C. 489) says: "If a person be indicted of felony and flies, or being arrested by warrant or process of law upon such indictment escapes and flies, and will not render himself, whereupon the officer or minister cannot take him without killing of him, this is not felony, neither shall the killer forfeit his goods, or be driven to sue forth his pardon, but upon his arraignment shall plead not guilty, and accordingly it ought to be found by the jury. But if he may be taken without severity, it is at least manslaughter in him that kills him, therefore, the jury is to inquire whether it were done of necessity or not."

Sir Michael Foster draws especial attention to the distinction between cases of bare flight and cases of resistance to arrest (Foster C.L. 270), and he says: "Where a felony is committed and the felon fleeth from justice, or a dangerous wound given, it is the duty of every man to use his best endeavours for preventing an escape; and if in the pursuit the party fleeing is killed, where he cannot otherwise be overtaken, this will be deemed justifiable homicide; for the pursuit was not barely warrantable, it is what the law requireth and will punish the wilful neglect of."

Sergeant Hawkins (1 Hawk. P.C. 81), says that, "First, if a person having actually committed a felony will not suffer himself to be arrested, but stand on his own defence or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them. Secondly, if an innocent person be indicted of a felony

where in truth no felony was committed, and will not suffer himself to be arrested by the officer who has a warrant for that purpose, he may be lawfully killed by him if he cannot otherwise be taken; for there is a charge against him upon record, to which, at his peril, he is bound to answer. Thirdly, if a criminal, endeavouring to break the gaol, assault his gaoler, he may be lawfully killed by him in the affray."

And it is laid down in 1 East P.C. 330, touching the safe custody of persons arrested and in confinement, that, after an arrest once legally made, if the party escape, the officer may lawfully kill him—(1) in the case of a felony actually committed; (2) or whether committed by him or not if he had been arrested upon a proper warrant; (3) or hue and cry had been raised against him by name; (4) or he had stood indicted for felony; but if in any of these cases the officer might otherwise have taken him, it will be at least manslaughter.

Escape from a reformatory.]—The following section (9) of R.S.C. 1886, ch. 155, as amended by 53 Vict. (Can.), ch. 37, was not repealed by the Code and is still in force:—(9) Every one who, being sentenced to imprisonment or detention in, or being ordered to be detained in, any reformatory prison, reformatory school, industrial refuge, industrial home or industrial school, escapes or attempts to escape therefrom, is guilty of a misdemeanour, and may be dealt with as follows:—

The offender may, at any time, be apprehended without warrant and brought before any magistrate, who, upon proof of his identity,—

(*a.*) In the case of an escape or attempt to escape from a reformatory prison or a reformatory school, shall remand him thereto for the remainder of his original term of imprisonment or detention; or,—

(*b.*) In the case of an escape or attempt to escape from an industrial refuge, industrial home or industrial school,—

(1.) May remand him thereto for the remainder of his original term of imprisonment or detention; or,—

(2.) If the officer in charge of such refuge, home or school certifies in writing that the removal of such offender to a place of safer or stricter imprisonment is desirable, and if the governing body of such refuge, home or school applies for such removal, and if sufficient cause therefor is shewn to the satisfaction of such magistrate, may order the offender to be removed to and to be kept imprisoned, for the remainder of his original term of imprisonment or detention, in any reformatory prison or reformatory school, in which by law such offender may be imprisoned for a misdemeanour—and when there is no such reformatory prison or reformatory school, may order the offender to be removed to and to be so kept imprisoned in any other place of imprisonment to which the offender may be lawfully committed;

(*c.*) And in any case mentioned in the preceding paragraphs (*a*) and (*b*) of this sub-section, or if the term of his imprisonment or detention has expired, the magistrate may, after conviction, sentence the offender to such additional term of imprisonment or detention, as the case may be, not exceeding one year, as to such magistrate seems a proper punishment for the escape or attempt to escape.

164. Escape from lawful custody.—Every one is guilty of an indictable offence and liable to two years' imprisonment who being in lawful custody other than as aforesaid on any criminal charge, escapes from such custody.

165. Assisting escape in certain cases.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who—

(*a.*) rescues any person or assists any person in escaping, or attempting to escape, from lawful custody, whether in prison or not, under sentence of death or imprisonment for life, or after conviction of, and before sentence for, or while in such custody upon a charge of any crime punishable with death or imprisonment for life; or

(*b.*) being a peace officer and having any such person in his lawful custody, or being an officer of any prison in which any such person is lawfully confined, voluntarily and intentionally permits him to escape therefrom.

Rescue.]—Rescue is the deliverance of a prisoner from lawful custody by a third person. 2 Bishop Crim. Law 893. It differs from prison breach only in this that prison breach is by the prisoner himself, while rescue is by another. Escape is the allowing, voluntarily or negligently, of a prisoner lawfully in custody to leave his confinement, and the same term is also used to denote the offence of a prisoner himself going away from the place of custody without a breaking of prison. 2 Bishop Crim. Law 893.

The rescuer, where the prisoner concurs in the rescue, is an aider at the fact, and therefore a principal in the prisoner's offence of prison breach. 1 Bishop Crim. Law 456.

The act of breaking with intent to let the prisoner escape may not be a technical rescue unless he does escape, but it is nevertheless indictable as an attempt. 2 Bishop Crim. Law 915; State v. Murray, 15 Maine 100.

166. Assisting escape in other cases.—Every one is guilty of an indictable offence and liable to five years' imprisonment who—

(*a.*) rescues any person, or assists any person in escaping, or attempting to escape, from lawful custody, whether in prison or not, under a sentence of imprisonment for any term less than life, or after conviction of, and before sentence for, or while in such custody upon a charge of any crime punishable with imprisonment for a term not less than life; or

(*b.*) being a peace officer having any such person in his lawful custody, or being an officer of any prison in which such person is lawfully confined, voluntarily and intentionally permits him to escape therefrom.

(*Amendment of 1900.*)

166A. Permitting escape.—Every one is guilty of an indictable offence and liable to one year's imprisonment, who by failing to perform any legal duty, permits a person in his lawful custody on a criminal charge to escape therefrom.

Negligent or voluntary escape.]—Wherever an officer having the custody of a prisoner charged with a criminal offence, knowingly gives him his liberty with an intent to save him either from his trial or punishment he is guilty of a "voluntary escape." 2 Bishop Crim. Law 920.

This formerly involved the officer in guilt for the same crime of which the prisoner was guilty and stood charged with. 2 Hawk. ch. 19, sec. 10.

A "negligent escape" is where the party arrested or imprisoned escapes against the will of him that arrests or imprisons him and is not freshly pursued and taken again before he has been lost sight of. Dalt. ch. 159, sec. 6.

A prisoner who is charged before justices with an indictable offence and who is verbally remanded, after the examination of witnesses, until the following day in order to procure bail or, in default, be committed, is not in the custody of the officer merely for the purpose of enabling him to procure bail, but under the original warrant, and the officer is liable to conviction if he negligently permits him to escape. R. v. Shuttleworth, 22 U.C.Q.B. 372.

Presumption.]—So strongly does the law incline to presume negligence in the officer where an escape occurs, that though such prisoner should break jail yet it seems that it will be deemed a negligent escape in the jailer, because it will be attributed to a want of due vigilance in the jailer or his officers. 1 Hale 601. But the presumption of default in the jailer in cases of escape may be rebutted by satisfactory proof that all due vigilance was used and that the jail was so constructed as to have been considered by persons of competent judgment a place of perfect security. 1 Russ. Cr. 371; 2 Bishop Cr. Law 921.

De facto officer.]—Whoever de facto occupies the office of jailer is liable to answer for a negligent escape, and it is not material whether or not his title to the office be legal, for the ill consequence to the public is the same in either case. 2 Hawk., ch. 19, sec. 23.

Arrest by private person.]—Wherever any person has another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape if he suffers him to go at large before he has discharged himself by delivering him over to some other who by law ought to have the custody of him. 2 Hawk., ch. 20, sec. 1; 1 Hale 595.

167. Aiding escape from prison.—Every one is guilty of an indictable offence and liable to two years' imprisonment who with intent to facilitate the escape of any prisoner lawfully imprisoned conveys, or causes to be conveyed, anything into any prison.

Aiding escape.]—By the common law any assistance given to one known to be a felon in order to hinder his being apprehended or tried or suffering the punishment to which he was condemned, was sufficient to make the person giving such assistance an accessory after the fact to such felony. 2 Hawk., ch. 29, sec. 26. And the aiding and assisting any prisoner to escape out of prison, by whatever means it may have been effected or whatever was the nature of the offence with which such prisoner was charged, was viewed as an offence indictable as an obstruction to the course of justice. 1 Gabbett's Cr. Law 297, 303.

168. Unlawfully procuring discharge of prisoner.—Every one is guilty of an indictable offence and liable to two years' imprisonment, who knowingly and unlawfully, under colour of any pretended authority, directs or procures the discharge of any prisoner not entitled to be so discharged, and the person so discharged shall be held to have escaped. R.S.C., c. 155, s. 8.

169. Punishment of escaped prisoners.—Every one who escapes from custody, shall, on being retaken, serve, in the prison to which he was sentenced, 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. R.S.C., c. 155, s. 11.

TITLE IV.

OFFENCES AGAINST RELIGION, MORALS AND PUBLIC CONVENIENCE.

PART XII.

OFFENCES AGAINST RELIGION.

SECT.

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170. Blasphemous libels.—Every one is guilty of an indictable offence and liable to one year's imprisonment who publishes any blasphemous libel.

2. Whether any particular published matter is a blasphemous libel or not is a question of fact. But no one is guilty of a blasphemous libel for expressing in good faith and in decent language, or attempting to establish by arguments used in good faith and conveyed in decent language, any opinion whatever upon any religious subject.

Blasphemy.]—Blasphemy consists in "speaking evil of the Deity with an impious purpose to derogate from the divine majesty and to alienate the minds of others from the love and reverence of God. It is purposely using words concerning God, calculated and designed to impair and destroy the reverence, respect and confidence due to him as the intelligent creator, governor and judge of the world. It embraces the idea of detraction, when used towards the supreme being as 'calumny' usually carries the same idea when applied to an individual. It is a wilful and malicious attempt to lessen men's reverence of God, by denying his existence or his attributes as an intelligent creator, governor and judge of men, and to prevent their having confidence in him as such." Commonwealth v. Kneeland, 20 Pick. 106, 213, per Shaw, C.J.; 2 Bishop Cr. Law 69.

It is to be collected from the offensive levity, scurrilous and approbrious language, and other circumstances, whether the act of the party was malicious. 2 Bishop Cr. Law 74; Updegraph v. Commonwealth, 11 S. & R. 394, 405.

Blasphemous libel.]—Publications which in an indecent and malicious spirit assail and asperse the truth of Christianity or of the Scriptures in language calculated and intended to shock the feelings and outrage the belief of mankind are punishable as blasphemous libels. R. v. Bradlaugh, 15 Cox C.C. 217; R. v. Hetherington, 4 St. Tr. (N.S.) 563, 590; R. v. Pelletier (1900), 6 Revue Legale, N.S. 116. But if the decencies of con-

troversy are observed even the fundamentals of religion may be attacked without the writer being guilty of blasphemous libel. R. v. Ramsay & Foote, 15 Cox C.C. 231, 238, 1 Cab. & El. 126; Odgers' Libel, 3rd ed., 466.

Defence.]—No justification of a blasphemous libel can be pleaded nor is argument as to its truth permitted. Cooke v. Hughes, Ry. & M. 112; R. v. Tunbridge, 1 St. Tr. (N.S.), 1168; R. v. Hicklin, L.R. 3, Q.B. 360. The application of sec. 634 of the Code as to pleas of justification is limited to cases of defamatory libels.

171. Obstructing officiating clergyman.—Every one is guilty of an indictable offence and liable to two years' imprisonment who—

(*a.*) by threats or force, unlawfully obstructs or prevents, or endeavours to obstruct or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-house, school-house or other place for divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place. R.S.C., c. 156, s. 1.

172. Violence to officiating clergyman.—Every one is guilty of an indictable offence and liable to two years' imprisonment who strikes or offers any violence to, or upon any civil process, or under the pretense 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 the next preceding section mentioned, or who, to the knowledge of the offender, is going to perform the same, or returning from the performance thereof. R.S.C., c. 561, s. 1.

173. Disturbing public worship.—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding fifty dollars and costs, and in default of payment to one month's imprisonment, 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 behaviour, or by making a noise, either within the place of such meeting or so near it as to disturb the order or solemnity of the meeting. R.S.C., c. 156, s. 2.

At common law.]—Any disturbance of a congregation legally assembled for divine service is an indictable offence at common law. 1 Hawk., ch. 28, sec. 23; Wilson v. Greaves, 1 Burr. 243.

Evidence.]—Where in a contest for the office of clerk of a congregation, one of the candidates pulled the other from the desk, it was held that such constituted a disturbance within a corresponding English statute. R. v. Hube, 5 T.R. 542, 2 R.R. 669.

PART XIII.

OFFENCES AGAINST MORALITY.

SECT.

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174. Unnatural offence.—Every one is guilty of an indictable offence and liable to imprisonment for life who commits buggery, either with a human being or with any other living creature. R.S.C., c. 157, s. 1.

Buggery.]—This offence, also called sodomy, is the carnal copulation against nature by human beings with each other or with a beast. 1 Bishop Cr. Law 380. There must be a penetration per anum. Archbold Cr. Plead. (1900), 879. A penetration of the mouth is not sodomy; Rex v. Jacobs, Russ. & Ry. 331; but is an offence under sec. 178. Unlike rape, sodomy may be committed between two persons, both of whom consent, and even by husband and wife. R. v. Jellyman, 8 C. & P. 604. Whichever is the pathic, both may be indicted. R. v. Allen, 1 Den. C.C. 364; 2 C. & K. 869.

Evidence.]—The common law presumption is, that a person under fourteen is incapable of having carnal knowledge, not merely that such a person is incapable of committing rape. It is because of the presumption, so understood, that a person under fourteen cannot be convicted of rape. The report of the case of The Queen v. Allen, 1 Dennison Cr. Cas. 364, shows that the presumption applies to cases of unnatural crime. R. v. Hartlen (1898), 2 Can. Cr. Cas. 12 (N.S.).

Penetration alone is now sufficient to constitute the offence. Sec. 4 A.

Evidence is not admissible to prove that the defendant has a general disposition to commit the offence. R. v. Cole, 3 Russ. Cr., 6th ed., 251.

Form of indictment.]—"The jurors, etc., present that J. S. on the ——— day of ——— at the ——— with a certain ——— (animal), *or*, in and upon one J. N.], unlawfully, wickedly and against the order of nature had a veneral affair, and then unlawfully, wickedly and against the order of nature with the said ——— did commit and perpetrate that detestable and abominable crime of buggery, not to be named among Christians, against the form of the statute in such case made and provided and against the peace, etc."

Excluding public from court room.]—At the trial of any person charged with an offence under this, and the four following sections, or with conspiracy or attempt to commit, or being an accessory after the fact to any such offence, the court or judge may order that the public be excluded from the room or place in which the court is held during such trial; and such order may be made in any other case also in which the court or judge or justice may be of opinion that the same will be in the interests of public morals. Sec. 550 A.

See secs. 259 to 260 as to indecent assaults and sec. 251 as to consent of minor.

175. Attempt to commit sodomy.—Every one is guilty of an indictable offence and liable to ten years' imprisonment who attempts to commit the offence mentioned in the next preceding section. R.S.C., c. 157, s. 1.

Excluding public from court room.]—See note to last preceding section.

176. Incest.—Every parent and child, every brother and sister, and every grandparent and grandchild, who cohabit or have sexual intercourse with each other, shall each of them, if aware of their consanguinity, be deemed to have committed incest, and be guilty of an indictable offence and liable to fourteen years' imprisonment, and the male person shall also be liable to be whipped: Provided that, if the court or judge is of the opinion that the female accused is a party to such intercourse only by reason of the restraint, fear or duress of the other party, the court or judge shall not be bound to impose any punishment on such person under this section. 53 V., c. 37, s. 8.

Incest was not an offence punishable at common law, but was dealt with by the English ecclesiastical courts, which had power to imprison for the offence. Stephen's Dig. Cr. Law, art. 170. It included other relationships than those specified in sec. 176 of the Code and applied to unlawful intercourse between parties related to each other within the degrees of consanguinity or affinity wherein marriage was prohibited by law. 2 Bishop Cr. Law 15.

Prior to the statute, 53 Vict. (Can.), ch. 37, sec. 8, from which sec. 176 is taken, it seems that incest, unless committed under circumstances amounting to rape, was not punishable in Ontario, as the ecclesiastical law of England was not introduced into that province. Re Lord Bishop of Natal, 3 Moo. P.C.N.S. 115.

There were, however, statutes dealing with the offence in the Provinces of Nova Scotia, New Brunswick and Prince Edward Island. R.S.N.S., 3rd

series, ch. 160, sec. 2; R.S.N.B., ch. 145, sec. 2; 24 Vict. (P.E.I.), ch. 27, sec. 3. Quære, whether those statutes do not still apply in those provinces as to cases of incest, for which no provision is made by sec. 176.

Defence.]—Oral evidence is not admissable to prove relationship on a charge of incest in the Province of Quebec, and the relationship must be established by the production of extracts from the registers of civil status, as required by the provincial laws of evidence made applicable to criminal proceedings by the Canada Evidence Act, sec. 21, unless the absence of such registers is proved. R. v. Garneau (1899), 4 Can. Cr. Cas. 69 (Que.).

It is not too late for the accused to object that oral evidence is insufficient proof, after the case for the prosecution has been closed. Ibid.

See sec. 188 as to conspiracy to induce, etc.

Excluding public from court room.]—See note to sec. 174.

177. Indecent acts.—Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a fine of fifty dollars or to six months' imprisonment with or without hard labour, or to both fine and imprisonment, who wilfully—

(*a.*) in the presence of one or more persons does any indecent act in any place to which the public have or are permitted to have access; or

(*b.*) does any indecent act in any place intending thereby to insult or offend any person. 58 V., c. 37, s. 6.

To publicly expose the naked person was a misdemeanor at common law. R. v. Sedley, 17 St. Tr. 155 (*n*); R. v. Rowed, 3 Q.B. 180.

But an indecent exposure seen by one person only was not an offence. R. v. Farrell, 9 Cox 446; R. v. Elliott, L. & C. 103. The presence of only one other person than the accused is now sufficient under this section.

A place out of sight of the public footway, where people had no legal right to go, but did habitually go without interference, is included. R. v. Wellard, L.R. 14 Q.B.D. 63.

Excluding public from court room.]—See note to sec. 174.

178. Acts of gross indecency.—Every male person is guilty of an indictable offence and liable to five years' imprisonment and to be whipped who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person. 53 V., c. 37, s. 5.

This section is similar in its terms to the English Criminal Law Amendment Act of 1885, 48-49 Vict., ch. 69, sec. 11. Under it, it has been held that it is an offence for a male person to procure the commission with himself of an act of gross indecency by another male person. R. v. Jones, [1896] 1 Q.B. 4, 18 Cox C.C. 207.

Excluding public from court room.]—See note to sec. 174.

(Amendment of 1900.)

179. Publishing obscene matter.—Everyone is guilty of an indictable offence and liable to two years' imprisonment who knowingly, without lawful justification or excuse—

(*a.*) manufactures, or sells, or exposes for sale or to public view, or distributes or circulates, or causes to be distributed or circulated any obscene book, or other printed, typewritten or otherwise written matter, or any picture, photograph, model or other object tending to corrupt morals; or

(*b.*) publicly exhibits any disgusting object or any indecent show; or

(*c.*) offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any medicine, drug or article intended or represented as a means of preventing conception or causing of abortion or miscarriage.

2. No one shall be convicted of any offence in this section mentioned if he proves that the public good was served by the acts alleged to have been done, and that there was no excess in the acts alleged beyond what the public good requires.

3. It shall be a question for the court or judge whether the occasion of the manufacture, sale, exposing for sale, publishing, or exhibition is such as might be for the public good, and whether there is evidence of excess beyond what the public good requires in the manner, extent or circumstances in, to or under which the manufacture, sale, exposing for sale, publishing or exhibition is made, so as to afford a justification or excuse therefor; but it shall be a question for the jury whether there is or is not such excess.

4. The motives of the manufacturer, seller, exposer, publisher or exhibitor shall in all cases be irrelevant.

Particulars of indictment.]—By sec. 615 it is provided that no count for (inter alia) selling or exhibiting an obscene book, pamphlet, newspaper or other printed or written matter shall be deemed insufficient on the ground that it does not set forth the words thereof; provided that the court may order that a particular shall be furnished by the prosecuton stating what passages in such book, pamphlet, newspaper, printing or writing are relied on in support of the charge. If the obscene words complained of are in a foreign language a translation of them should be set out in the particulars. Zenobio v. Axtell, 6 T.R. 162; R. v. Peltier, 28 St. Tr. 529.

Obscenity.]—"The test of obscenity is whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influence, and into whose hands a publication of this sort may fall." R. v. Hicklin, L.R. 3 Q.B. 371, per Cockburn, L.C.J.

The indiscriminate publication of a pamphlet, half of which relates to controversial questions which are not obscene, but the other half of which

is obscene, as relating to impure acts and words, is an offence, although the publisher does not sell the pamphlet for the purposes of gain or to prejudice good morals (although the indiscriminate sale of it is calculated to have that effect), but sells it as a member of a politico-religious society, to promote the objects of that society and to expose what he deems to be the errors of the Roman Catholic church and the immorality of the confessional. R. v. Hicklin, supra; Steele v. Brannan, L.R. 7 C.P. 261.

Indecent show.]—A herbalist, who publicly exposed in his shop a picture of a man naked to his waist and covered with sores, was held to be properly found guilty of a nuisance, though the motive for its exhibition was innocent. R. v. Grey, 4 F. & F. 73.

A person who openly exposes or exhibits in any way, street, road, highway or public place any indecent exhibition is liable to summary conviction as a "vagrant" under secs. 207 and 208.

Drugs for abortion.]—In a recent case the prisoner, who was a manufacturer and dealer in medicine advertised as a "Female Regulator," was indicted under the above sub-sec. (*c*) for that he "did unlawfully, knowingly, and without lawful justification or excuse, offer to sell, advertise and have for sale or disposal a certain medicine, drug or article, commonly known as "Friar's French Female Regulator," intended or represented as a means of preventing conception or causing of abortion or miscarriage, and did thereby then commit an indictable offence, contrary to the Crim. Code, sec. 179, (*c*)."

A box of the medicine was produced in evidence. On the back of this box, in conspicuous lettering, was printed, "Caution—ladies are warned against using these tablets during pregnancy." Circulars were also produced explaining that its object was to promote a natural condition in the patient—it having the properties of an emmenagogue—which accompanied the remedy. No evidence was offered shewing the ingredients of the tablets, and the Crown simply pressed for a conviction for the offence of advertising, and contended that the caution in realty counseled the employment of the medicine to avoid pregnancy.

It was held by McDougall, County Judge at Toronto, that the words used must be taken in their natural and primary sense, and could not in this view be treated as coming within the contemplation of the above section of the Code, and that the case must be dealt with as though the allegation had been the subject of a criminal libel. The learned judge directed the jury to return a verdict of not guilty, but reserved a case at the request of the Crown prosecutor which is now pending. R. v. Karn (1901), 38 C.L.J. 135.

(Amendment of 1900.)

180. Posting immoral literature.—Every one is guilty of an indictable offence and liable to two years' imprisonment who posts for transmission or delivery by or through the post—

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

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

(*c*.) any letter or circular concerning schemes devised or intended to deceive and defraud the public or for the purpose of obtaining money under false pretenses.

This section is taken from the Post Office Act, R.S.C. (1886), ch. 35, sec. 103.

Any letter.]—For the statutory definition of a "post letter" see ante, p. 15.

(Amendment of 1893.)

181. Seduction of girl under sixteen.—Every one is guilty of an indictable offence and liable to two years' imprisonment who seduces or has illicit connection with any girl of previously chaste character, of or above the age of fourteen years and under the age of sixteen years. R.S.C., c. 157, s. 3; 53 V., c. 37, s. 3.

Limitation.]—A prosecution under this section must be commenced within one year from the commission of the offence. Sec. 551 (*c*).

Previously chaste character.]—A similar statute of New York State does not punish seduction generally, but only when it is committed under promise of marriage, upon an unmarried woman of "previous chaste character." "Chaste character," as thus used in the statute, does not mean reputation for chastity, but actual personal virtue. Kenyon v. People, 26 N.Y. 203, 207. The girl must be actually chaste and pure in conduct and principle, up to the time of the commission of the offence. Carpenter v. People, 8 Barb. 603, 608.

The burden of proof of previous unchastity on the part of the girl is upon the accused. Sec. 183 A.

Corroboration.]—Sec. 684 of the Code enacts that "no person accused of an offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused.

Evidence of the girl's pregnancy, and of her having been employed in domestic service at the defendant's residence and of facts shewing merely a strong probability of there having been no opportunity at which any other man could have been responsible for her condition, does not constitute the corroborative evidence "implicating the accused" required by Cr. Code sec. 684, in order to sustain a conviction. R. v. Vahey (Ont.), 2 Can. Cr. Cas. 258.

The prisoner's admission made after the girl reached the age of sixteen that he had had connection with her may be taken into consideration with the other facts, as corroboration of the charge of having had connection with her before she became of that age. R. v. Wyse (1895), 1 Can. Cr. Cas. 6. And a statement made by the accused, before he was charged with the offence, that he had been advised that if he could get the girl to marry him he would escape punishment is corroborative evidence implicating the accused. Ibid.

Proof of age.]—By sec. 701 A the following is prima facie evidence to prove the age of the girl for the purposes of this section:—(a) Any entry or record by an incorporated society or its officers having had the control or care of the girl at or about the time of her being brought to Canada if such entry or record has been made before the alleged offence was committed; (b) In the absence of other evidence or by way of corroboration of other evidence, the judge, or in cases where an offender is tried with a jury the

jury before whom an indictment for the offence is tried, or the justice before whom a preliminary inquiry thereinto is held, may infer the age from the appearance of the girl. Sec. 701 A was introduced into the Code by the Amending Act of 1900 and came into force January 1st, 1901.

A certificate of registration of birth, coupled with evidence of identity, is legal evidence of the age of the person mentioned in it. R. v. Cox, [1899] 1 Q.B. 179, 18 Cox C.C. 672; R. v. Weaver, L.R. 2 C.C.R. 85.

Proof of the date of birth may be given by some one who was present at the birth. R. v. Nicholls, 10 Cox 476.

The evidence of the girl as to her own age would not be admissible. R. v. Rishworth, 2 Q.B. 476; but quære, whether she might not identify the certificate of registration of her own birth if she were the custodian of it. Re Bulley (1886), W.N. 80.

Excluding public from court room.]—At the trial of any person charged with an offence under this, and the nine following sections, or with conspiracy or attempt to commit, or being an accessory after the fact to any such offence, the court or judge may order that the public be excluded from the room or place in which the court is held during such trial; and such order may be made in any other case also in which the court or judge or justice may be of opinion that the same will be in the interests of public morals. Sec. 550 A.

182. Seduction of girl under twenty-one under promise of marriage.—Every one, above the age of twenty-one years, is guilty of an indictable offence and liable to two years' imprisonment who, under promise of marriage, seduces and has illicit connection with any unmarried female of previously chaste character and under twenty-one years of age. 50-51 V., c. 48, s. 2.

Limitation.]—The prosecution must take place within one year from the commission of the offence. Sec. 551 (*c*).

Corroboration.]—A conviction is not to be made upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused. Sec. 684 (*c*); and see note to sec. 181.

Under promise of marriage.]—A subsisting promise of marriage between the seducer and the seduced is necessary. If the man is married, living with his wife and the woman knows it, his act of seduction is not within the section; if she were ignorant of his subsisting marriage the consequence would be otherwise, because the promise then would be binding on him to the extent of enabling her to maintain against him her civil suit for its breach. Wild v. Harris, 7 C.B. 999; Millward v. Littlewood, 5 Exch. 775; People v. Alger, 7 Parker 333.

A promise of marriage conditional upon her becoming pregnant as a result of the intercourse has been held not to be sufficient to support a charge under a similar New York law. People v. Van Alstyne, 39 N.E. Rep. 343.

It will be observed that while under sec. 181 the offence consists of either seducing *or* having illicit connection, the offence under this section is for seducing *and* having illicit connection. It is therefore necessary to prove that the intercourse was the result of the man's solicitation based upon the promise of marriage as a reason for her acquiescence.

Subsequent marriage of parties.]—The subsequent intermarriage of the seducer and the seduced is a good plea in defence of the charge. Sec. 184 (2).

Previously chaste character.]—See note to sec. 181. Under this, as well as the preceding section, the burden of proof of previous unchastity is upon the accused. Sec. 183 A.

Under twenty-one.]—As to proof of age, see note to sec. 181.

Excluding public from court room.]—See note to last preceding section.

(Amendment of 1900.)

183. Seduction of ward or employee.—Every one is guilty of an indictable offence and liable to two years' imprisonment,—

(*a.*) who, being a guardian, seduces or has illicit connection with his ward; or

(*b.*) who seduces or has illicit connection with any woman or girl previously chaste and under the age of twenty-one years who is in his employment in a factory, mill, workshop, shop or store, or who, being in a common, but not necessarily similar, employment with him in such factory, mill, workshop, shop or store, is, in respect of her employment or work in such factory, mill, workshop, shop or store, under or in any way subject to his control or direction, or receives her wages or salary directly or indirectly from him.

In the case of the seduction of a ward by her guardian their subsequent intermarriage is not a defence. Sec. 184 (2). The word "guardian" here includes any person who has in law or in fact the custody or control of the girl. Sec. 186 A.

Limitation.—The prosecution must be brought within one year from the time of the offence. Sec. 551 (*c*).

Corroboration.]—See sec. 684.

Excluding public from court room.]—See note to sec. 181.

(Amendment of 1900.)

183 A. Burden of Proof.—The burden of proof of previous unchastity on the part of the girl or woman under the three next preceding sections shall be upon the accused.

The three sections referred to relate to the following offences: Seduction of girls under sixteen (sec. 181), seduction under promise of marriage (sec. 182), and seduction of a ward, or employee (sec. 183 as as amended in this statute).

184. Seduction of female passenger on vessel by employee, etc.—Everyone is guilty of an indictable offence and liable to a fine of four hundred dollars, or to one year's imprisonment who, being the master or other officer or a seaman or other person employed on board of any vessel, while such vessel is in any water within the jurisdiction of the Parliament of Canada, under promise of marriage, or by threats, or by the

exercise of his authority, or by solicitation, or the making of gifts or presents, seduces and has illicit connection with any female passenger.

2. The subsequent intermarriage of the seducer and the seduced is, if pleaded, a good defence to any indictment for any offence against this or either of the two next preceding sections except in the case of a guardian seducing his ward. R.S.C. ch. 65, sec. 37.

Excluding public from court room.]—See note to sec. 181.

185. Procuring.—Everyone is guilty of an indictable offence, and liable to two years' imprisonment with hard labour, who,—

(*a.*) procures, or attempts to procure, any girl or woman under twenty-one years of age, not being a common prostitute or of known immoral character, to have unlawful carnal connection, either within or without Canada, with any other person or persons; 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 knowingly conceals in such house any such woman or girl so inveigled or enticed; or

(*c.*) procures, or attempts to procure, any woman or girl to become, either within or without Canada, a common prostitute; or

(*d.*) procures, or attempts to procure, any woman or girl to leave Canada with intent that she may become an inmate of a brothel elsewhere; or

(*e.*) procures any woman or girl to come to Canada from abroad with intent that she may become an inmate of a brothel in Canada; or

(*f.*) procures, or attempts to procure, any woman or girl to leave her usual place of abode in Canada, such place not being a brothel, with intent that she may become an inmate of a brothel within or without Canada; or

(*g.*) by threats or intimidation procures, or attempts to procure, any woman or girl to have any unlawful carnal connection, either within or without Canada; or

(*h.*) by false pretenses or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection, either within or without Canada; or

(*i.*) applies, administers to, or causes to be taken by any woman or girl any drug, intoxicating liquor, matter, or thing

with intent to stupefy or overpower so as thereby to enable any person to have unlawful carnal connection with such woman or girl. 53 Vict., ch. 37, sec. 9; R.S.C. ch. 157, sec. 7.

A conviction for "unlawfully procuring or attempting to procure" a girl to become a prostitute, is void for duplicity and for uncertainty. R. v. Gibson (1898), 2 Can. Cr. Cas. 302.

Limitation.]—Prosecutions for offences under this section must be brought within one year from the commission of the offence. Sec. 551 (*c*).

Corroboration.]—No person accused of an offence under this section shall be convicted upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused. Sec. 684.

In R. v. McNamara (1891), 20 O.R. 489, it was held that on an indictment for attempting to procure a woman to become a prostitute, it is admissible to prove in corroboration of the woman's evidence, that the house to which the prisoner had taken her had the general reputation of being a bawdy house; (Galt, C.J., Rose and MacMahon, JJ.,). Mr. Justice Rose there adopts the opinion of O'Neall, J., in State v. McDowell, Dudley's South Carolina Law & Eq. Reports 346, in which that judge propounds a much more extensive rule and says:—

"Every corrupting fact which can be supplied by general proof should be excluded. The general proof here is just as satisfactory as the most direct proof can be. . . . And in a case in which character is its very gist I am willing to make that which everybody says, the evidence on which a jury may, if they choose, convict defendants for keeping a bawdy house." Dudley S.C.L. & Eq. R. 346.

With reference to the opinion just quoted, Osler, J.A., says in The Queen v. St. Clair, 3 Can. Cr. Cas. 551, that he is not prepared to concur with it unreservedly.

Search for women in house of ill-fame.]—Whenever there is reason to believe that any woman or girl mentioned in section 185 has been inveigled or enticed to a house of ill-fame or assignation, then upon complaint thereof being made under oath by the parent, husband, master or guardian of such woman or girl, or in the event of such woman or girl having no known parent, husband, master or guardian in the place 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 if necessary use force for the purpose of effecting such entry whether by breaking open doors or otherwise, 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, husband, master or guardian, or to be discharged, as law and justice require. Sec. 574.

Excluding public from court room.]—See note to sec. 181.

186. Parent or guardian procuring defilement of girl.—Every one who, being the parent or guardian of any girl or woman,—

(*a.*) procures such girl or woman to have carnal connection with any man other than the procurer; or

(*b.*) orders, is party to, permits or knowingly receives the avails of the defilement, seduction or prostitution of such girl or woman,

is guilty of an indictable offence, and liable to fourteen years' imprisonment if such girl or woman is under the age of fourteen years, and if such girl or woman is of or above the age of fourteen years to five years' imprisonment. 53 Vict., ch. 37, sec. 9.

(Added by Amendment of 1900).

186 A. "Guardian."—The word "guardian" in secs. 183 and 186 includes any person who has in law or in fact the custody or control of the girl or child.

Limitation.]—A prosecution under this section must be commenced within one year from the commission of the offence. Sec. 551.

Excluding public from court room.]—See note to sec. 181.

Proof of age.]—See note to sec. 181.

(Amendment of 1900.)

187. Householders permitting defilement.—Every one who, being the owner or 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, is guilty of an indictable offence and—

(*a.*) is liable to ten years' imprisonment if such girl is under the age of fourteen years; and

(*b.*) is liable to two years' imprisonment if such girl is of or above the age of fourteen and under the age of eighteen years.

Evidence.]—A father was convicted under a similar section of the English Criminal Law Amendment Act, 1885, of knowingly suffering his daughter under sixteen to be on the premises for the purpose mentioned, although occupied by the father and daughter as their home. R. v. Webster, 16 Q.B.D. 134, 15 Cox C. C. 775; but a mother was held not to be guilty under it where, for the purpose of obtaining conclusive evidence against a man who had seduced her daughter, she permitted him to come to her house to repeat his unlawful intercourse. R. v. Merthyr Tydfil Justices, 10 Times L. R. 375.

Corroboration required.]—See section 684.

Limitation.]—The prosecution must be commenced within one year from the commission of the offence. Sec. 551 (*c*).

Excluding public from court room.]—See note to sec. 181.

188. Conspiracy to defile.—Every one is guilty of an indictable offence and liable to two years' imprisonment who conspires with any other person by false pretenses, or false representations or other fraudulent means, to induce any woman to commit adultery or fornication.

Corroboration.]—See sec. 684.

Excluding public from court room.]—See note to sec. 181.

(Amendment of 1900).

189. Carnally knowing idiots.—Every one is guilty of an indictable offence and liable to four years' imprisonment who unlawfully and carnally knows, or attempts to have unlawful carnal knowledge of, any female idiot or imbecile, insane or deaf and dumb woman or girl, under circumstances which do not amount to rape but where the offender knew or had good reason to believe, at the time of the offence, that the woman or girl was an idiot, or imbecile, or insane or deaf and dumb.

Corroboration.]—See sec. 684.

Excluding public from court room.]—See note to sec. 181.

190. Prostitution of Indian women.—Every one is guilty of an indictable offence and liable to a penalty not exceeding one hundred dollars and not less than ten dollars, or six months' imprisonment—

(*a.*) who, being the keeper of any house, tent or wigwam, allows or suffers any unenfranchised Indian woman to be or remain in such house, tent or wigwam, knowing or having probable cause for believing that such Indian woman is in or remains in such house, tent, or wigwam with the intention of prostituting herself therein; or

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

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

2. Every person who appears, acts or behaves as master or mistress, or as the person who has the care or management, of any house, tent or wigwam in which any such Indian woman is or remains for the purpose of prostituting herself therein, is deemed to be the keeper thereof, notwithstanding he or she is not in fact the real keeper thereof. R.S.C., ch. 43, sec. 106; 50-51 Vict., ch. 33, sec. 11.

Corroboration.]—See sec. 684.

Excluding public from court room.]—See note to sec. 181.

PART XIV.

NUISANCES.

SECT.

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191. Common nuisance defined.—A common nuisance is an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all His Majesty's subjects.

This section is a statement of the common law in regard to indictable nuisances.

Common nuisance.]—The injury or annoyance must be to the whole community in general to constitute a common (*i.e.*, a public) nuisance, and whether or not the number of persons affected is sufficient to make it a common nuisance is a question for the jury. R. v. White, 1 Burr. 337.

The omission of an electric railway company operating their cars upon a highway to use reasonable precautions so as to avoid endangering the lives of the public using the highway in common with the company, is a breach of legal duty constituting a common nuisance under secs. 191 and 213, for which an indictment will lie. R. v. Toronto Ry. Co. (1900), 4 Can. Cr. Cas. 4 (Ont.).

The carrying on of an offensive trade is indictable where it is destructive of the health of the neighbourhood or renders the houses untenantable. R. v. Davey, 5 Esp. 217; R. v. Neil, 2 C. & P. 485. But if a noxious trade is

already established in a place remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects; or if a public road be made so near to it that the carrying on of the trade becomes a nuisance to the persons using the road, in those cases the party is entitled to continue his trade because it was legal before the erecting of the houses in the one case and the making of the road in the other. R. v. Cross, 2 C. & P. 483, per Abbott, C.J.; R. v. Nevill, Peake R. 93. If, however, the annoyance is much increased by the extension of the trade carried on, a conviction is proper. R. v. Watt, Moo. & Mal. N. P. 281.

Manufacturing or keeping large quantities of gunpowder in towns or closely inhabited places is an indictable offence at common law. R. v. Williams, 1 Russ. Cr. 5th ed. 421; R. v. Taylor, 2 Str. 1167; Crowder v. Tinkler, 19 Ves. 617; and the same rule applies to the keeping and storing of large quantities of naphtha and rectified spirits of wine, the same being proved to be more inflammable than either spirits or gunpowder and there being no efficient means of putting out a fire if communicated to the premises. R. v. Lister, Dears. & B. 209, 26 L.J.M.C. 196. As to the illegal possession of explosives for an unlawful object, see sec. 101, ante.

Nuisance by noise if sufficiently great is indictable. Walker v. Brewster, L.R. 5 Eq. 25; Bellamy v. Wells, 39 W.R. 158; Christie v. Davey, [1893] 1 Ch. 316; excepting, however, noise made in the exercise of statutory powers and without negligence. Harrison v. Southwark W. W. Co., [1891] 2 Ch. 409.

Omission to discharge a legal duty.]—If the legal duty does not exist at common law, and a particular penalty is imposed by the statute creating the duty, the remedy by indictment for common nuisance is probably excluded. Bulbrook v. Goodere, 3 Burr. 1768; Saunders v. Holborn Board, [1895] 1 Q.B. 64, 61 L.J.Q.B. 101.

The object with which the omission is made is immaterial if the probable result is to affect the public or any appreciable part of the public injuriously in any of the ways stated in the section. R. v. Moore, 3 B. & Ad. 184; R. v. Carlisle, 6 C. & P. 636; R. v. Lloyd, 4 Esp. 200; Barber v. Penley, [1893] 3 Ch. 447.

Master's liability.]—Where works are so carried on as to be a nuisance, and the proprietor is indicted therefor, it has been held not to be a defence that he did not personally superintend the works and that he had given express orders to his employees that the works should be carried on in a manner which, had it been followed, would not have caused a nuisance. R. v. Stephens, L.R. 1 Q.B. 702.

Time.]—The public have a right to demand the suppression of a common nuisance though of long standing. Weld v. Hornby, 7 East 199; Anonymous, 3 Camp. 227; Fowler v. Sanders, Cro. Jac. 446. But where the alleged nuisance relates to the carrying on of a trade, the fact that it has been of long standing militates against a finding of nuisance. 1 Russ. Cr. 5th ed. 442; R. v. Nevill, Peake R. 93; R. v. Smith, 4 Esp. 111.

Abatement.]—If the nuisance is alleged in the indictment to be still continuing the judgment may direct that the defendant shall remove it at his own cost. 1 Hawk., ch. 75, sec. 14.

192. Nuisance endangering public safety.—Every one is guilty of an indictable offence and liable to one year's imprisonment or a fine who commits any common nuisance which endangers the lives, safety or health of the public, or which occasions injury to the person of any individual.

A railroad company was found guilty on an indictment for a nuisance by obstructing a public highway, by lowering the same at a point of intersection and thereby making the highway dangerous. Time having elapsed, and nothing having been done to abate the nuisance, a motion was made for judgment on the verdict, and it was held that the proper sentence was that defendants should pay a fine, and that the nuisance complained of be abated. R. v. The Grand Trunk Railway Co. (1858), 17 U.C.Q.B. 165.

Although a corporation cannot be guilty of manslaughter, it may be indicted, under Cr. Code sec. 252, for having caused grievous bodily injury by omitting to maintain in a safe condition a bridge or structure which it was its duty to so maintain, and this notwithstanding that death ensued at once to the person sustaining the grievous bodily injury. R. v. Union Colliery Co. (1900), 3 Can. Cr. Cas. 523 (B.C.), affirmed 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81.

Alterations authorized by statute to be made upon highways must be made with reasonable care and so as to cause no unnecessary danger to the travelling public or the parties doing the work may be indicted under this section. R. v. Burt, 11 Cox 399.

193. Abatement of nuisance.—Any one convicted upon any indictment or information for any common nuisance other than those mentioned in the preceding section, shall not be deemed to have committed a criminal offence; but all such proceedings or judgments may be taken and had as heretofore to abate or remedy the mischief done by such nuisance to the public right.

Not a "criminal" offence.]—Quære, whether the declaration made by this section that it shall not be deemed a criminal offence does not relegate the subject to the jurisdiction of the provincial legislatures.

Obstructing highway.]—It is the duty of a municipality, in whom a highway is vested, to see that obstructions on the highway are removed. R. v. Cooper (1876), 40 U.C.Q.B. 294.

It is a nuisance also to obstruct the navigation of a public river, but it is a question for the jury in each case to determine whether or not the erection of a bridge or wall partly in the river constitutes an actual obstruction. R. v. Betts, 16 Q.B. 1022.

A permanent obstruction erected upon a highway without lawful authority and which renders the way less commodious than before to the public is a common nuisance, although the safety of the public is not endangered. R. v. United Kingdom Telegraph Co., 31 L.J.M.C. 166. And this notwithstanding the fact that sufficient space was left for traffic and that the telegraph poles which constituted the obstruction were not placed on the travelled portion of the road. Ibid.

Where a county council is liable to repair a bridge, the proper remedy is indictment, not mandamus. "Indictment will lie; it is an adequate remedy, and that being so I do not see why I should take upon myself to grant an extraordinary remedy (mandamus)." Per Harrsion, C.J., in Re Jamieson and County of Lanark (1876), 38 U.C.Q.B. 647.

Where an indictment for obstructing a highway had been removed by certiorari, at the instance of the private prosecutor into the Court of Queen's Bench and defendant was acquitted, it was held that the court had no power to impose payment of costs on such prosecutor, except as a condition of any indulgence granted in such a case, such as a postponement of the trial, or a new trial. R. v. Hart (1880), 45 U.C.Q.B. 1.

Upon a verdict of guilty to an indictment charging a nuisance by the obstruction of the King's highway the proper judgment is that the nuisance be abated by the defendants within a time named in the judgment. R. v. Grover (1892), 23 O.R. 92.

But a Court of General Sessions in Ontario has no authority to make an order directing the plaintiff to abate a nuisance (not criminal), the only authority on which the sheriff can act in such case being by a writ of *de nocumento amovendo*. R. v. Grover (1892), 23 O.R. 92; Glen on Highways, 182. The Court of Sessions may, however, award the costs of prosecution against the defendants. Ibid.; Ovens v. Taylor, 19 U.C.C.P. 54.

In Ontario it has been held that a prosecution of a municipal corporation for a nuisance in not keeping a public street in repair must be by indictment, but no preliminary enquiry can be held. R. v. City of London (1900), 37 Can. Law Jour. 74.

After an acquittal upon an indictment for nuisance in obstructing a highway by placing a building on a portion of it, a certiorari will not be granted on the Crown's application to remove the indictment with a view of applying for a new trial; or to stay the entry of judgment, so that a new indictment might be preferred and tried without prejudice. R. v. Whittier (1854), 12 U.C.Q.B. 214.

Intent.]—Where the nuisance, instead of being merely a nuisance affecting an individual or one or two individuals, affects the public at large, and no private individual, without receiving some special injury, could have maintained an action, an indictment lies to prevent the recurrence of the nuisance. The prosecutor cannot proceed by action, but must proceed by indictment, but it is not strictly a criminal proceeding, and the doctrine of mens rea does not apply. R. v. Stephens (1866), L.R. 1 Q.B. 702.

Compounding the offence.]—All agreements which have for their object the stifling of a prosecution for a felony or for a misdemeanor in which the public are interested, are contrary to public policy and void, and the sanction of the magistrate cannot render that legal which is otherwise invalid. Corporation of Hungerford v. Lattimer (1886), 13 Ont. App. 315. But where in addition to the public misdemeanor an injury to the private rights of the prosecutor is also involved, then so long as the private rights of the public are preserved inviolate either by the conviction or acquittal of the accused, the question between the parties may, with the leave of the Court, be referred or otherwise made the subject of agreement. Ibid.; Keir v. Leeman (1844), 6 Q.B. 308, and in Error (1846), 9 Q.B. 371, and R. v. Blakemore (1852), 14 Q.B. 544.

And it has been held that an indictment for obstructing a public road cannot legally be referred to arbitration by an agreement between the prosecutor and the accused. Hungerford v. Lattimer (1886), 13 Ont. App. 315; but quære as to the effect of the declaration contained in this section of the Code that the offence is not to be deemed "criminal."

194. Selling things unfit for food.—Every one is guilty of an indictable offence and liable to one year's imprisonment who knowingly and wilfully exposes for sale, or has in his possession with intent to sell, for human food articles which he knows to be unfit for human food.

2. Every one who is convicted of this offence after a previous conviction for the same crime shall be liable to two years' imprisonment.

At common law.]—The selling of food which is dangerous or unfit for human food with knowledge of the fact is an offence at common law. R. v.

Dixon (1814), 3 M. & Sel. 11; 15 R.R. 381; Shillito v. Thompson (1875), 1 Q.B.D. 12. If death ensues from eating such food, the seller knowing that it is dangerous is indictable for manslaughter. R. v. Stevenson (1861), 3 F. & F. 106; R. v. Kempson (1893), 28 L. J. (Eng.) 477.

Procedure.]—It is not competent for magistrates where an information charges an offence under this section which they have no jurisdiction to try summarily, to convert the charge into one under a municipal by-law which they have jurisdiction to try summarily, and to so try it on the original information. R. v. Dungey (1901), 5 Can. Cr. Cas. 38.

Adulterated foods and drugs.]—Other provisions regarding the adulteration of foods and drugs and the sale or exposure for sale of the adulterated article are contained in the Adulteration Act, R.S.C. 1886, ch. 107, and amendments thereto.

. Section 23 of that Act, as amended by sec. 9 of chapter 26 of the Canada statutes of 1890, and by sec. 5 of chapter 24 of the statutes of 1898, is as follows:—

(23) Every person who, by himself or his agent, sells, offers for sale, or exposes for sale, any article of food or any drug, which is adulterated within the meaning of this Act, shall,—

(*a.*) if such adulteration is, within the meaning of this Act, deemed to be injurious to health, for a first offence incur a penalty not exceeding two hundred dollars and costs, or three months' imprisonment, or both, and for each subsequent offence a penalty not exceeding five hundred dollars and costs, or six months' imprisonment. or both, and not less than fifty dollars and costs;

(*b.*) if such adulteration is, within the meaning of this Act, deemed not to be injurious to health, incur for each such offence a penalty not exceeding one hundred dollars and costs, and not less than five dollars and costs.

2. Provided that if the person accused proves to the court before which the case is tried that he had purchased the article in question as the same in nature, substance and quality as that demanded of him by the purchaser or inspector, and with a written warranty to that effect,—which warranty, in the form of the third schedule to this Act, is produced at the trial of the case,—and that he sold it in the same state as when he purchased it, and that he could not with reasonable diligence have obtained knowledge of its adulteration, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he has given due notice to him that he will rely on the above defence, and has called the party from whom he purchased the said article into the case, as provided for by the next following sub-section of this section, in which case he shall be liable only to the forfeiture provided by section 21 of this Act.

3. The person presenting the defence referred to in the next preceding sub-section shall, upon his sworn declaration that he purchased the article in good faith, and as provided for in the said sub-section, obtain a summons to call such third party into the case; and the court shall at the same time hear all the parties, and decide upon the entire merits of the case, not only as regards the person originally accused, but also as regards the third party so brought into the case.

Section 28 of the same Act as amended 1890, ch. 26, sec. 11, and 1898, ch. 24, sec. 8, making the following special provision as to the costs of analysis and for the taxation of a counsel fee in prosecutions thereunder:—

(28) Any expenses incurred in procuring and analyzing any food, drug or agricultural fertilizer, in pursuance of this Act, shall, if the person from whom the sample is taken is convicted of having in his possession, selling, offering or exposing for sale, adulterated food, drugs or agricultural fertilizers, in violation of this Act, be deemed a portion of the costs of the proceedings against him, and shall be paid by him accordingly; and in all

other cases such expenses shall be paid as part of the expenses of the officer, or by the person who procured the sample, as the case may be.

2. Such expenses of prosecution shall also include a reasonable counsel fee, in the discretion of the judge; and in the case of a private prosecutor, if the prosecution is dismissed as being instituted without reasonable and probable cause, the costs of such defence shall be taxed against such prosecutor.

Nothing in the Adulteration Act affects the power of proceeding by indictment or takes away any other remedy against any offender under it. Can. Stats. 1898, ch. 24, sec. 9.

195. Common bawdy-house defined. — A common bawey-house is a house, room, set of rooms or place of any kind kept for purposes of prostitution.

Bawdy-houses.]—The keeping of a bawdy-house is a nuisance at common law, on the ground both of its corrupting public morals and its endangering the public peace by reason of dissolute persons resorting thereto. 1 Russell on Crimes, 5th ed., 427; Hawkins Pleas of the Crown, b. 1, ch. 74, sec. 1. Sec. 198 declares it to be an indictable offence punishable with one year's imprisonment.

The vagrancy clauses of the Code (secs. 207 and 208), also deal with this offence by declaring that a keeper of a bawdy-house is a vagrant and may be punished on summary conviction. (Sec. 208 as amended by 57-58 Vict., ch. 57, and 63-64 Vict., ch. 46.)

It is immaterial whether indecent or disorderly conduct is or is not perceptible from the outside. Steph. Crim. Law, 122; R. v. Rice (1866), L.R. 1 C.C.R. 21.

The term "house of ill-fame" is synonymous with "bawdy-house," Century Dict., *verb*, "house." A "brothel" is a place where people of opposite sexes are allowed to resort for illicit intercourse. A house occupied by one woman for the purpose of prostituting herself therein with a number of different men, but not allowing other women to use the premises for a like purpose is not a "brothel," Singleton v. Ellison, [1895] 1 Q.B. 607; 64 L.J.M.C.123; but the use of a single room by a lodger in a house in like manner to a bawdy-house has been held to constitute the keeping of a "bawdy-house." R. v. Pierson (1705), 2 Ld. Raym. 1197, 1 Salk. 382.

In the United States it has been held that a flat-boat floating on a river may be a "house of ill-fame," State v. Mullin, 35 Iowa 199; and that a tent may be a "disorderly house," Killman v. State, 2 Texas Ct. App. 222; or a room in a steamship, Com. v. Bulman, 118 Mass. 456. The word "house" as used in statutes for the suppression of "disorderly houses" is used in a generic sense, and applies to nearly all kinds of buildings, and is not restricted to dwelling houses. State v. Powers, 36 Conn. 77.

The keeping of a bawdy-house is a nuisance indictable at common law, 3 Inst., ch. 98, p. 204, 1 Hawk. P.C., ch. 74 and 75, sec. 6, and the common law punishment was by fine or imprisonment, but without hard labour.

A feme covert may be guilty of the offence as well as if she were a feme sole, for the *keeping* the house does not necessarily import property but may signify that share of government which the wife has in a family as well as the husband. R. v. Williams (1712), 1 Salk. 383.

(Amendment of 1895.)

196. Common gaming-house defined. — A common gaming house is—

(*a.*) a house, room or place kept by any person for gain, to which persons resort for the purpose of playing at any game of chance, or at any mixed game of chance and skill; or

(*b.*) a house, room or place kept or used for playing therein at any game of chance, or any mixed game of chance and skill, in which—

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

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

2. Any such house, room or place shall be a common gaming-house although part only of such game is played there and any other part thereof is played at some other place, either in Canada or elsewhere, and although the stake played for, or any money, valuables or property depending on such game is in some other place, either in Canada or elsewhere.

Gaming houses at common law.]—All common gaming houses are nuisances in the eyes of the law; not only because they are great temptations to idleness, but also because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood. 1 Hawkins' Pleas of the Crown, ch. 75, sec. 6.

The principle upon which common gaming houses are punishable as nuisances is that they are detrimental to the public, as they promote cheating and other corrupt practices; and incite to idleness and avaricious ways of gaining property, great numbers whose time might otherwise be employed for the good of the community. Jenks v. Turpin (1884), 13 Q.B.D. 505, 514; Russell on Crimes, 1896, 6th ed. I., 741.

It makes no difference that the use of the house and the gaming therein was limited to the subscribers and members of a club, and that it was not open to *all* persons who might be desirous of using the same; a *common* gaming-house is that which is forbidden—that is, a house in which a large number of persons are invited habitually to congregate for the purpose of gaming. Per Hawkins, J., in Jenks v. Turpin (1884), 13 Q.B.D. 505, 516.

At common law the playing at any game was legal and permissible; 11 Co. Rep. 87; and reference is to be had to the statutes alone to see what games are rendered unlawful. Jenks v. Turpin, supra.

Evidence.]—A room resorted to for the purpose of playing the game of poker is not shewn to be kept "for gain" under sec. 196 (*a*) by the mere proof that the proprietor who participated in the game on equal terms with the others, was allowed by the consent of the players, and not as a matter of right nor as a condition on which the playing took place, to take small sums from the stakes on several occasions by way of reimbursement for refreshments provided by him to the players, where such sums are not shewn to exceed the cost or value of the refreshments. R. v. Saunders (1900), 3 Can. Cr. Cas. 495 (Ont.).

But if the "rake-off" be for the benefit of the proprietor, a conviction will be maintained. R. v. Brady (1896), 10 Que. S.C. 539.

The game of "black jack" is a game of chance, and a place kept or used for playing it, although not kept for gain, is a common gaming house under Cr. Code sec. 196 (*b*). R. v. Petrie (1900), 3 Can. Cr. Cas. 439 (B.C.).

The keeping of a house, room or place for playing a game of chance or mixed game of chance and skill in which the chances of the game are in favour of the player who is the dealer or banker therein for the time being, is an indictable offence under secs. 196 and 198, if the position of dealer or banker passes from one player to another by the chances of the game and not by rotation. Ibid.

That a house is "common" does not necessarily mean that it is open to everyone; it may be of limited access. R. v. Ah Pow (1880), 1 B.C.R., pt. 1, p. 147; R. v. Laird (1894), 3 Rev. de Jurisprudence (Que.) 389.

A magistrate might reasonably decide that a room was a common gaming house if it is commonly used or adopted for gaming, frequented by many people promiscuously, especially if by many various persons, by a fortuitous concourse, or without the necessity of any direct or personal invitation from the occupier or other person legally entitled to the sole enjoyment of the room or place, and if thereby a general opportunity of gaming though without any fixed intention or invitation to do so. Per Begbie, C.J., in R. v. Ah Pow (1880), 1 B.C.R., pt. 1, p. 152. Such an establishment will be a common gaming house though a large part of the general public are excluded by keys or watch-words, or in any other manner. Ibid.

Finding of gaming instruments as evidence.]—Sec. 702 provides that when any cards, dice, balls, counters, tables or other instruments of gaming used in playing any unlawful game are found in any house, room or place suspected to be used as a common gaming-house, and entered under a warrant or order issued under this Act, or about the person of any of those who are found therein, it shall be primâ facie evidence, on the trial of a prosecution under section 198 or section 199, that such house, room or place is used as a common gaming-house, and that the persons found in the room or place where such tables or instruments of gaming are found were playing therein although no play was actually going on in the presence of the officer entering the same under such warrant or order, or in the presence of those persons by whom he is accompanied as aforesaid. Sec. 702 as amended by the Code Amendment Act 1900.

Evidence of unlawful gaming.]—In any prosecution under section 198 for keeping a common gaming house, or under section 199 for playing in a common gaming house, it shall be primâ facie evidence that a house, room or place is used as a common gaming-house, and that the persons found therein were unlawfully playing therein—

(*a.*) if any constable or officer authorized to enter any house, room or place, is wilfully prevented from, or obstructed or delayed in entering the same or any part thereof; or

(*b.*) if any such house, room or place is found fitted or provided with any means or contrivance for any unlawful gaming, or with any means or contrivance for concealing, removing or destroying any instruments of gaming. Sec. 703 as amended by the Code Amendment Act 1900.

Property in Canada or elsewhere.]—The second sub-section was passed to override the decision in R. v. Wettman (1894), 1 Can. Cr. Cas. 287.

An English statute against bigamy (24 & 25 Vict. (Imp.), ch. 100, sec. 57), using the words "whether the second marriage shall have taken place in England or Ireland *or elsewhere*" was held, in Earl Russell's trial, [1901] A.C. 446, to apply to the marriage of a British subject celebrated beyond the King's dominions.

Place used for gaming in stocks.]—See sec. 201 (3).

197. Common betting-house defined. — A common betting-house is a house, office, room or other place—

(*a*) opened, kept or used for the purpose of betting between persons resorting thereto and—

(i.) the owner, occupier, or keeper thereof;

(ii.) any person using the same;

(iii.) any person procured or employed by, or acting for or on behalf of any such person;

(iv.) any person having the care or management, or in any manner conducting the business thereof; or

(*b.*) opened, kept or used for the purpose of any money or valuable thing being received by or on behalf of any such person as aforesaid, as or for the consideration,

(i.) for any assurance or undertaking, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race or other race, fight, game or sport; or

(ii.) for securing the payment or giving by some other person of any money or valuable thing on any such event or contingency; or

(*Amendment of 1895*).

(*c.*) opened, or kept for the purpose of recording or registering bets upon any contingency or event, horse race or other race, fight, game or sport, or for the purpose of receiving money or other things of value to be transmitted for the purpose of being wagered upon any such contingency or event, horse race or other race, fight, sport or game, whether any such bet is recorded or registered there, or any money or other thing of value is there received to be so transmitted or not; or

(*d.*) opened, kept or used for the purpose of facilitating, or encouraging or assisting in, the making of bets upon any contingency or event, horse race or other race, fight, game or sport, by announcing the betting upon, or announcing or displaying the results of, horse races or other races, fights, games or sports, or in any other manner, whether such contingency or event, horse race or other race, fight, game or sport, occurs or takes place in Canada or elsewhere.

Other place.]—In construing the words "other place" the doctrine of "ejusdem generis" is applicable, and the meaning of the word "place" must be controlled by the specific words, "house, office, or room." Powell v. Kempton Park, [1897] 2 Q.B. 242. [1899] A.C. 143.

In The Queen v. Humphrey, [1898] 1 Q.B. 875, an archway which was a private thoroughfare leading from a public street into a yard containing dwelling houses, stables and workshops, which the prisoner was accustomed

to resort to for the purpose of betting with persons who came to him there, was held to be a "place" within the meaning of the Betting Act 1853, (16 & 17 Vict. (Imp.), ch. 119) secs. 1, 3. And see Brown v. Patch, [1899] 1 Q.B. 892; Belton v. Busby, [1899] 2 Q.B. 380.

Code sec. 204 (2) validates betting on a racecourse of an incorporated association during the actual progress of a race meeting.

Evidence.]—A bank, a telegraph office, and another office were simultaneously opened in a town. Moneys were deposited in the bank by various persons, who were given receipts therefor in the name of a person in the United States, which receipts were taken to the telegraph office, where information as to horse races being run in the United States was furnished to the holders of the receipts, who telegraphed instructions to the person there for whom the receipts were given to place, and who placed bets equivalent to the amounts deposited on horses running in the races, and on their winning the amounts won were paid to the holders of the receipts at the third office by telegraphic instructions from the persons making the bets in the United States:—Held, on the evidence and admissions to the above effect, that the defendant, who kept the telegraph office, was properly convicted of keeping a common betting house under secs. 197-198 of the Code. R. v. Osborne (1896), 27 O.R. 185.

198.—Keeping disorderly house.—Every one is guilty of an indictable offence and liable to one year's imprisonment who keeps any disorderly house, that is to say, any common bawdy-house, common gaming-house or common betting-house, as hereinbefore defined.

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

Disorderly house.]—The term "disorderly house" in Cr. Code 783 (*f*) has been held to apply only to those cases which fall within this statutory definition. Ex parte John Cook (1895), 3 Can. Cr. Cas. 72 (B.C.).

And a more limited meaning is given in a recent Quebec decision where it was held that the meaning of the words "disorderly house" in secs. 783 (*a*) and 784, is governed by the rule noscitur a sociis, and is therefore restricted to houses of the nature and kind of a house of ill-fame or bawdy-house. R. v. France (1898), 1 Can. Cr. Cas. 321 (Que.).

A house will be none the less a public nuisance because it is found to be disorderly as well as a bawdy-house. It is in law disorderly if it be a bawdy-house. R. v. Munro (1864), 24 U.C.Q.B. 44.

Describing the offence.]—The information need only give a concise and legal description of the offence charged, and contain the same certainty as an indictment. The description of the charge must include every ingredient required by the statute to constitute the offence, but, as in an indictment, the statement of the offence may be in the words of the enactment which describes it or declares the transaction to be an indictable offence. R. v. Taylor (1824), 3 B. & C. 502, 612; R. v. France (1898), 1 Can. Cr. Cas. 321 (Que.).

Procedure.]—Where there is nothing upon the face of a conviction for keeping a house of ill-fame to shew whether the police magistrate who tried the case acted under the "summary trials" clauses of the Code, by virtue

of which he has an absolute jurisdiction in respect of that offence, or simply as a justice of the peace under the "summary convictions" clauses and of Code secs. 207 and 208, and the conviction is defective in form but is amendable if within the "summary conviction" clauses and not amendable if under the "summary trials" clauses, the court will treat it as a "summary conviction" and correct the same under Code sec. 889, by reducing the term of imprisonment where the sentence is in excess of that authorized by law. R. v. Spooner, (1900), 4 Can. Cr. Cas. 209 (Ont.).

Semble, upon indictment under sec. 198, the offence of keeping a common bawdy-house is punishable in Ontario by a sentence to the "Mercer Reformatory" for any term less than two years under sec. 34 of the Public Prisons Act, R.S.C. ch. 183, which section remains unrepealed by the Code. Ibid.

Evidence.]—The owner of a house who leases it to another person knowing and assenting when the lease was made to the purpose of the latter to maintain it as a common bawdy house, thereby does an act for the purpose of aiding the lessee to commit the indictable offence of keeping a disorderly house, and he may be indicted and convicted as a principal under Cr. Code sec. 61 (*b*). R. v. Roy (1900), 3 Can. Cr. Cas. 472 (Que.).

In R. v. Barrett (1862), 32 L.J.M.C. 36, the accused let a house to a weekly tenant who used it as a brothel, but it was not proved that the accused received any additional rent by reason of the nature of the occupation or in any way participated in the direct profits of the immorality carried on there; but he had notice that the house was used for immoral purposes, and he did not give the tenant notice to quit. It was held that he could not be convicted of keeping the house as a disorderly house.

In R. v. Stannard (1863), 33 L.J.M.C. 61, the owner of a house let it in separate apartments on weekly tenancies to several women, who with his knowledge and consent used them for purposes of prostitution. He did not himself live in the house, and received no direct share in the immoral gains of the women, nor had he any control over them except such as might arise indirectly from his power as landlord to terminate any tenancy at the end of a week. It was held that he could not be convicted of keeping the house.

Keeping a house of ill-fame or disorderly house is a cumulative offence, and although the charge is in general terms, evidence may be given of particular facts and of the particular time of such facts. Clark v. Periam (1742), 2 Atk. 339; Roscoe's Crim. Evid., 11th ed., 773. It is not necessary to prove who frequents the house, which in many cases it might be impossible to do, but if unknown persons are proved to have been there, conducting themselves in a disorderly manner, it will maintain an indictment. l'Anson v. Stuart (1787), 1 T.R. 754. A common bawdy-house is defined by sec. 195 of the Code to be a house, room, set of rooms or place of any kind, kept for purposes of prostitution. It is immaterial whether indecent or disorderly conduct is or is not perceptible from the outside. Steph. Crim. Law 122.

It is not necessary that it should be proved that any indecent or disorderly conduct was visible from the exterior of the house. R. v. Rice (1866), L.R. 1 C.C.R. 21.

Appearing as the keeper.]—The sub-section as to acting or appearing as the mistress of the house, Cr. Code 198 (2), originated in the English "Disorderly Houses Act, 1751," 25 Geo. 2, ch. 36. By sec. 8 of that statute it was enacted that any person who shall appear, act or behave himself or herself as master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not be in fact the real owner or keeper thereof.

In R. v. Spooner (1900) 4 Can. Crim. Cas. 209, a plea of guilty to the charge of "*appearing* the keeper of a house of ill-fame" was held equiva-

lent to an admission that she kept a house of ill-fame. The words used in the charge did not charge an offence known to the law under that form of words so as to give them any technical meaning, nor do they follow the phraseology of sub-sec. (2) of sec. 198 which enacts that "Any one who appears, acts or behaves as master or mistress, or as the person having the care, government or management of any disorderly house [any common bawdy-house, common gaming-house or common betting house as defined by secs. 193, 196 and 197] shall be *deemed* to be the keeper," etc. It is submitted that the sub-section does not become operative until the fact that the house *is* a disorderly house is proved or admitted. The offence is, by its nature, one to be proved by shewing a series of circumstances, constituting the house a disorderly one, a continued use of the same for purposes of prostitution where the charge is for the keeping of a common bawdy-house. Does the accused admit either such continued keeping of the house for purposes of prostitution or the ill-reputation of the house by admitting that she appears the keeper of a house of ill-fame? The meaning of the words should not be extended beyond their ordinary acceptation, and if there be any ambiguity the construction most favourable to the prisoner should be taken. In common parlance a person may be said to *appear* such keeper if she were unquestionably the keeper of a house which had some of the appearances or indications of being a house of ill-fame, but in point of fact was not. And an isolated act of prostitution carried on in the house with the connivance of the mistress thereof might make such mistress *appear* the keeper of a bawdy-house, although the house was in fact one of good repute. It is submitted that the decision in R. v. Spooner (1900) 4 Can. Crim. Cas. 209, would have been much more satisfactory had the conviction for "keeping" been set aside as not warranted by the plea of guilty to "appearing the keeper" and the commitment set aside as not disclosing any offence known to the law.

Finding gaming instruments.]—See secs. 702 and 703.

Obstruction of officer as evidence.]—See sec. 703.

199. Playing or looking on in gaming-house.—Every one who plays or looks on while any other person is playing in a common gaming-house is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars and not less than twenty dollars, and in default of payment to two months' imprisonment. R.S.C. ch. 158, sec. 6.

See note to sec. 198, and see secs. 702 and 703.

200. Obstructing police officer entering a gaming-house.—Every one is guilty of an offence and liable, on summary conviction before two justices of the peace, to a penalty not exceeding one hundred dollars, and to six months' imprisonment with or without hard labour who—

(*a.*) wilfully prevents any constable or other officer duly authorized to enter any disorderly house, as mentioned in section one hnndred and ninety-eight, from entering the same or any part thereof; or

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

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

(*d.*) uses any means or contrivance whatsoever for the purpose of preventing, obstructing or delaying the entry of any constable or officer, authorized as aforesaid, into any such disorderly house or any part thereof. R.S.C. ch. 158, sec. 7.

See note to sec. 196.

201. Gaming in stocks and merchandise.—Every one is guilty of an indictable offence and liable to five years' imprisonment, and to a fine of five hundred dollars, who, with intent to make gain or profit by the rise or fall in price of any stock of any incorporated or unincorporated company or undertaking, either in Canada or elsewhere, or of any goods, wares or merchandise—

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

(*b.*) makes or signs, or authorizes to be made or signed, any contract or agreement, oral or written, purporting to be for the sale or purchase of any such shares of stock, goods, wares or merchandise in respect of which no delivery of the thing sold or purchased is made or received, and without the *bonâ fide* intention to make or receive such delivery.

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

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

Stock gambling.]—A broker, who merely acts as such for two parties, one a buyer and the other a seller, without having any pecuniary interest in the transaction beyond his fixed commission, and without any guilty knowledge on his part of the intention of the contracting parties to gamble in stocks

or merchandise, is not liable to prosecution under sec. 201, paragraphs (*a*) and (*b*), of the Criminal Code of Canada, nor as accessory under sec. 61. R. v. Dowd (1899), 4 Can. Cr. Cas. 170 (Que.), per Choquette, Sessions Judge at Montreal.

In re Cronmire, [1898] 2 Q.B. 383, transactions between a stockbroker and his client for differences on the sale and purchase of shares resulted in a balance in favour of the client. The broker agreed to sell certain stock to the client in settlement of the balance due, and forwarded a contract note to the client. The stock not having been delivered, the client claimed to prove against the broker's estate in bankruptcy for damages for non-delivery of the stock; but the Court of Appeal (Smith, Williams and Rigby, L.JJ.), held that, as the balance resulting from the gambling transactions was not recoverable, there was no valid consideration for the promise to deliver the stock, and therefore that the proof must be rejected. The client had deposited money to cover any loss which might arise on the gaming transactions, a balance of which still remained in the broker's hands to the credit of the client, and as to this sum it was held that the client was entitled to prove against the broker's estate, as the money had not been used for the purpose for which it was deposited.

In re Gieve, [1899] 1 Q.B. 794, an appeal was taken by a trustee in bankruptcy against the allowance of a proof of claim by a creditor in respect of certain stock and share transactions between himself and the bankrupt, and the question was whether the transactions in question were gambling or wagering transactions, and, as such, void under the Gaming Act, 1845 (8 and 9 Vict. (Imp.), c. 109, s. 18). The bankrupt had carried on business as a dealer in stock and shares, and Moss, the creditor, had had dealings with him on the "cover" or "margin" system. Moss's claim consisted of the differences in the market price of certain stocks sold by the bankrupt to Moss at the day named for delivery, and the price for which the sale was made. The "sold note," read as follows: "I beg to advise having sold you 20 Canadas—Cover, 1%; price, 50¼; plus, ¼th, if the stock is taken up," etc., really a contract of sale of the stock. The words "plus ¼th, if stock is taken up," indicating, in the opinion of the Court of Appeal, that the buyer need not take up the stock unless he chose, but that, if he did, he was to pay the extra ¼th. It was held that the contract was really a bargain for differences, with an option to the buyer to pay ¼th more, when the contract was to be a real one for the purchase and delivery of the stock, and that it was, therefore, a contract "by way of gaming and wagering" within the meaning of the Gaming Act (Eng.), 1845.

Onus of proof.]—By s. 704, whenever, on the trial of a person charged with making an agreement for the sale or purchase of shares, goods, wares or merchandise in the manner set forth in section two hundred and one, it is established that the person so charged has made or signed any such contract or agreement of sale or purchase, or has acted, aided or abetted in the making or signing thereof, the burden of proof of the bona fide intention to acquire or to sell such goods, wares or merchandise, or to deliver or to receive delivery thereof, as the case may be, shall rest upon the person so charged.

202. Frequenting "bucket-shops." —Every one is guilty of an indictable offence and liable to one year's imprisonment who habitually frequents any office or place wherein the making or signing, or procuring to be made or signed, or the negotiating or bargaining for the making or signing, of such contracts of sale or purchase as are mentioned in the section next preceding is carried on. 51 Vict., ch. 42, sec 1.

203. Gaming in public conveyances.—Every one is guilty of an indictable offence and liable to one year's imprisonment who—

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

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

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

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

4. Every company or person who owns or works any such railway car or steamboat must keep a copy of this section posted up in some conspicuous part of such railway car or steamboat.

5. Every company or person who makes default in the discharge of such duty is liable to a penalty not exceeding one hundred dollars and not less than twenty dollars. R.S.C., c. 160, ss. 1, 3 and 6.

204. Betting and pool-selling.—Every one is guilty of an indictable offence and liable to one year's imprisonment, and to a fine not exceeding one thousand dollars, who—

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

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

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

(*d.*) records or registers any bet or wager, or sells any pool, upon the result—

(i.) of any political or municipal election;

(ii.) of any race;

(iii.) of any contest or trial of skill or endurance of man or beast.

2. The provisions of this section shall not extend to any person by reason of his becoming the custodian or depositary of any money, property or valuable thing staked, to be paid to the winner of any lawful race, sport, game, or exercise, or to the owner of any horse engaged in any lawful race, or to bets between individuals or made on the race course of any incorporated association during the actual progress of a race meeting. R.S.C., c. 159, s. 9.

The object of the Legislature in enacting the latter part of sub-sec. 2 of sec. 204 apparently was to reserve the race courses of incorporated associations to places where bets might be made during the actual progress of race meetings, without the bettors being subject to the penalties of that section. An agreement for the sale of betting and gaming privileges at a race meeting by an incorporated association, who are the lessees of an incorporated association, the owners of the race course, is not illegal. Stratford Turf Association v. Fitch (1897), 28 Ont. R. 579.

(*Amendment of 1895*).

205. Lotteries.—Every one is guilty of an indictable offence and liable to two years' imprisonment and to a fine not exceeding two thousand dollars, who—

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

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

(*c.*) conducts or manages any scheme, contrivance or operation of any kind for the purpose of determining who or the holders of what lots, tickets, numbers or chances are the winners of any property so proposed to be advanced, loaned, given, sold or disposed of.

2. Every one is guilty of an offence and liable on summary conviction to a penalty of twenty dollars, who buys, takes or receives any such lot, ticket or other device as aforesaid.

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

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

5. This section includes the printing or publishing, or causing to be printed or published, of any advertisement, scheme, proposal or plan of any foreign lottery, and the sale or offer for sale of any ticket, chance or share, in any such lottery, or the advertisement for sale of such ticket, chance or share, and the conducting or managing of any such scheme, contrivance or operation for determining the winners in any such lottery.

(Amendments of 1900 and 1901).

6. This section does not apply to—

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

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

Lottery defined.]—A lottery is a distribution of prizes by lot or chance without the use of any skill. Archibold Crim. Plead. (1900), 1141; R. v. Harris (1866), 10 Cox C.C. 352; Barclay v. Pearson, [1893] 2 Ch. 154; Stoddard v. Sagar, [1895] 2 Q.B. 474; Hall v. Cox, [1899] 1 Q.B. 198.

Province cannot authorize.]—Provincial legislatures have no power to authorize the running of lotteries; and no action can be maintained for the recovery of money under a contract for the operation of a lottery scheme which would contravene the criminal law. Brault v. St. Jean Baptiste Association (1900), 4 Can. Cr. Cas. 284 (S.C. Can.).

Where there are two agreements, both of which are in furtherance of the unlawful scheme, the second being in form a contract of loan but collateral and auxiliary to the first which provides for the operation of the lottery, both agreements are invalid and unenforceable. Ibid.

Evidence.]—When the complainant went to the defendant's place of business, and having been told by defendant that in certain spaces on two shelves there were in cans of tea, a gold watch, a diamond ring, or $20 in money, he paid $1 and received a can of tea, which, containing an article of small value, he handed the can back, paid an additional 50 cents and received another can, which also contained an article of small value; he handed this can back also, paid another 50 cents and received another can which also contained an article of small value. It was held that the object really sought for, and for the chance of obtaining which the money was paid, was one of the three prizes named; and that the transaction constituted an offence. R. v. Freeman (1889), 18 Ont. R. 524.

The accused was tried on two charges: (1) that he did unlawfully cause to be advertised and published a certain proposal, scheme, or plan for disposing of a horse, buggy, and harness by lot; (2) that he unlawfully sold, bartered, exchanged, or otherwise disposed of certain lots, cards, or tickets, as a means or device for giving, selling, or disposing of a certain horse, buggy, and harness by lot.

The accused carried on a business under the name of "The Bankrupt Stock Buying Company," selling clothing and other goods; he published an advertisement in a newspaper in Winnipeg, which contained the following:

"Gigantic free gift. During this sale we shall give to each purchaser of $5 and upwards a ticket entitling him to participate in the free gift of a horse, buggy, and harness, value, $300."

"To be given away on December 24th. The holder of the winning ticket, if he shoots a certain turkey at fifty yards in five shots, gets the horse, buggy, and harness."

The accused gave to each purchaser of goods for $5 and upwards a coupon or ticket as follows: "This coupon entitles the holder to participate in the drawing for horse, buggy, and harness given away by The Bankrupt Stock Buying Company. Drawing to take place December 24th, 1900." The accused had upon his premises a horse, buggy, and harness, which he represented to purchasers of goods to be the identical horse, buggy, and harness referred to in the advertisement and coupon. The jury found the accused guilty of both charges. The following question was reserved: "Was the accused, under the circumstances, properly convicted of the offences charged in the indictment." It was held that the conviction should be affirmed; and that it was a question for the jury whether the interposition of the shooting was intended as a real contest, or as a device for covering up a scheme to dispose of the property by lot, and upon the evidence they were justified in finding as they did. R. v. Johnson (1902), 22 C.L.T. 125 (Man.).

The offer of prizes to the nearest guesser of the number of beans contained in a jar exhibited to view is not a lottery, as it is a matter of judgment or skill and not of chance. R. v. Dodds (1884), 4 O.R. 390.

And where a shopkeeper placed in his shop window a jar containing a number of buttons of different sizes, and advertised a prize of a pony and cart which he exhibited in his window to the person who should guess the number nearest to the number of buttons in the jar; stipulating that the successful one should buy a certain amount of his goods; this was held not to be a "mode of chance" for the disposal of property within the meaning of the Lottery Act, as the approximation of the number of buttons depended upon the exercise of judgment, observation and mental effort. R. v. Jamieson (1884), 7 O.R. 149.

The sale of lottery tickets is an offence, whether made for profit or not. R. v. Parker, 9 Man. R. 203.

In the case of a newspaper sold with coupons to be filled up by purchasers with the names of the winning horses in a horse race and the reward of a money prize for the correct guesses, it is a question of fact to be decided whether the money received was paid in consideration of a promise to pay a prize on the event of the race or was only the ordinary price of the newspaper. R. v. Stoddart, 70 L.J.Q.B. 189. And the sale of extra coupons at a fixed price is a fact to be taken into consideration. Ibid. Stoddart v. Sagar, [1895]. 2 Q.B. 474, 18 Cox C.C. 165; Caminada v. Hulton, 17 Cox C.C. 307.

An offer of a money prize by a newspaper coupon scheme under which the readers were asked to predict the number of registered births and deaths in a certain district during a certain period, was held not to constitute a lottery. Hall v. Cox, [1899] 1 Q.B. 198.

Art distributions.]—This section originally contained an exception under which certain distributions by lot of paintings, drawings and other works of art were legalized where done under the direction of an incorporated society established for the encouragement of art. The operations of several of so-called art societies were conducted so much upon a lottery basis that the evil became a serious one, particularly in Montreal, and the exception in favor of art distributions was therefore repealed by the Code Amendment Act of 1900.

Credit Foncier.]—By a sub-section to the original Code, sec. 205 was not to apply to the Crédit Foncier du Bas-Canada or the Crédit Foncier Franco-Canadien, but such exception was repealed by the Code Amendment Act of 1901 (1 Edw. VII., c. 42).

Right of search.]—See sec. 575.

206. Misconduct in respect to human remains.—Every one is guilty of an indictable offence and liable to five years' imprisonment who—

(*a.*) without lawful excuse, neglects to perform any duty either imposed upon him by law or undertaken by him with reference to the burial of any dead human body or human remains; or

(*b.*) improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not.

At common law.]—Exposing the naked dead body of a child in or near the highway and within view therefrom is a common law nuisance. R. v. Clark, 15 Cox C.C. 171.

And to leave unburied the corpse of a person for whom the accused was bound to provide Christian burial, was an indictable misdemeanor, if the accused were shewn to have been of ability to provide such burial. R. v. Vann (1851), 2 Den. 325; R. v. Stewart, 12 A. & E. 773; Jenkins v. Tucker (1788), 1 H.Bl. 90.

It is also a common law misdemeanour to remove without authority a corpse from a grave in a church burial ground; R. v. Sharpe, Dears. & B. 160; 7 Cox 214; or to sell a dead body without lawful authority for the purpose of dissection. R. v. Lynn, 1 Leach 497, 1 R.R. 607; R. v. Gilles, R. & R. 366 (*n*); R. v. Cundick, Dowl. & Ry. 13; R. v. Duffin, R. & R. 365.

Stranger undertaking to bury.]—The neglect to decently bury a dead human body by a person who has undertaken to do so and has removed the body with that expressed intent is an indictable offence under this section, although such person was, apart from such undertaking, under no legal obligation in respect of the burial. R. v. Newcomb (1898), 2 Can. Cr. Cas. 255.

Coroner's right.]—A coroner has a legal right to direct a disinterment for the purposes of holding an inquest. R. v. Clerk (1702), Holt 167; R. v. Bond (1716), 1 Str. 22; Jervis on Coroners, 6th ed. 37. Any disposition of a corpse to obstruct or prevent a coroner's inquest when one ought to be held is a common law misdemeanour. R. v. Stephenson, 13 Q.B.D. 331; R. v. Price, 12 Q.B.D. 247.

PART XV.

VAGRANCY

SECTS.

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207. Vagrant defined.—Every one is a loose, idle or disorderly person or vagrant who—

(*Amendment of 1900*).

(*a*.) Not having any visible means of subsistance, is found wandering abroad or lodging in any barn or outhouse or in any deserted or unoccupied building, or in any cart or wagon, or in any railway carriage or freight car, or in any railway building, and not giving a good account of himself, or who, not having any visible means of maintaining himself, lives without employment;

(*a*)—*No visible means of support.*]—By a proviso added to sec. 208 by the Code Amendment Act of 1900, no aged or infirm person shall be convicted as a loose, idle or disorderly person or vagrant, for any reason coming within paragraph (*a*) of this section, in the county of which he has for the two years immediately preceding been a resident.

A person suspected of being a confidence man had registered at a hotel and on the same day was arrested at a railway station as a suspicious character. On his person were found two cheques one for $700 and another for $900 which were sworn to be such as are used by confidence men, also a mileage ticket nearly used up issued in the name of another person and $8 in cash. He offered no explanation of the cheques or ticket and gave no information about himself. It was held that he could not be properly convicted as a vagrant on the evidence. R. v. Bassett, 10 Ont. Prac. R. 386, per Osler, J. Before a person can be convicted under sub-sec (*a*) as being an idle person who not having visible means of maintaining himself lives without employment, he must have acquired in some degree a character which brings him within it as an idle person, who having no visible means of maintaining himself, i.e., not "paying his way" or being apparently able to do so yet lives without employment. Ibid.

(*b*.) being able to work and thereby or by other means to maintain himself and family wilfully refuses or neglects to do so;

(*b*)—*Failure to maintain the family.*]—In order to constitute a wilful refusal or neglect on the part of a husband to maintain his family, under Cr. Code sec 207 (*b*), it is necessary that he should be under a legal obligation to do so, and his failure to maintain his wife, who had left him without valid cause and refused to return, is not an offence under that section. R. v. Leclair (1898), 2 Can. Cr. Cas. 297; Flannagan v. Overseers (1857) 3 Jurist N. S. 1103; Morris v. Edmonds, 18 Cox C. C. 627.

(*c.*) openly exposes or exhibits in any street, road, highway or public place, any indecent exhibition;

(*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, wanders about and begs, or goes about from door to door, or places himself or herself in any street, highway, passage, or public place to beg or receive alms;

(*d*)—*Begging.*]—It must be shewn that the wandering about and begging is a mode of life with the accused, and the section does not apply where persons with regular occupations temporarily out of employment through a "strike" go about seeking public contributions in aid of a general fund to sustain the strikers and their families. Pointon v. Hill, 12 Q.B.D. 306.

(*e.*) loiters on any street, road, highway, or public place, and obstructs passengers by standing across the footway, or by using insulting language, or in any other way;

(*e*)—*Loitering, etc.*]—A licensed cabman who contrary to a city ordinance loitered on the street near the entrance of a hotel and solicited passengers to hire his cab was held not within this provision where no obstruction of passengers was shewn. Smith v. The Queen, 4 Montreal L. R. 325.

(*f.*) causes a disturbance in or near any street, road, highway or public place, 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 disturbs the peace and quiet of the inmates of any dwelling-house near such street or highway;

(*f*) *and* (*g*)—*Causing disturbance.*]—It is not sufficient to charge merely 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 Legal News (Montreal) 387; R. v. Daly, 24 C.L.J. 157, 12 Ont. Prac. 411.

"Disturbing the inhabitants" of a town was held by Wilson, C.J., to mean annoying them, as by making a noise which interferes with the thoughts or proceedings of others. R. v. Martin (1886), 12 O.R. 800. It is distinguishable from the term "creating a disturbance," which applies either to raising a clamour, commotion, quarreling or fighting, and refers to conduct of the nature of a breach of the peace. Ibid. The disturbance should be of the nature of a nuisance. Thomson v. Mayor of Croydon, 16 Q.B. 708.

(*h.*) tears down or defaces signs, breaks windows or doors or door plates, or the walls of houses, roads or gardens, or destroys fences;

(*i.*) being a common prostitute or night walker, wanders in the fields, public streets or highways, lanes or places of public meeting or gathering of people, and does not give a satisfactory account of herself;

(*i*)—*Prostitutes.*]—Sub-section (*i*) taken from the Vagrant Act, 32 & 33 Vict. (Can.) ch. 28, does not, on its true construction, declare that being a prostitute, etc., makes such persons liable to punishment as such, but only those who when found at the places mentioned, under circumstances suggesting impropriety of purpose, on request or demand are unable to give a satisfactory account of themselves. R. v. Arscott (1885), 9 O.R. 541, per Rose, J.; but see Arscott v. Lilley, 11 O.R. 153.

"A common prostitute wandering in the public streets should not be apprehended and taken to a lock-up without knowing what it is for. In the nature of things she should know, if she is taken up, what it is for. She is not to be taken at all, until she has failed to give a satisfactory account of herself. If she is not asked what business she, a common prostitute, has wandering in the streets, or why it is she is there, she may not know whether she is taken up for murder or for robbery, or for what other offence, or whether she is taken up for any offence at all; and she cannot suppose she is taken up for wandering in the streets, though she is a common prostitute, so long as she is conducting herself harmlessly and decently, and just as other people are conducting themselves. The conviction should allege that the woman was asked before she was taken, or at the time of her being taken, to give an account of herself—that is of her wandering in the public streets, she being a common prostitute or night-walker—and that she did not give a satisfactory account of herself." R. v. Levecque (1870), 30 U.C.Q.B. 509.

(*j*.) is a keeper or inmate of a disorderly house, bawdy-house or house of ill-fame, or house for the resort of prostitutes;

(*j*)—*Houses of ill-fame.*]—Keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family as well as the husband. R. v. Williams, 10 Mod. 63; R. v. Dixon, 10 Mod. 335; R. v. Warren (1888), 16 O.R. 590.

Though the charge is general, yet at the trial evidence may be given of particular facts, and the particular time of doing them. Witnesses who speak simply to a general reputation without being able to point to anything particular, may easily attribute the character of a common bawdy house or a house of ill-fame to a house to which, however irregular may be the life of its inmates, the law does not affix that character. R. v. St. Clair (1900), 3 Can. Cr. Cas. 551 (Ont.).

A conviction for that the accused was on April 21 "and on divers other days and times during the month of April" the keeper of a disorderly house, based upon an information in like terms laid on April 29, is bad, because it may be read as inclusive of an offence committed subsequently to the laying of the information, and including the date of the conviction, as to which the prisoner was not charged on her trial before the convicting magistrate. R. v. Keeping (1901), 4 Can. Cr. Cas. 494 (N.S.).

It was held in R. v. Keeping (1901), 4 Can. Cr. Cas. 494, per Weatherbe, J. (N S.), that to give jurisdiction to a justice to punish on summary conviction the keeper of a disorderly house under the vagrancy clauses of the Code (secs. 207 and 208), the information must charge that the accused is a loose, idle or disorderly person or vagrant (sec. 208), and that it is not sufficient to charge simply that the person is a keeper of a disorderly house, although that fact constitutes the person a loose, idle or disorderly person or vagrant, by virtue of sec. 207. It may be doubted whether that view is correct, as by sec. 558 (2) an information may be either in the Code form (*C*), or to the like effect.

A conviction should not be made upon a charge of keeping, or being an inmate of, a bawdy house upon evidence of general reputation only, and the prosecution should be required to produce proof of acts or conduct from

which the character of the house may be inferred. R. v. St. Clair (1900), 3 Can. Cr. Cas. 551 (Ont. C.A.).

The conduct and statements of the inmates of an alleged bawdy house at the time of their arrest therein may properly be proved in support of the charge. Ibid.

Where the "keeper" is charged, the punishment may be, (*a*) on summary conviction before a justice, fine of $50 or six months' imprisonment, or both; (*b*) on summary trial under sec. 783, fine $100 or six months' imprisonment, or both (Code sec. 788); (*c*) on trial under indictment, one year's imprisonment (Code sec. 198) or a fine in discretion, or both (Code sec. 958 as amended in 1900).

A charge of "keeping a bawdy house for the resort of prostitutes" charges one offence only although keeping a bawdy house is itself an offence and so by virtue of sub-section (*j*) is the keeping of a house for the resort of prostitutes. R. v. McKenzie, 2 Man. R. 168.

(*k*.) is in the habit of frequenting such houses and does not give a satisfactory account of himself or herself; or

(*k*)—*Frequenters of houses of ill-fame.*]—Persons may be able to give the most satisfactory account of themselves although they may be in the habit of frequenting such houses. Arscott v. Lilley (1886), 11 O.R. 153, 181, 14 A.R. 283; R. v. Levecque, 30 U.C.Q.B. 509. As said by Wilson, C.J., in the former case:—"They may go to preach to, or to admonish the inmates, to visit them in sickness, to acquire statistical information, or for police purposes, or for the discovery of crime or criminals or their apprehension, or the recovery of stolen goods, or for the collection of rent or debts." 11 O.R. p. 181.

A conviction for being an *unlawful* frequenter is not good, it should be for being an *habitual* frequenter. R. v. Clark (1883), 2 O.R. 523.

(*l*.) having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution. R.S.C. ch. 157, sec. 8.

(*l*)—*Supported by prostitution.*]—A woman who is kept by a married man and who surrenders herself to sexual intercourse with him alone, does not come under the purview of sub-section (*l*). R. v. Rehe (1897), 1 Can. Cr. Cas. 63 (Que.).

In Gareau's case, Que. (cited 1 Can. Cr. Cas. 66) a woman had been convicted as a vagrant for having kept for more than three months a disorderly house, for the purposes of prostitution with a man who was not her husband and who paid her; and on a writ of habeas corpus the Court of Queen's Bench at Montreal unanimously held that the resorting to her room by only one man did not constitute it a disorderly house, and that her illicit intercourse with one man alone did not constitute prostitution within the meaning of the paragraph, and the conviction was consequently quashed.

Supported by gaming or crime.]—The evidence on a charge of vagrancy under Cr. Code 207 on the ground that the accused had for the most part supported himself by gaming and crime must shew that the gaming or crime took place during the time within or for which he is charged in the information with having been a vagrant. R. v. Riley (1898), 2 Can. Cr. Cas. 128.

If the accused resides for a portion of the year with his parents at their request, they being able and willing to provide for his support, a conviction for vagrancy under Cr. Code 207 (*a*) because "not having had any visible

means of maintaining himself he had lived without employment" should be quashed. Ibid.

Semble, although it may appear that part of the money by which the accused is supported with his parents had been acquired by him by his gaming, etc., prior to the time of the offence charged, and that the accused while so resident with his parents idled away his time in places of public resort, such does not justify a conviction for vagrancy. Ibid.

An accused person was summarily convicted under 32-33 Vict. (Can.), ch. 28, sec. 1, of being "a person, who, having no peaceable profession or calling to maintain himself by, but who does for the most part support himself by crime and then was a vagrant," etc. The evidence shewed that the defendant did not support himself by any peaceable profession or calling and that he consorted with thieves and reputed thieves, but the witnesses did not positively say that he supported himself by crime. It was held that it was not to be inferred that the defendant supported himself by crime; that to sustain the conviction there should have been statements that witnesses believed he got his living by thieving or by aiding and acting with thieves or by such other acts and means as shewed he was pursuing crime. R. v. Organ, 11 Ont. Prac. 497, per Adam Wilson, C.J.

It is not to be assumed that because the accused has no visible occupation and is greatly addicted to gambling that the gambling contributes mainly to his support. R. v. Davidson, 8 Man. R. 325.

(*Amendment of 1894*).

2. The expression "public place" in this section includes any open place to which the public have or are permitted to have access and any place of public resort.

(*Amendments of 1894 and 1900*).

208. Penalty for vagrancy.—Every loose, idle or disorderly person or vagrant is liable, on summary conviction, to a fine not exceeding fifty dollars or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both. R.S.C., c. 157, s. 8.

(*Amendment of 1900*).

Provided that no aged or infirm person shall be convicted as a loose, idle or disorderly person or vagrant for any reason coming within paragraph (a) of section 207, in the county of which he has for the two years immediately preceding been a resident.

Vagrancy.]—Vagrancy is not an indictable offence, but loose and idle persons were liable at common law to be apprehended and bound over for their good behaviour, and were liable to summary proceedings before justices of the peace under various early statutes in England. Crankshaw's Crim. Code, 2nd ed., p. 210. Then under the Code, and under the Revised Act respecting Public Morals, R.S.C. 1886, ch. 157 (sec. 8), from which the vagrancy clauses are derived, "inmates" as well as "keepers" of bawdy houses were made subject to summary prosecution as vagrants, and likewise any person who is an habitual frequenter of a bawdy house and who, on being asked by a peace officer to give an account of himself or herself when

found there, fails to give a satisfactory account. R. v. Levesque, 30 U.C. Q.B. 509; R. v. Clark, 2 Ont.R. 523; R. v. Arscott, 9 Ont.R. 541; Arscott v. Lilley, 11 Ont.R. 153.

Summary trial of bawdy house cases.]—Although secs. 782 and 783 appear under the general heading given to Part LV., *i.e.* "Summary trial of indictable offences," the inclusion therein of the offences of being an inmate of a bawdy house or being an habitual frequenter of same, must be taken as referring to the vagrancy clauses, secs. 207 and 208, and as providing an alternative procedure for the enforcement of those sections as well under the "summary trials" procedure, Part LV., as under the procedure by "summary convictions by justices" (Part LVIII.), as there are no other sections of the Code dealing with "inmates" and "frequenters."

It is submitted that the judicial officers empowered by sec. 782 to hold summary trials are given absolute jurisdiction to summarily try the offences of being an inmate or habitual frequenter of a bawdy house (sec. 784), whether or not such officers are constituted justices of the peace under their Provincial laws, and that the penalty for such offenders is limited to that imposed by sec. 208. The contrary has, however, been held by Ritchie, J., of the Supreme Court of Nova Scotia, in The King v. Roberts (1901), 4 Can. Cr. Cas. 253.

In that case it was held that the extended jurisdiction by which magistrates and certain other functionaries are empowered to summarily try that and other offences under Part LV. of the Criminal Code, and to impose imprisonment up to six months and a fine not exceeding, with costs, $100, is not restricted as to the offence of being an inmate of a house of ill-fame by the fact that, if the accused had been prosecuted before such magistrate in his capacity of justice of the peace, under the "summary convictions" clauses for the similar offence of being a "vagrant" by reason of being such inmate, the fine could not have exceeded $50 in addition to six months' imprisonment. R. v. Roberts (1901), 4 Can. Cr. Cas. 253 (N.S.).

The offence of keeping a common bawdy-house may be proceeded with by indictment under sec. 198, which authorizes one year's imprisonment therefor; or proceedings may be taken under the "Summary Trials" clauses, secs. 783 and 784, the latter section giving to the magistrate under Part LV. an absolute jurisdiction in respect of that offence, independently of the consent of the accused. Such magistrate proceeding under sec. 784 may impose imprisonment with or without hard labour for any term not exceeding six months or may impose a fine not exceeding with the costs in the case, $100, or to both fine and imprisonment not exceeding such sum and term; and such fine may be levied by warrant of distress or the person convicted may be condemned, in addition to any other imprisonment on the same conviction, to be committed for a further term not exceeding six months unless such fine is sooner paid. Sec. 788. These provisions are in addition to the special powers given by sec. 785 to police and stipendiary magistrates of cities and incorporated towns, and to recorders exercising judicial functions, authorizing them to try any offence for which in Ontario the accused might be tried by a Court of General Sessions and to impose the same punishment as might be imposed by that court, but where the magistrate has jurisdiction only by virtue of sec. 785 no person shall be summarily tried thereunder without his consent. Sec. 785 (3), added by 63-64 Vict., ch. 46, and in force from January 1, 1901. The effect of sec. 785 appears to be that the magistrate having authority under it may, without the consent of the accused, try the offence of keeping a bawdy-house but is then restricted to the penalty provided by sec. 788; but if the trial be with the consent of the accused, the latter preferring to consent rather than defend a like charge by indictment before a court and jury, sec. 788 will not then apply and the punishment may be as onerous as could be imposed on indictment under sec. 198. In the Province of Ontario the

powers conferred by sec. 785 may also be exercised by a police or stipendiary magistrate "in any county district or provisional county in such province. Sec. 785 (1).

Summary conviction.]—This section only applies to authorize six months' imprisonment when imposed as the substantive punishment on summary conviction for keeping a bawdy-house, and not as a means of enforcing payment of a fine. R. v. Stafford, 1 Can. Cr. Cas. 239 (N.S.).

If a fine be imposed for an offence under this section either as the sole punishment or with the addition of imprisonment for a term not exceeding six months, the justice may by his conviction after adjudging payment of the fine order and adjudge that in default of payment thereof the defendant be imprisoned for any period not exceeding three months unless the fine and the expenses of conveying the defendant to gaol under the commitment for such default are sooner paid. Sec. 872 (*b*).

Instead of directing imprisonment on default of payment of the fine forthwith or within a limited time, the justice may, by his conviction, order and adjudge that on such default, the penalty shall be levied by distress and, if sufficient distress cannot be found, that the defendant be imprisoned for any period not exceeding three months unless the penalty *and* the expenses of the distress *and* of conveying the defendant to gaol are sooner paid. Sec. 872 (*a*).

If the justice making a summary conviction adjudges a pecuniary penalty and a distress to realize same, and in default of sufficient distress that the defendant be imprisoned, the costs of the distress and of conveying the defendant to gaol are not in the discretion of the justice, but must be included in the formal conviction. R. v. Vantassel No. 1 (1894), 5 Can. Cr. Cas. 128.

The formal conviction may provide under sec. 872 (*a*) for the payment of the costs both of the distress and of conveying to gaol, although the minute of conviction does not include the costs of distress but merely directs imprisonment unless the penalty and costs and the costs of conveying to gaol are sooner paid. Ibid.

And the omission of a provision for the costs of distress and conveying to gaol from the formal conviction will invalidate the conviction. R. v. Vantassel (No. 2) (1894), 5 Can. Cr. Cas. 133.

Excluding public from court room.]—At the trial of any person charged with an offence under paragraphs (*i*), (*j*) and (*k*), of sec. 207, the court or judge may order that the public be excluded from the room or place in which the court is held during such trial. Sec. 550A.

Search warrants for vagrants.]—Section 576 provides that any stipendiary or police magistrate, mayor or warden, or any two justices of the peace, upon information before them made, that any person described in Part XV. as a loose, idle or disorderly person, or vagrant, is or is reasonably suspected to be harboured 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.

Commitment to house of industry, etc.]—Sub-section 4 of sec. 8 of the Revised Act respecting Public Morals R.S.C. 1886, c. 157, remains in force. (Code sec. 981 and schedule 2). It is as follows:—"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, workhouse or reformatory prison."

TITLE V.

OFFENCES AGAINST THE PERSON AND REPUTATION.

PART XVI.

DUTIES TENDING TO THE PRESERVATION OF LIFE.

SECT.

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209. Duty to provide the necessaries of life.—Every one who has charge of any other person unable, by reason either of detention, age, sickness, insanity or any other cause, to withdraw himself from such charge, and unable to provide himself with the necessaries of life, is, whether such charge is undertaken by him under any contract, or is imposed upon him by law, or by reason of his unlawful act, under a legal duty to supply that person with the necessaries of life, and is criminally responsible for omitting, without lawful excuse, to perform such duty if the death of such person is caused, or if his life is endangered, or his health has been or is likely to be permanently injured, by such omission.

Neglect to supply necessaries.]—A person, who has the necessary means to procure medical aid for a child in his care or charge, who is, to the knowledge of such person, in a dangerous state of health, and for whom medical aid and medicine were such essential things, that reasonably careful persons would have provided them for children in their care, is bound to do so, and if the jury find that the death of the child was caused or accelerated by such want of medical aid, such person is guilty of manslaughter. It makes no difference that such person believes that to call in medical aid would be wrong, as being contrary to the teaching of the Bible, or as shewing want of faith. R. v. Senior, [1899] 1 Q.B. 283.

In a recent British Columbia case the prisoner, an elder of the sect known as Zionites, was indicted for aiding and abetting and counselling in his actions one John Rogers, who neglected to provide two of his young children under six years of age with medical attendance and remedies when sick with diphtheria. Both children died. The finding at the trial was that the prisoner knew that the children had diphtheria and that he knew that it was a dangerous and contagious disease. It was also found that the ordinary remedies would have prolonged their lives and in all probability would have resulted in their complete recovery, and the prisoner was convicted and sentenced to three months' imprisonment. On a case reserved it was held that medical attendance and remedies are necessaries within the meaning of Code secs. 209 and 210 and also at common law, and that anyone legally liable to provide such is criminally responsible for neglect to do so. R. v. Brooks (1902), 22 C.L.T. 105 (B.C.), per Walkem, Irving and Martin, JJ. Conscientious belief that it is against the teachings of the Bible and therefore wrong to have recourse to medical attendance and remedies is no excuse. Ibid.

Although it is shewn that proper medical aid might have saved or prolonged the child's life and that it would have increased the chances of recovery but that it might have been of no avail, a conviction for manslaughter is not sustainable where there is no positive evidence that the death was caused or accelerated by the neglect to provide medical aid. R. v. Morby, 8 Q.B.D. 571.

If a person having the care and custody of another who is helpless, neglects to supply him with the necessaries of life, and thereby causes or accelerates his death, he was guilty of a criminal offence even before the statute. R. v. Nasmith (1877), 42 U.C.Q.B. 242. But if a person over the age of sixteen (see sec. 211) and having the exercise of free will, chooses to stay in a service where bad food and lodging are provided and death is thereby caused, the master is not criminally liable. R. v. Charlotte Smith, 10 Cox 94.

If the neglect was premeditated and there has been a deliberate omission to supply food to the helpless person in the custody or charge of the accused and death results from the omission, it is murder. R. v. Condé, 10 Cox C.C. 547; R. v. Bubb, 4 Cox C.C. 457; R. v. Self, 1 Leach 137; but if by gross neglect and without deliberate intent, the offence is only manslaughter. R. v. Instan, [1893] 1 Q.B. 450; R. v. Senior, [1899] 1 Q.B. 283.

If a grown-up person chooses to undertake the charge of a human creature, helpless either from infancy, simplicity, lunacy or other infirmity, he is bound to execute that charge without wicked negligence; and if a person who has chosen to take charge of a helpless creature lets it die by wicked negligence that person is guilty of manslaughter. R. v. Nicholls, 13 Cox C.C. 75. In such a case mere negligence will not establish the offence of manslaughter; there must be wicked negligence, that is, negligence so great as to satisfy a jury that the prisoner had a wicked mind in the sense that he was reckless and careless whether the creature died or not. Ibid, per Brett, J.

If the death of an apprentice labouring under disease is caused by want of care of and harsh treatment by the master who has charge of him the master is guilty of murder. R. v. Squire, 3 Russ. Cr. 6th ed. 13.

The master is not bound to provide medicine and attendance on his servant while such servant remains under his roof as part of the family. Winnall v. Adney, 3 B. & P. 247; unless in the case of an apprentice. R. v. Stokes, 8 C. & P. 153.

A young unmarried woman being about to be confined returned to the house of her mother and stepfather. There she was taken in labour during her stepfather's absence, and the mother did not take ordinary care to procure the assistance of a midwife though she could have got one had she

wished to do so. In consequence of such want of assistance the daughter died in her confinement. There was no evidence that the mother had any means of paying for the midwife's services. It was held under these circumstances that there was no legal duty on the part of the mother to call in a midwife and consequently there was no such breach of duty as to render her liable to be convicted of manslaughter. R. v. Shepherd, L. & C. 147, 31 L.J.M.C. 102.

The children of any old, blind, lame, infirm, or other person not able to work, shall, if of sufficient ability, at their own charge, relieve and maintain such parent. 43 Eliz. ch. 2. The Civil Code of Quebec, article 166, enacts that: "Children are bound to maintain their father, mother, and other ascendants, who are in want."

Necessaries for wife or child.]—See sec. 210.

Servants or apprentices under sixteen years.]—See sec. 211.

Permanently injured.]—See note to sec. 210.

Punishment.]—For murder, see sec. 231; manslaughter sec. 236; other cases of neglect under sec. 209, three years' imprisonment, sec. 215.

210. Duty of head of family to provide necessaries.—Every one who as parent, guardian or head of a family is under a legal duty to provide necessaries for any child under the age of sixteen years is criminally responsible for omitting, without lawful excuse, to do so while such child remains a member of his or her household, whether such child is helpless or not, if the death of such child is caused, or if his life is endangered or his health is or is likely to be permanently injured, by such omission.

2. Every one who is under a legal duty to provide necessaries for his wife, is criminally responsible for omitting, without lawful excuse so to do, if the death of his wife is caused, or if her life is endangered, or her health is or is likely to be permanently injured by such omission.

(Amendment of 1900).

3. In this section the word "guardian" has the same meaning as, under section 186 A, it has in sections 183 and 186.

Head of a family.]—A person who engages the services of a child under sixteen years, placed out with him by his legal guardian under a contract for the child's services for a fixed period, whereby the party with whom he is placed engages to furnish the child with board, lodging, clothing, and necessaries, is not as to such child a "guardian or head of a family" so as to become criminally responsible as such, under sec. 210, for omitting to provide "necessaries" to such child while a member of his household. The relationship in such case is that of master and servant, and comes within the provisions of sec. 211, under which the master is criminally responsible only in respect of a failure to provide "necessary food, clothing, or lodging." R. v. Coventry, 3 Can. Cr. Cas. 541. Section 211 of the Code does not impose a criminal responsibility upon the master to provide the servant with medical attendance or medicine, and, *semble*, per Rouleau, J., medical aid is not within the term "necessaries" under sec. 210. Ibid; but see note to sec. 209.

Proof of age.]—In order to prove the age of a boy, girl, child or young person for the purpose of this and the next section the following shall be sufficient primâ facié evidence:—(*a*) Any entry or record by an incorporated society or its officers having had the control or care of the boy, girl, child or young person at or about the time of the boy, girl, child or young person being brought to Canada, if such entry or record has been made before the alleged offence was committed. (*b*) In the absence of other evidence, or by way of corroboration of other evidence, the judge or, in cases where an offender is tried with a jury, the jury before whom an indictment for the offence is tried, or the justice before whom a preliminary inquiry thereinto is held, may infer the age from the appearance of the boy, girl, child or young person. Sec. 710A.

Without lawful excuse.]—It must be shewn that the parent or guardian was in the actual possession of means to provide for the child. R. v. Saunders, 7 C. & P. 277; R. v. Edwards, 8 C. & P. 611; R. v. Chandler, Dears. 453; and see R. v. Robinson (1897), 1 Can. Cr. Cas. 28. The mere fact that he might have obtained such means by application to a relief officer is not sufficient. R. v. Chandler, Dears. 453; R. v. Rugg, 12 Cox C.C. 16.

It must also be shewn that the child was unable to provide for himself. R. v. Friend, R. &. R. 20.

Permanently injured.]—It is purely a question of fact whether the acts proved are such that the health of the person is likely to be permanently injured by reason thereof; and the words "permanently injured," as here used, have no technical meaning. R. v. Bowman (1898), 3 Can. Cr. Cas. 410 (N.S.).

On a case reserved upon a conviction for failing to supply necessaries to a wife whereby her health is likely to be permanently injured, the conviction should be affirmed, if there is some evidence from which an inference may be drawn that such injury was likely to result from the non-supplying of necessaries. R. v. McIntyre (1898), 3 Can. Cr. Cas. 413 (N.S.).

Where a child's toes were so badly frozen, through the neglect of the person in whose charge the child was, that they had to be amputated, it was held in the Territories that the court should not without expert evidence upon the effect of the loss of the toes infer that the child's health had thereby been or was likely to be "permanently injured," or that his life had thereby been endangered. R. v. Coventry, 3 Can. Cr. Cas. 541 (N.W.T.).

Non-support of wife.]—It is necessary to prove that the defendant is the husband of the prosecutrix, that the wife was in need of food, clothing or lodging, and that the husband omitted to provide the same. R. v. Nasmith (1877), 42 U.C.Q.B. 242. Under the former law it was necessary to shew that the accused wilfully and without lawful excuse refused or neglected to provide (32-33 Vict., ch. 20, sec. 25), and under it an ability to perform was necessary to constitute a neglect. R. v. Ryland, L.R. 1 C.C.R. 99. And it seems to be still necessary for the prosecution to give evidence of his ability in order to shew that the omission was without lawful excuse.

Evidence is admissible, as tending to shew a lawful excuse, of an agreement between husband and wife at time of marriage that she should be supported as before the marriage and not by him until he could earn sufficient means for the maintenance of both. Such evidence is admissible although the contract alone may not furnish an answer to the charge. R. v. Robinson (1897), 1 Can. Cr. Cas. 28 (Ont.).

The prisoner may have become possessed of ample means since his marriage, and the offence being a public one cannot be met by a mere agreement between the husband and wife. Ibid, per Street, J.

A present inability to support his wife may be proved by the accused by way of defence. Ibid.

The defendant may be convicted notwithstanding that his wife has in consequence of the neglect to supply her with necessaries left him, taking with her a small sum of money belonging to him. R. v. Pennock (1898), 18 C.L.T. 79.

Where the complainant in a charge of non-support of wife had been previously married, but had always lived apart from her first husband, and swore to having heard two years before the second marriage that her husband was dying in a foreign country, and that about a year after her second marriage she again heard that her husband was dead, such was held to be evidence to go to the jury to prove that her first husband had died before her marriage to the defendant. R. v. Holmes (1898), 2 Can. Cr. Cas. 131.

In R. v. Bissell (1883), 1 O.R. 514, previous to the Canada Evidence Act, 1893, it was held that the evidence of a wife is inadmissible in the prosecution of her husband for refusal to support her under 32-33 Vict., ch. 20, sec. 25. Under sec. 4 of the Canada Evidence Act the wife of the person charged with any offence under the Code is a competent witness, with the exception that she is incompetent as to the disclosure of any communication made to her by her husband during their marriage.

211. Duty of masters to provide necessaries.—Every one, who as master or mistress, has contracted to provide necessary food, clothing or lodging for any servant or apprentice under the age of sixteen years, is under a legal duty to provide the same, and is criminally responsible for omitting without lawful excuse to perform such duty, if the death of such servant or apprentice is caused, or if his life is endangered, or his health has been or is likely to be permanently injured, by such omission.

Master and servant.]—This and the preceding section originated in 32-33 Vict. (Can.), ch. 20, sec. 25, adapted from the Imperial Statute 24 & 25 Vict., ch. 100, s. 26. Under 32-33 Vict., the gist of the offence was the wilfully and without lawful excuse refusing or neglecting to provide. R. v. Nasmith (1877), 42 U.C.Q.B. 242. The words of the Code constitute the mere omission an offence, if without lawful excuse.

This section does not impose a criminal responsibility upon the master to provide the servant with medical attendance or medicine, and, semble, per Rouleau, J., medical aid is not within the term "necessaries" under Cr. Code 210. R. v. Coventry (1898), 3 Can. Cr. Cases 541.

The court should not, without expert evidence upon the effect of the loss of a child's toes resulting from exposure to cold, and their consequent amputation, infer that the child's health had thereby been or was likely to be "permanently injured," or that his life has thereby been endangered. Ibid.

An indictment did not lie against a master at common law for not providing sufficient food and sustenance for a servant, whereby the servant became sick and emaciated, unless it alleged that the servant was of tender years and under the dominion and control of the master. R. v. Friend, Russ. & Ry. 20; R. v. Ridley, 2 Camp. 650. The reason of the restriction is, that if the servant be not of tender years, he may if not provided with proper nourishment remonstrate, and, if necessary, leave the service. R. v. Nasmith (1877), 42 U.C.Q.B. 242, 245. The present section does not appear to have changed the law in that respect except in fixing the age limit at sixteen.

Without lawful excuse.]—On a charge against a master for neglecting to supply food to his apprentice it must be shewn that the master was in the actual possession of means to provide for him. R. v. Saunders, 7 C. & P. 277; R. v. Edwards, 8 C. & P. 611; R. v. Chandler, Dears. 453, 6 Cox, C.C. 519. The mere fact that he might have obtained such means by application to a relief officer is not sufficient. R. v. Chandler, Dears, 453; R. v. Rugg, 12 Cox C.C. 16.

Proof of age.]—See note to last preceding section.

212. Duty of persons doing dangerous acts.—Every one who undertakes (except in case of necessity) to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and to use reasonable knowledge, skill and care in doing any such act, and is criminally responsible for omitting, without lawful excuse, to discharge that duty if death is caused by such omission.

Surgical or medical treatment.]—A medical man must, at his peril, use proper skill and caution in administering a poisonous drug. R. v. Macleod, 12 Cox C.C. 534.

If a party having a competent degree of skill and knowledge, whether a licensed physician or not, makes an accidental mistake in his treatment of a patient and the patient's death results from the mistake, such party is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter. R. v. Webb, 2 Lewin 196, 1 M. & Rob, 405.

It may be left to the jury to say first, whether death was occasioned or accelerated by the medicines administered, and if they find that it was, then the jury may be instructed that the prisoner is guilty of manslaughter if they think that in so administering the medicine he acted with a criminal intention or from very gross negligence. Ibid; R. v. Chamberlain, 10 Cox C.C. 486.

Evidence cannot be gone into, on either side, of former cases treated by the prisoner, but the opinion of experts may be given as to the treatment which the evidence shews was administered in the case in question. R. v. Whitehead, 3 C. & K. 202; Archbold Cr. Plead. (1900), 755.

On an indictment against a medical man for manslaughter by administering poison by mistake for some other drug, it is not sufficient for the prosecution to shew merely that the prisoner, who dispensed his own drugs, supplied a mixture which contained a large quantity of poison; the prosecution must also shew that this happened through the gross negligence of the prisoner. R. v. Spencer, 10 Cox C.C. 525.

A woman practising "Christian science" and not called in as a medical attendant was held not guilty of manslaughter where the only treatment by her was to sit silently by the patient, a child ill of diphtheria, although the child's health might have been saved or prolonged had proper medical aid been called in. R. v. Beer, 32 C.L.J. 416. But the aiding and abetting the person charged with the duty of providing necessaries is punishable in like manner as the principal offence. Secs. 61, 209, 210. R. v. Brooks (1902), 22 Can. L.T. 105 (B.C.).

213. Duty of persons in charge of dangerous things.—Every one who has in his charge or under his control anything whatever, whether animate or inanimate or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

Criminal liability of corporation.]—A corporation is not subject to indictment upon a charge of any crime the essence of which is either personal criminal intent or such a degree of negligence as amounts to a wilful incurring of the risk of causing injury to others. R. v. Great West Laundry Co. (1900), 3 Can. Cr. Cas. 514 (Man.).

Secs. 213 and 220, as to want of care in the maintenance of dangerous things, do not extend the criminal responsibility of corporations beyond what it was at common law. Ibid.

Although a corporation cannot be guilty of manslaughter, it may be indicted, under Cr. Code sec. 252, for having caused grievous bodily injury by omitting to maintain in a safe condition a bridge or structure which it was its duty to so maintain, and this notwithstanding that death ensued at once to the person sustaining the grievous bodily injury. R. v. Union Colliery Co. (1900), 3 Can. Cr. Cas. 523 (B.C.) affirmed, 4 Can. Cr. Cas. 400, 31 Can. S.C.R. 81.

Under sec. 213 a corporation may be indicted for omitting, without lawful excuse, to perform the duty of avoiding danger to human life from anything in its charge or under its control. The fact that the consequence of the omission to perform such duty might have justified an indictment for manslaughter in the case of an individual is not a ground for quashing the indictment. Union Colliery Co. v. R. (1900), 4 Can. Cr. Cas. 400 (S.C. Can.).

As the Criminal Code provides no punishment for the offence as against a corporation, the common law punishment of a fine may be imposed on a corporation indicted under it. Ibid.

Where deceased was run over by a railroad car and died from his injuries a few hours afterwards, the statement of the deceased, made immediately after he was run over in answer to a question as to how it happened, was held admissible. Armstrong v. Canada Atlantic (1901), 2 O.L.R. 219; Thompson v. Trevanion (1693), Skin. 402; Aveson v. Kinnaird (1805), 6 East 188, at p. 193; Rex v. Foster (1834), 6 C. & P. 325.

Evidence.]—See note to sec. 191.

214. Duty to avoid omissions dangerous to life.—Every one who undertakes to do any act, the omission to do which is or may be dangerous to life, is under a legal duty to do that act, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform that duty.

Negligent omission by medical practitioner.]—A person acting as a medical man is not criminally responsible for the death of a patient occasioned by his treatment, unless his conduct is characterized either by gross ignorance of his art, or by gross inattention to his patient's safety. R. v. St. John Long, 4 C. & P. 398; Hunter v. Ogden, 31 Q.B. 132.

Dangerous medical treatment.]—See sec. 212.

Bodily injury.]—By sec. 252 every one is guilty of an indictable offence and liable to two years' imprisonment who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person.

(*Amendment of 1893*).

215. Neglecting duty to provide necessaries.—Every one is guilty of an indictable offence and liable to three years' imprisonment who, being bound to perform any duty specified in sections two hundred and nine, two hundred and ten and two hundred and eleven without lawful excuse neglects or refuses to do so, unless the offence amounts to culpable homicide.

Form of indictment.]—An indictment under the former law 32-33 Vict., ch. 20, sec. 25, was held sufficient where it was in the following form:—"for that he (the defendant) on the (date) at the city of Montreal, then being the husband of one B.D., his wife, and then being legally liable to provide for the said B.D. as his wife as aforesaid necessary food and clothing and lodging, unlawfully, wilfully and without lawful excuse did neglect and refuse to provide the same against the form, etc." R. v. Smith (1879), Ramsay's Cases (Que.) 190. The indictment in that case was held to be sufficient as being in the words of the statute, without an allegation of capacity of providing and without alleging that the neglect or refusal was of a nature to endanger her life or to permanently injure her health. Ibid.

See also notes to secs. 209, 211, ante.

216.—Abandoning children under two years of age.—Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully abandons or exposes any child under the age of two years, whereby its life is endangered, or its health is permanently injured.

2. The words "abandon" and "expose" include a wilful omission to take charge of the child on the part of a person legally bound to do so, and any mode of dealing with it calculated to leave it exposed to risk without protection. R.S.C. ch. 162, sec. 20.

Evidence.]—A woman who was living apart from her husband, and who had the actual custody of their child under two years of age brought the child to the door of the father's house telling him she had done so. He knowingly allowed it to remain lying outside his door for four hours in the night time and it was then removed by a constable. It was held that, although the father had not the actual custody and possession of the child, yet as he was bound by law to provide for it, his allowing it to remain where he did was an abandonment and exposure of the child by him whereby its life was endangered. R. v. White (1871), L.R. 1 C.C.R. 311, 40 L.J. M.C. 134.

And where the mother of a bastard child five weeks old put the child in a hamper and shipped the hamper as a goods parcel by railway a distance of four miles to the child's putative father who had told her, prior to the

child's birth, that if she sent it to him he would keep it, and the hamper was addressed for immediate delivery and was in fact delivered within an hour and a quarter from the time the mother left it, and the child died three weeks afterwards from causes not attributable to such conduct of the mother, yet it was held that she was properly convicted of abandoning and exposing the child whereby its life was endangered. R. v. Falkingham (1870), L.R. 1 C.C.R. 222, 39 L.J.M.C. 47.

Proof of age.]—See note to sec. 210.

217. Causing bodily harm to apprentices or servants.—Every one is guilty of an indictable offence and liable to three years' imprisonment who, being legally liable as master or mistress to provide for any apprentice or servant, unlawfully does, or causes to be done, any bodily harm to any such apprentice or servant so that the life of such apprentice or servant is endangered or the health of such apprentice or servant has been, or is likely to be, permanently injured. R.S.C. ch. 62, sec. 19.

A verdict for common assault is maintainable upon an indictment under this section. R. v. Bissonnette (1879), Ramsay's Cases (Que.) 190.

Neglect to supply necessary food, etc.]—See sec. 211.

PART XVII.

HOMICIDE.

SECT.

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218. Homicide Defined.—Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever.

Homicide, excusable or justifiable.]—Homicide, when not amounting to murder or manslaughter, is divided by Russell into two classes:—(1) Excusable; (2) Justifiable. 3 Russell Cr., 6th ed., 205.

Sec. 220, infra, divides the subject of homicide into:—(1) culpable homicide, which is sub-divided into two classes: (a) murder, (b) manslaughter; (2) homicide not culpable. The same section defines what is "culpable" homicide, and declares that homicide which is not culpable is not an offence. Excusable homicide is said to be of two sorts: Either per infortunium, by misadventure; or se et sua defendendo, upon a principle of self-defence.

The term excusable homicide imports some fault in the party by whom it has been committed; but of a nature so trivial that the law excuses such homicide from the guilt of felony, though in strictness it deems it to be deserving of some degree of punishment. It appears to be the better opinion that the punishment inflicted for this offence was never greater than a forfeiture of the goods and chattels of the delinquent or a portion of them. 3 Russell Cr., 6th ed., 205, 4 Bl. Com. 188. Then the practice arose of granting a pardon and writ of restitution as a matter of right in such cases upon payment of the expenses of suing them out; and to prevent this expense it became usual for judges to permit or direct a general verdict of acquittal where the death had notoriously happened by misadventure or in self defence. 4 Bl. Com. 188, 1 East P.C., ch. 5, sec. 8, Fost. 288.

By sec. 6 of the Offences against the Person Act, R.S.C. (1886), ch. 162 (repealed by the Code), it was provided that "no punishment or forfeiture shall be incurred by any person who kills another by misfortune or in his own defence, or in any other manner without felony." This was taken from 32-33 Vict. (Can.), ch. 20, sec. 7, a re-enactment of sec. 7 of the Imperial statute, 24-25 Vict., ch. 100. It was probably thought unnecessary to repeat that enactment in the Code, as sub-sec. (3) of sec. 220 declares that "homicide which is not culpable is not an offence."

Homicide by misadventure.]—Homicide by misadventure is where one doing a lawful act, without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately happens to kill another person. 1 East P.C. 5, p. 221, and sec. 36, pp. 260, 261, Fost. 258, 1 Hawk. P.C., ch. 29, sec. 1. The act must be lawful; for if it be unlawful, the homicide will amount to murder or manslaughter, and it must not be done with intention of great bodily harm, for then the legality of the act, considered abstractedly, would be no more than a mere cloak or pretence, and consequently would avail nothing. The act must also be done in a proper manner and with due caution to prevent danger. 1 East P.C., ch. 5, sec. 36, p. 261, 3 Russell 206.

Thus, if people following their common occupations, use due caution to prevent danger, and nevertheless happen, unfortunately to kill any one, such killing will be homicide by misadventure. 1 Hale 472, 475, 1 Hawk. P.C. ch. 629, secs. 2 and 4. Thus, where a person, driving a cart or other carriage, happens to drive over another and kill him, 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. Fost 263, 1 Hale 476. In a case where a person was riding a horse, and the horse, being whipped by some other person, sprang out of the road, and ran over a child and killed it, this was held to be misadventure only in the rider, though manslaughter in the person who whipped the horse. 1 Hawk. P.C., ch. 29, sec. 3.

Where parents, masters, and other persons having authority in foro domestico, give correction to those under their care, and such correction exceeds the bounds of due moderation, so that death ensues, the offence will be either murder or manslaughter, according to the circumstances; but if the correction be reasonable and moderate, and by the struggling of the party corrected, or by some other misfortune, death ensue, the killing will be only misadventure. 1 Hale 454, 473, 474, 4 Blac. Com. 182.

Homicide in self-defence.]—If the slayer has not begun to fight, or, having begun, endeavors to decline any further struggle and afterwards being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. 4 Bl. Com. 184.

If one comes to beat another or to take his goods as a trespasser, though the owner may justify a battery for the purpose of making him desist, yet if he kill him it will be manslaughter. 1 Hale P.C. 485, 1 East P.C. 272, 277; R. v. Bourne (1831), 5 C. & P. 120.

It is not essential that an actual felony should be about to be committed in order to justify the killing; if the circumstances are such as that after all reasonable caution the party suspects that the felony is about to be immediately committed, he will be justified in making the resistance. R. v. Levet, Cro. Cas. 538, Foster 299; See also secs. 45, 46 and 47.

219. When a child becomes a human being.—A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether it has breathed or not, whether it has an independent circulation or not, and whether the navel string is severed or not. The killing of such a child is homicide when it dies in consequence of injuries received before, during or after birth.

Killing unborn child.]—A living child in its mother's womb or a child in the act of birth, even though such child may have breathed, is not a

"human being," and the killing of such child before it is born is not homicide. R. v. Enoch, 5 C. & P. 539; R. v. Wright, 9 C. & P. 754; R. v. Sellis, 7 C. & P. 850; Burb. Cr. Dig. 209.

But by sec. 271 every one is guilty of an indictable offence and liable to imprisonment for life who causes the death of any child which has not become a human being, in such a manner that he would have been guilty of murder if such child had been born. And by sub-sec. (2) of the same section no one is guilty of any offence who by means which he in good faith considers necessary for the preservation of the life of the mother of the child causes the death of any such child before or during its birth.

220. Culpable homicide.—Homicide may be either culpable or not culpable. Homicide is culpable when it consists in the killing of any person, either by an unlawful act or by an omission, without lawful excuse, to perform or observe any legal duty, or by both combined, or by causing a person, by threats or fear of violence, or by deception, to do an act which causes that person's death, or by wilfully frightening a child or sick person.

2. Culpable homicide is either murder or manslaughter.

3. Homicide which is not culpable is not an offence.

Code secs. 213 and 220 do not extend the criminal responsibility of corporations beyond what it was at common law. R. v. Great West Laundry Co. (1900), 3 Can. Cr. Cas. 514 (Man.).

221. Procuring death by false evidence.—Procuring by false evidence the conviction and death of any person by the sentence of the law shall not be deemed to be homicide.

Perjury or subornation of perjury committed in order to procure the conviction of a person for any crime punishable by death is a crime punishable with imprisonment for life. Sec. 146 (2).

222. Death must be within a year and a day.—No one is criminally responsible for the killing of another unless the death take place within a year and a day of the cause of death. The period of a year and a day shall be reckoned inclusive of the day on which the last unlawful act contributing to the cause of death took place. Where the cause of death is an omission to fulfil a legal duty the period shall be reckoned inclusive of the day on which such omission ceased. Where death is in part caused by an unlawful act and in part by an omission, the period shall be reckoned inclusive of the day on which the last unlawful act took place or the omission ceased, whichever happened last.

If the death takes place after the expiration of a year and a day from the time the deceased was wounded, the law presumes that his death had proceeded from some other cause. 1 Hawk., ch. 23, sec. 90; 1 East P.C. 343.

The prisoner was convicted of manslaughter in killing his wife, who died on November 10, 1881. The immediate cause of her death was acute inflammation of the liver, which the medical testimony proved might be occasioned by a blow or a fall against a hard substance. About three weeks before her death the prisoner had knocked his wife down with a bottle; she fell against a door and remained on the floor insensible for some time; she was confined to her bed soon afterwards and never recovered. Evidence was given of frequent acts of violence committed by the prisoner upon his wife within a year of her death, by knocking her down and kicking her in the side. On questions reserved, whether the evidence was properly received of assaults and violence committed by the prisoner upon the deceased prior to the date of death or prior to the occasion on which he had knocked her down with the bottle, and whether there was any evidence to leave to the jury to sustain the charge, it was held by the Supreme Court of Canada, affirming the judgment of the Supreme Court of New Brunswick, that the evidence was properly received and that there was evidence to submit to the jury that the disease which caused her death was produced by the injuries inflicted by the prisoner. Theal v. The Queen, 7 Can. S.C.R. 397.

223. Killing by influence on the mind.—No one is criminally responsible for the killing of another by any influence on the mind alone, nor for the killing of another by any disorder or disease arising from such influence, save in either case by wilfully frightening a child or sick person.

To wilfully frighten a child or sick person as a result of which such child or sick person dies is culpable homicide. Sec. 220.

224. Acceleration of death.—Every one who, by an act or omission, causes the death of another kills that person, although the effect of the bodily injury caused to such other person be merely to accelerate his death while labouring under some disorder or disease arising from some other cause.

A., a practising physician who kept a hospital for the sick, on three successive days forced the person of B. a patient then under his control in such hospital, she being in a condition of health that rendered sexual intercourse dangerous even with her consent. B. died on the sixth day after the last occasion on which she had been ravished and her death was hastened if not caused thereby. It was held that there was sufficient evidence to justify A.'s surrender under the Ashburton treaty for extradition on a charge of murder. Re Weir, 14 Ont. R. 389.

A. inflicts bodily injury on B. who at the time is so ill that she could not possibly have lived more than six weeks if she had not been struck. In consequence B. dies earlier than she otherwise would. A. is guilty of culpable homicide. R. v. Fletcher, 1 Russ. Cr. 703.

225. Causing death which might have been prevented.—Every one who, by any act or omission, causes the death of another kills that person, although death from that cause might have been prevented by resorting to proper means.

226. Causing injury the treatment of which causes death.—Every one who causes a bodily injury, which is of itself of a dangerous nature to any person, from which death results kills that person, although the immediate cause of death be treatment proper or improper applied in good faith.

Bodily injury resulting in death.]– In R. v. Holland, 2 Moo. and Rob. 351, A. had assaulted B. and injured B.'s finger. B. was advised by a surgeon to allow it to be amputated but refused to do so, and lockjaw resulted causing B.'s death. It was held that these facts constituted culpable homicide. But quære whether this would be so under this section, as it could hardly be said that an injury to the finger was "of itself of a dangerous nature," i.e., dangerous to life. Cf. R. v. Coventry (1898), 3 Can. Cr. Cas. 541.

Where in a duel a wound is given which in the judgment of competent medical advisers is dangerous, and the treatment which they bona fide adopt is the immediate cause of death, the party who inflicted the wound is guilty of culpable homicide. R. v. Pym, 1 Cox C.C. 339.

PART XVIII.

MURDER, MANSLAUGHTER, ETC.

SECT.

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227. What is murder.—Culpable homicide is murder in each of the following cases:

(*a.*) If the offender means to cause the death of the person killed;

(*b.*) If the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and is reckless whether death ensues or not;

(*c.*) If the offender means to cause death or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed;

(*d.*) If the offender, for any unlawful object, does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

Murder at common law.]—The common law definition of murder is—the killing any person under the King's peace, with malice prepense or aforethought, either express or implied by law. 3 Inst. 47, 51; 1 Hawk. P.C. c. 31, s. 3; Fost. 256.

Malice may be either (1) express, or (2) 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. 1 Hale 451.

Malice is implied by law from any deliberate cruel act committed by one person against another, however sudden, 1 East P.C. 215; 3 Russell Crim. (1896) 2. And it is a general rule that all homicide is presumed to be malicious until the contrary appears from circumstances of alleviation, excuse or justification. R. v. Greenacre (1837), 8 C. & P. 35.

And where one is killed in consequence of such wilful act as shews the person by whom it is committed to be an enemy of all mankind, the law will infer a general malice from such depraved inclination to mischief. 1 Hale 474. If a person driving a cart or other carriage happen to kill and it appear that he saw or had timely notice of the mischief likely to ensue and yet drove on, it will be murder. 1 Hale 475; Fost. 263.

Where several persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, they must, when they engage in such bold disturbances of the public peace, at their peril abide the event of their actions; and therefore if in doing any of these acts they happen to kill a man they are all guilty of murder. 1 Hawk. P.C. c. 31, s. 51. But, in order to make the killing by any, murder in all those who are confederated together for an unlawful purpose merely on account of the unlawful act done or in contemplation, it must happen during the actual strife or endeavour or at least within such a reasonable time afterwards as may leave it probable that no fresh provocation intervened. 3 Russ. Cr., 6th ed. 125. The fact must appear to have been committed strictly in prosecution of the purpose for which the party was assembled, and therefore if divers persons be engaged in an unlawful act, and one of them with malice prepense against one of his companions, finding an opportunity, kill him, the rest are not concerned in the guilt of that act, because it had no connection with the crime in contemplation. 1 Hawk. P.C. c. 31, s. 52; Jackson's Case, 9 St. Tr. (Harg.) 715.

Provocation reducing offence to manslaughter.]—See sec. 229 and note to same.

Corpus delicti.]—Corpus delicti in murder, is defined, as having two components, death as the result and the criminal agency of another as the means, and it is only where there is direct proof of one that the other can be established by circumstantial evidence. This ruling is an affirmance of the holding of Lord Hale (2 P.C. 290) that a conviction of murder or manslaughter cannot be had unless the fact be proved to be done or at least the body found dead. Where one is proven by direct evidence the other may be by circumstances, and in determining a question of fact upon a criminal trial from circumstantial evidence, the facts proved must not only be consistent with and point to the guilt of the prisoner, but must be inconsistent with his innocence.

Finding the body.]—It has been considered a rule that no person should be convicted of murder unless the body of the deceased has been found, and a very great judge says, "I would never convict any person of murder or manslaughter unless the fact were proved to be done, or at least the body be found dead." 2 Hale 290. Lord Hale only laid this down as a caution, not as a rule in every case. Per Maule, J., in R. v. Burton (1854), Dears.

C.C. 282. But this rule, it seems, must be taken with some qualifications; and circumstances may be sufficiently strong to shew the fact of the murder, though the body has never been found. 3 Russell Cr., 6th ed., 158. Thus, where the prisoner, a mariner, was indicted for the murder of his captain at sea, and a witness stated that the prisoner had proposed to kill the captain, and that the witness being afterwards alarmed in the night by a violent noise, went upon deck, and there observed the prisoner take the captain up and throw him overboard into the sea, and that he was not seen or heard of afterwards, and that near the place on the deck where the captain was seen a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood, the court, though they admitted the general rule of law, left it to the jury to say, upon the evidence, whether the deceased was not killed before his body was cast into the sea; and the jury being of that opinion, the prisoner was convicted, and the conviction being unanimously approved of by the judges, was afterwards executed. R. v. Hindmarsh (1792), 2 Leach 569.

And where the mate of a ship was seen to seize the captain from behind and throw him into the sea, and the captain fell, striking a boat, and leaving marks of blood upon it, but was never seen again, Archibald, J., allowed the case to go to the jury, and the prisoner was convicted of manslaughter. R. v. Armstrong (1875), 13 Cox C.C. 184.

But where upon an indictment against the prisoner for the murder of her bastard child, it appears that she was seen with the child in her arms on the road from the place where she had been at service to the place where her father lived about six in the evening, and between eight and nine she arrived at her father's without the child, and the body of a child was found in a tide-river, near which she must have passed in her road to her father's, but the body could not be identified as that of the child of the prisoner, and the evidence rather tended to shew that it was not the body of such child, it was held that she was entitled to be acquitted. The evidence rendered it probable that the child found was not the child of the prisoner, and with respect to the child, which was really her child, the prisoner could not by law be called upon either to account for it, or to say where it was, unless there were evidence to shew that her child was actually dead. R. v. Hopkins (1838), 8 C. & P. 591, Lord Abinger, C.B.; R. v. Cheverton (1862), 2 F. & F. 833, Erle, C.J.

Post-mortem examination.]—The medical practitioner should examine all the important organs for marks of natural disease and note down any unusual pathological appearances or abnormal deviations although they may at the time appear to have no bearing on the cause of death.

Mr. Clark Bell, in his 12th Amer. edition of Taylor's Medical Jurisprudence, 1897, page 23, says: "In medico-legal cases involving questions of life and death, the examination of the body cannot be too thorough and exhaustive; the omission of any one organ is a radical and sometimes a fatal defect. This was well illustrated in 1872 by two leading cases in the United States—that of Mrs. E. G. Wharton, charged with poisoning General Ketchum, and that of Dr. Paul Schoeppe, charged with poisoning Miss Steinnecke. In neither case was the post mortem sufficiently complete."

The body is inspected not merely to shew that a person has died as a result of the criminal act, but to prove that he has *not* died from any natural cause. Medical practitioners commonly give their attention exclusively to the first point, while lawyers, defending accused parties, very properly direct a most searching examination to the last mentioned point, i.e., the healthy or unhealthy state of those organs which are essential to life. If the cause of death is obscure after the general examination of the body, there is good reason for inspecting the condition of the spinal marrow. In certain obscure cases it may become necessary to institute a microscopic examination, especially of the brain and heart. Taylor's Medical Jurisprudence, 1897, 12th Am. Ed. 23.

In a trial for murder by committing an abortion resulting in the woman's death, it appeared that the post mortem examination was insufficient, and that, so far as the medical evidence was concerned, it was possible that death might have been occasioned by some undiscovered disease which a post mortem examination of other organs than those examined might have disclosed, and none of the medical men would swear positively to the cause of death; but there was other evidence tending to shew that death was caused by a criminal operation, and connecting the prisoners therewith. It was held, that such last mentioned evidence was properly submitted to the jury. R. v. Garrow (1896), 1 Can. Cr. Cas. 246 (B.C.).

Proving cause of death.]—A question has sometimes been raised whether a prisoner can be convicted of murder where it is impossible for any evidence to be given of the cause of death, in consequence of the state in which the body was found, but it would seem that it is a question for the jury, taking all the circumstances into consideration, whether the death was caused by violence or not, and whether that violence was the act of the prisoner. Per Kennedy, J. R. v. Macrae, Northampton Winter Assizes, 1892, cited 3 Russ. Cr., 6th ed., 160.

On a trial for murder, in order to prove the state of the health of the deceased prior to the day of his death, a witness was asked in what state of health the deceased seemed to be when he last saw him, and he began to state a conversation which had then taken place between the deceased and himself on this subject; and Alderson, B., held that what the deceased said to the witness was reasonable evidence to prove his state of health at the time. R. v. Johnson (1847), 2 C. & K. 354.

Dying declaration as evidence.]—The principle upon which dying declarations are admitted as evidence is stated by Eyre, C.B., in the case of R. v. Woodcock, 1 Leach, C.C., 502, as follows:

"The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful consideration to speak the truth; a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

A dying declaration is only admissible in criminal cases, and then only in cases of murder or manslaughter, and only where the death is the subject of the charge, and the circumstances of the death the subject of the declaration. R. v. Mead, 2 B. & C. 605. But the dying declaration of a person was admitted in a case in which the prisoner was being tried, not for murdering the declarant, but another person, by the administration of poison, but in the perpetration of that act he had also inadvertently poisoned the declarant. In that case the court held that the same act caused the death of one as the other, and that, it being all one transaction, the evidence was admissible. R. v. Baker, 2 M. & Rob. 53.

Where the deceased person stated at the time of being wounded that he could not live much longer and that he was bound to die, such was held sufficient evidence of a belief of impending death so as to make his dying declaration admissible testimony. State v. Ashworth (1898), 23 Sou. Rep. 270.

The fact of a person having received extreme unction according to the rites of the Roman Catholic Church is some evidence that she thought herself to be in a dying state. Carver v. U.S., 1897, 17 S.C.R. (U.S.), 228; Minton's case, cited in R. v. Howell, 1 Denison Crown Cases 1; and so also is the rejection by a dying man belonging to the Roman Catholic faith, of an offer to bring him a priest, some evidence to shew that he did not think himself in articulo mortis. R. v. Howell, supra.

Such declarations being necessarily ex parte, the prisoner is entitled to the benefit of any advantage he may have lost by the want of an oppor-

tunity for cross-examination. R. v. Ashton, 2 Lewin Crown Cas. 147. So it has recently been held by the Supreme Court of the United States that it is error to refuse to permit the defendant to prove by witnesses that the deceased made statements to them in apparent contradiction of her dying declaration, and tending to shew that defendant did not shoot her intentionally. Whether these statements were admissible as dying declarations or not is immaterial, since they were admissible as tending to impeach the declaration of the deceased, which had already been admitted. Carver v. U.S., 1897, 17 Sup. Ct. Rep. 228. A dying declaration by no means imports absolute verity. The history of criminal trials is replete with instances where witnesses, even in the agonies of death, have, through malice, misapprehension, or weakness of mind, made declarations that were inconsistent with the actual facts; and it would be a great hardship to the defendant, who is deprived of the benefit of a cross-examination, to hold that he could not explain them. Dying declarations are a marked exception to the general rule that hearsay testimony is not admissible, and are received from the necessities of the case, and to prevent an entire failure of justice, as it frequently happens that no other witnesses to the homicide are present. They may, however, be inadmissible by reason of the extreme youth of the declarant (R. v. Pike, 3 Car. & P. 598), or by reason of any other fact which would make him incompetent as an ordinary witness. They are only received when the court is satisfied that the witness was fully aware of the fact that his recovery was impossible, and in this particular the requirement of the law is very stringent. They may be contradicted in the same manner as other testimony, and may be discredited by proof that the character of the deceased was bad, or that he did not believe in a future state of reward or punishment. Carver v. U.S., supra; State v. Elliott, 45 Iowa, 486; Com. v. Cooper, 5 Allen, 495; Goodall v. State, 1 Or. 333; Tracy v. People, 97 Ill. 101; Hill v. State, 64 Miss. 431.

A dying declaration of the deceased that he was shot in the body and was "going fast," indicates a settled and hopeless consciousness that he was in a dying state and his declaration is admissible in evidence. R. v. Davidson (1898) 1 Can. Cr. Cas. 351 (N.S.).

In deciding the preliminary question as to whether the deceased was under a sense of impending death, so as to allow evidence of his dying declaration to be admitted, the trial judge must have regard to the whole of the surrounding circumstances including the nature and extent of the gun charge and the immediate result of the wound. Ibid.

A dying declaration is not admissible if there existed in the mind of the party making it a hope of recovery or a hope of escape from almost immediate death; but if there is a firm, settled expectation by deceased of impending death and no hope of recovery remaining in his mind, the declaration is admissible, although such belief was the result of panic and not well founded. The fact, that a person making a dying declaration subsequently entertains a hope of recovery, is irrelevant, except in so far as it may be evidence of his state of mind at the time of the declaration. R. v. Davidson (1898), 1 Can. Cr. Cas. 351 (N.S.); R. v. Hubbard, 14 Cox 565.

The rule as to the admissibility of dying declarations in evidence is thus stated in Taylor on Evidence, 6th ed., vol 1, p. 643: "It is not, however, necessary that the declarant should have *stated* that he was *speaking under a sense of impending death*, providing it satisfactorily appears, in any mode, that the declarations were really made under that sanction; as, for instance, if the fact can be reasonably inferred from the evident danger of the declarant, or from the opinions of the medical or other attendants stated to him, or from his conduct, such as settling his affairs, taking leave of his relations and friends, giving directions respecting his funeral, receiving extreme unction or the like. In short, all the circumstances of the case may be resorted to, in order to ascertain the state of the declarant's mind.

. . . . On the other hand, a firm belief that death is impending—by which is meant, not as was once thought, that it will almost immediately follow, but that it will happen shortly in consequence of the injury sustained—will suffice to render the statement evidence, though the sufferer may chance to linger on for some days, or even for two or three weeks. . . . In general, it is no objection to their admissibility that they "(the answers) were made in answer to leading questions, or obtained by earnest solicitations." Cited by Hagarty, C.J., in R. v. Smith (1873), 23 U.C.C.P. 312.

It is essential to the *admissibility* of these declarations, and it is a preliminary fact to be proved by the party offering them in evidence, that they were *made under a sense of impending death*; but it is not necessary that they should be stated at the time to be so made; it is enough if it satisfactorily appears, in any mode, that they were made under that sanction, whether it be expressly proved by the express language of the declarant, or be inferred from his evident danger, or the opinion of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case; all of which are resorted to in order to ascertain the state of the declarant's mind. Greenleaf on Evidence, 12th ed., vol. 1, p. 183, sec. 158. R. v. Smith (1873), 23 U.C.C.P. 312.

The court must be satisfied that whatever statement is admitted in evidence must be shewn by credible testimony to have been made in full belief of approaching death, with an abandonment of all hope of life. R. v. Sparham (1875), 25 U.C.C.P. 143, 154.

Prisoners G. and S. were indicted with the murder of B., the charge being that, the deceased being with child by the prisoner G., the prisoner S. had, at the request of G., attempted by the use of an instrument, to procure abortion, and had thereby caused the death of deceased. It was admitted that there was not sufficient evidence to connect the prisoners, or either of them, with the acts which caused the death of the deceased, unless it was the dying declaration of the deceased. Two declarations were made by the deceased, one upon the Thursday, the 24th, before her death on the 28th, and the other upon the Saturday, the 26th, of the same week. The statement made on the 24th commenced: "I am very ill; I have no hope whatever of recovery; I expect to die. She then narrated the facts, and then added: "If I die in this sickness, I believe it will have been caused by the operation performed on me by S. at the instigation of G. I make these statements in all truth, with the fear of God before my eyes, for I firmly believe that I am dying." On the 26th she was again examined, and the previous statement read over to her; she confirmed its truth in every respect, and added that she felt she was in the presence of God, and had no hope of recovery of any kind at the time; and, her attention being called to the expression "If I die," she said, "I had no doubt whatever that I was dying, and felt that I was dying, and did not by the form of the expression mean to doubt in any way that I was dying." It was held that both statements were admissible; that the mere use of the words, "If I die" would not alone defeat the emphatic declaration of abandonment of all hope on the same occasion; and that the second declaration was receivable in order to explain the first. R. v. Sparham (1875), 25 U.C.C.P. 143.

An objection that part of the statement was made in answer to a leading question is not sustainable. R. v. Smith (1873), 23 U.C.C.P. 312.

Proof of Motive.]—In every charge of murder where the act of killing is proved against the prisoner "the law presumeth the fact to have been founded in malice until the contrary appeareth." (Foster's Crown Law 255). At common law mere words or provoking actions or gestures expressing contempt or reproach, unaccompanied with an assault upon the person, did not reduce the killing from murder to manslaughter, though if immediately upon such provocation the party provoked had given the other a box on the ear, or had struck him with a stick, or other weapon *not likely to kill*, and had

unfortunately and contrary to his expectation killed him, it would only be manslaughter. R. v. McDowell (1865), 25 U.C.Q.B. 108; but see sec. 229 and note thereto.

To prove the alleged motive of securing life insurance moneys, in a trial for murder, evidence is properly admissible, as a part of the res gestæ of all applications for insurance made practically at the same time and forming parts of one transaction, although some of the applications were refused and no insurance effected thereupon. R. v. Hammond (1898), 1 Can. Cr. Cas. 373 (Ont.). But evidence of an attempt made some time previously by the accused to insure another person for the benefit of the accused is not admissible. R. v. Hendershott (1895), 26 Ont. R. 678.

All questions as to motive, intent, heat of blood, etc., must be left to the jury, and should not be dealt with as propositions of law. R. v. McDowell (1865), 25 U.C.Q.B. 108; R. v. Eagle, 2 F. & F. 827.

A trial would not appear to be fair if the prisoner, when defending himself for murder, is also called on for a contingent defence against charges for several alleged assaults in the course of several weeks, some of which may be open to contradiction, others to justification and others to mitigation. Per Erle, J., in R. v. Bird (1851), 5 Cox 1, 2 Den. Cr. Cas. 94; R. v. Ganes (1872), 22 U.C.C.P. 185-189.

In the case of a sudden quarrel, where the parties immediately fight, there may be circumstances indicating malice in the party killing, which killing will then be murder. R. v. McDowell (1865), 25 U.C.Q.B. 108.

Flight as evidence.]—The flight of the accused is competent evidence against him as having a tendency to establish his guilt. Wharton on Homicide, sec. 710; Hickory v. United States. 160 U.S. 408.

Relevancy of other criminal acts.]—In the case of Makin v. New South Wales (1894), A.C. 57, the prisoners had been convicted of the wilful murder of an infant child received from its mother by the prisoners for adoption and whose body had been found buried in the garden of a house occupied by him, and it was held by the Judicial Committee of the Privy Council that evidence that several other infants had been received from their mothers by the prisoners on like representations and on like terms, and that bodies of infants had been found buried in a similar manner in the gardens of several houses occupied by the prisoners, was relevant to the issue which had been tried by the jury, and was therefore admissible. The Geering Case (18 L.J.N.S.M.C. 215) which was approved of by the Judicial Committee, was one of arsenical poisoning, and Pollock, C.B., admitted evidence to shew that two sons of the prisoner, who had formed part of the same family, and for whom, as well as for her husband, the prisoner had cooked their food, had died of poison, the symptoms with all of them being the same. It is noteworthy, however, that in the latter case the administration to all of the parties appears to have been contemporaneous and with preparations of food made in quantities for all of the four persons and distributed to them on their leaving the house to go to their work.

In R. v. Heeson (1878), 14 Cox C.C. 40, Lush, J., approved of and followed the decision in the Geering case and admitted evidence of both previous and subsequent deaths occurring under like circumstances and from similar symptoms, and held that where it was proved that a motive for the murder charged might exist from the fact of the prisoner having insured the life of the deceased, evidence might also be given upon the same indictment to shew an equal motive for the deaths of the others because of their having been similarly insured at the instance of the prisoner.

In Makin v. Attorney-General for New South Wales, [1894] A.C. 65, the law was expounded as follows: "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused had been guilty of criminal acts other than those covered by the indictment, for the

purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

In Reg. v. Geering, 18 L.J. (M.C.) 215, the accused was charged with the murder of her husband by administering arsenic to him, and the Crown offered in evidence post mortem analysis of the contents of the stomach, etc., of the husband and two sons who had subsequently died, and a medical analysis of the vomit of another son, and also offered evidence that these four persons lived with the prisoner during their lives, and formed part of her family, and that she generally made tea for them and cooked their victuals. This evidence was objected to and received, not because it proved that the sons had been murdered by the prisoner, but merely because it proved that the death of the sons proceeded from the same cause as that of the husband, namely, arsenic, and because it had a tendency to prove that the death of the husband, whether felonious or not, was occasioned by arsenic.

In the recent case of R. v. Sternaman in Ontario, evidence was held admissible on a charge of murder by poisoning to shew the administration of the same kind of poison by the prisoner to another person, as proving intent. Evidence of similar symptoms of arsenical poisoning attending the death of prisoner's former husband following administration to him of food prepared by the prisoner is evidence to shew intent as regards a charge of arsenical poisoning of a second husband on evidence of arsenical poison of the latter and of similar preparation of food by the prisoner and her attendance on her husband during his illness. R. v. Sternaman (1898), 1 Can. Cr. Cas. 1 (Ont.).

Evidence of other facts are admissible where those facts tend to prove the point in issue, as where the intent of the prisoner forms part of the matter in issue, and such other facts tend to establish the intent of the prisoner in committing the act in question; so the deliberate menaces or threats of a prisoner made at a former time are admissible, where they tend to prove the intent of the party and the prisoner's malice against the deceased. It is quite proper on the count for murder to give evidence of the prisoner's previous assaults upon and threats against the deceased to shew the animus of the prisoner. Theal v. R. (1882), 7 Can. S.C. 397, 406.

Credibility of witnesses.]—On a trial for murder, the Crown having made out a prima facie case by circumstantial evidence, the prisoner's daughter, a girl of fourteen, was called on his behalf, and swore that she herself killed the deceased, without the prisoner's knowledge, and under circumstances detailed, which would probably reduce her guilt to manslaughter. Held, that the judge was not bound to tell the jury that they must believe this witness in the absence of testimony to shew her unworthy of credit, but that he was right in leaving the credibility of her story to them; and, if from her manner he derived the impression that she was under some undue influence, it was not improper to call their attention to it in his charge. R. v. Jones (1868), U.C.Q.B. 416.

Medical expert testimony.]—In the course of a trial for murder by shooting a witness was called at the trial to give evidence as a medical expert, and in answer to the Crown prosecutor, he said "there are indicia in medical science from which it can be said at what distance small shot were fired at the body. I have studied this—not personal experience, but from books." He was not cross-examined as to the grounds of this statement, and no medical witnesses were called by the prisoner to confute it. The witness

then stated the distance from the murdered man at which the shot must have been fired in the case before the court, and on what he based his opinion as to it, giving the result of his examination of the body. Held by the majority of the Supreme Court of Canada, Ritchie, C.J., and Taschereau and Gwynne, JJ. (Strong and Fournier, JJ., dissenting), that by his preliminary statement the witness had established his capacity to speak as a medical expert, and it not having been shewn by cross-examination, or other testimony, that there were no such indicia as stated, his evidence as to the distance at which the shot was fired was properly received. R. v. Preeper (1888), 15 Can. S.C.R. 401.

The prisoner's witness having stated that death was caused by two blows from a stick of certain dimensions, it was held that a medical witness previously examined by the Crown was properly recalled to state that in his opinion the injuries found on the body could not have been so occasioned. R. v. Jones, 28 U.C.Q.B. 416.

The theory of the defence in an indictment for murder, was that the death was caused by the communication of smallpox virus by Dr. M., who attended the deceased, and one of the witnesses for the defence explained how the contagion could be guarded against. Dr. M. had not in his examination in chief or cross-examination been asked anything on this subject; it was held that he was properly allowed to be called in reply, to state that precautions had been taken by him to guard against the infection. R. v. Sparham and Greaves, 25 U.C.C.P. 143.

Evidence generally.]—On a trial for murder the death of the deceased was shewn to have been caused by his being stabbed by a sharp instrument. It was proved that the prisoner struck the deceased, but neither a knife nor other instrument was seen in his hand. For the prisoner evidence was offered that on the day preceding the homicide the prisoner had a knife which could not have inflicted the wound of which deceased died; and that on that day the prisoner parted with it to a person who held it until after the crime was committed. This evidence was rejected as being too remote, and because it would not shew that it was impossible for the prisoner to have had a weapon that might have caused the wounds of which deceased died. R. v. Herod (1878), 29 U.C.C.P. 428.

Prisoner being indicted for the murder of H., the principal witness for the Crown stated that the crime was committed on a day stated, and that prisoner and one S. (who had been previously tried and acquitted) threw H. over the parapet of the bridge into the river Don. Counsel for the prisoner then proposed to prove by one D. that S. was at his place, fifty miles off, on that evening, but the judge rejected the evidence, saying that S. might be called, and if contradicted might be confirmed by other testimony. S. was called, and swore that he was not present at the time, but he not being contradicted, D. was not examined. Draper, C.J., who tried the case, reserved the point for the consideration of the court whether the evidence of D. might not be found to have been legally admissible. The court held that the presence of S. was a fact material to the enquiry, and that D. should have been admitted when tendered, and a new trial was ordered. Robinson, C.J., observing, "It appears to me that any fact so closely connected with the alleged offence as to be in fact part of what was transacted or said to be transacted at the very moment, cannot be treated as irrelevant in investigating the truth of the charge." . . . "It is sufficient, I think, to make the evidence that was offered admissible, that it applied to the very fact to be determined, namely, by whom and how the deceased person came to his death. R. v. Brown (1861), 21 U.C.Q.B. 338.

On the indictment of a prisoner for murder, a witness swore that he heard shots fired, that half an hour aftewards deceased came to his house and asked witness to take him in for he was shot, that witness did so, and deceased died some hours afterwards; it was held that evidence of state-

ments made by deceased after being taken into the house (not provable as dying declarations) were inadmissible, as not forming part of the res gestæ, being made after all action on the part of the wrong-doer had ceased through the completion of the principal act, and after all pursuit or danger had ceased. R. v. McMahon (1889), 18 Ont. R. 502, following R. v. Bedingfield, 14 Cox 341, and R. v. Goddard, 15 Cox 7.

Where the charge depends upon circumstantial evidence, the latter must not only be consistent with the prisoner's guilt but inconsistent with any other rational conclusion. R. v. Hodge (1838), 2 Lewin 227.

Punishment.]—By sec. 231 it is enacted that every one who commits murder is guilty of an indictable offence and shall on conviction thereof be sentenced to death.

(*d*)—*Act necessarily endangering life.*]—If a man does an illegal act although its immediate purpose may not be to take life, yet if it be such that life is necessarily endangered by it and the doer knows or believes that life is likely to be sacrificed by it, it is murder. London Times, April 28, 1868, per Cockburn, C.J., cited Burbidge Cr. Dig. 218, and see 11 Cox C.C. 146; R. v. Allen, 17 L.T.N.S. 223, Burb. Cr. Dig. 522-529.

Aiders and abettors.]—In order to make an abettor to a murder or manslaughter principal in the felony he must be present aiding and abetting the fact committed. The presence, however, need not always be an actual standing by within sight or hearing of the fact; for there may be a constructive presence, as when one commits a murder and another keeps watch or guard at some convenient distance. 1 Hale 615, 4 Blac. Com. 34. But a person may be present, and, if not aiding and abetting, be neither principal nor accessory. As, if A. happen to be present at a murder and take no part in it, nor endeavour to prevent it, or to apprehend the murderer, this strange behaviour, though highly criminal, will not of itself render him either principal or accessory. Fost. 350, 1 Hale 439, 3 Russ. Cr. 141.

If several persons are present at the death of a man they may be guilty of different degrees of homicide, as one of murder and another of manslaughter; for if there be no malice in the party striking, but malice in an abettor, it will be murder in the latter, though only manslaughter in the former. 1 East P.C., ch. 5, sec. 121, p. 350. So if A. assault B. of malice and they fight, and A.'s servant come in aid of his master, and B. be killed, A. is guilty of murder; but the servant, if he knew not of A.'s malice, is guilty of manslaughter only. 1 Hale 446. Several persons conspired to kill Dr. Ellis, and they set upon him accordingly, when Salisbury, who was a servant to one of them, seeing the affray and fighting on both sides, joined with his master, but knew nothing of his master's design. A servant of Dr. Ellis, who supported his master, was killed. The court told the jury that malice against Dr. Ellis would make it murder in all those whom that malice affected, as the malice against Dr. Ellis would imply malice against all who opposed the design against Dr. Ellis; but, as to Salisbury, if he had no malice, but took part suddenly with those who had, without knowing of the design against Dr. Ellis, it was only manslaughter in him. The jury found Salisbury guilty of manslaughter and three others of murder, and the three were executed. R. v. Salisbury, Plowd. 97.

It has been decided that if the person charged as principal be acquitted, a conviction of another charged in the indictment as present aiding and abetting him in the murder, is good; for (by Holt, C.J.), "though the indictment be against the prisoner for aiding, assisting and abetting A., who was acquitted, yet the indictment and trial of this prisoner is well enough, for all are principals, and it is not material who actually did the murder." R. v. Wallis (1703), Salk. 334; R. v. Taylor (1785), 1 Leach 360, 1 East P.C., ch. 5, sec. 121, p. 351. And though anciently the person who

gave the fatal stroke was considered as the principal, and those who were present aiding and assisting, only as accessories; yet it has long been settled that all who are present aiding and assisting are equally principals with him who gave the stroke whereof the party died, though they are all called principals in the second degree. 1 Hale 437, Plow. Com. 100a. So that if A. be indicted for murder or manslaughter, and C. and D. for being present and assisting A., and A. appears not, but C. and D. appear, they shall be arraigned, and if convicted, shall receive judgment, though A. neither appear nor be outlawed. 1 Hale 437, Plow. Com. 97, 100, Gythin's case. And if A. be indicted as having given the mortal stroke, and B. and C. as present, aiding and assisting, and upon the evidence it appears that B. gave the stroke, and A. and C. were only aiding and assisting, it maintains the indictment, and judgment shall be given them all, for it is only a circumstantial variance, and in law it is the stroke of all that were present aiding and abetting. 1 Hale 438, Plow. Com. 98a, 9 Co. 67b; R. v. Mackally, 1 East P.C., ch. 5, sec. 121, p. 350; Turner's case, 1 Lewin 177, Parke B.; R. v. Phelps (1841), C. & Mar. 180, 3 Russ. Cr., 6th ed., 142.

Accessory after the fact.]—Where a person, knowing a murder to have been committed by the offender, receives, comforts or assists him, such person is an accessory after the fact; but this doctrine is subject to this exception, that no married person whose husband or wife has been a party to an offence shall become an accessory after the fact thereto, by receiving, comforting or assisting the other of them, and no married woman whose husband has been a party to an offence shall become an accessory after the fact thereto, by receiving, comforting or assisting in his presence and by his authority any other person, who has been a party to such offence, in order to enable her husband or such other person to escape. Sec. 63.

228. Other examples.—Culpable homicide is also murder in each of the following cases, whether the offender means or not death to ensue, or knows or not that death is likely to ensue:

(*a.*) If he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences in this section mentioned, or the flight of the offender upon the commission thereof, and death ensues from such injury; or

(*b.*) If he administers any stupefying or overpowering thing for either of the purposes aforesaid, and death ensues from the effects thereof; or

(*c.*) If he by any means wilfully stops the breath of any person for either of the purposes aforesaid, and death ensues from such stopping of the breath.

2. The following are the offences in this section referred to:—Treason and the other offences mentioned in Part IV. of this Act, piracy and offences deemed to be piracy, escape or rescue from prison or lawful custody, resisting lawful apprehension, murder, rape, forcible abduction, robbery, burglary, arson.

See note to sec. 227.

229. Provocation. — Culpable homicide, which would otherwise be murder, may be reduced to manslaughter if the person who causes death does so in the heat of passion caused by sudden provocation.

2. Any wrongful act or insult, of such a nature as to be sufficient to deprive an ordinary person of the power of self-control, may be provocation if the offender acts upon it on the sudden, and before there has been time for his passion to cool.

3. Whether or not any particular wrongful act or insult amounts to provocation, and whether or not the person provoked was actually deprived of the power of self-control by the provocation which he received, shall be questions of fact. No one shall be held to give provocation to another by doing that which he had a legal right to do, or by doing anything which the offender incited him to do in order to provide the offender with an excuse for killing or doing bodily harm to any person.

4. An arrest shall not necessarily reduce the offence from murder to manslaughter because the arrest was illegal, but if the illegality was known to the offender it may be evidence of provocation.

Provocation.—Manslaughter is principally distinguishable from murder in this, that though the act which occasions the death is unlawful, or likely to be attended with bodily mischief, yet the malice either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter, the act being rather imputed to the infirmity of human nature. 1 East's Pleas of the Crown, 218; Roscoe's Criminal Evidence, 12th ed., 620. Murder is unlawful homicide with malice aforethought; manslaughter is unlawful homicide without malice aforethought. R. v. Doherty (1887), 16 Cox C.C. 306.

Whenever death ensues from sudden transport of passion or heat of blood, if upon reasonable provocation and without malice, or upon sudden combat, it will be manslaughter; if there be no such provocation, or if the blood has had reasonable time to cool, or if there be evidence of express malice, it will be murder. 2 East's Pleas of the Crown, 232; Foster 313; Roscoe's Cr. Evid. 620. Where the provocation is sought by the prisoner it cannot furnish any defence against the charge of murder. 1 East P.C. 239. The provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed. Russell on Crimes III. 38; Foster 315. As a general rule, no provocation of words will reduce the crime of murder to that of manslaughter. Foster's Crown Law, 290. But under special circumstances there may be such a provocation of words as will have that effect. Russell on Crimes (1896) III. 38. And Blackburn, J., in summing up to the jury in R. v. Rothwell (1871), 12 Cox C.C. 145, said that what they would have to consider was, whether the words which were spoken just previous to the blows amounted 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 the prisoner in striking as he did the person who used the words.

Where, however, there are no blows there must be a provocation at least as great as blows; for instance, a man who discovers his wife in the act of adultery and thereupon kills the adulterer is only guilty of manslaughter. Blackburn, J., in R. v. Rothwell (1871), 12 Cox C.C. 145, 147. All the circumstances of the case must lead to the conclusion that the act done, though intentional of death or great bodily harm, was not the result of a cool, deliberate judgment and previous malignity of heart, but solely imputable to human infirmity. 1 East P.C. 23E; Russell on Crimes III. 38. In the United States it has been held that words may give character to acts of menace and so may make an act, otherwise without meaning, an act of provocation which will reduce the subsequent killing to manslaughter. Watson v. State, 82 Ala. 10; State v. Keene, 50 Mo. 357; Pridgen v. State, 31 Tex. 420.

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, it may be regarded as reducing the crime to that of manslaughter. R. v. Sherwood (1844), 1 C. & K. 556; R. v. Smith (1865), 3 F. & F. 1066.

If on any sudden provocation of a slight nature, one person beat another in a cruel and unusual manner so that he dies, it is murder by express malice, though the person so beating the other did not intend to kill him. 4 Black. Com. 199, Halloway's Case, Cro. Car. 131. Slight provocations have been considered in some cases as extenuating the guilt of homicide, upon the ground that the conduct of the party killing upon such provocations might fairly be attributed to an intention to chastise, rather than to a cruel and implacable malice; but in such cases it must appear that the punishment was not administered with brutal violence, nor greatly disproportionate to the offence, and the instrument must not be such as, from its nature, was likely to endanger life. Foster's Crown Law 291; Russell on Crimes III. 47.

In R. v. McDowell (1865), 25 U.C.Q.B. 108, the rule was stated as follows by the Court of Queen's Bench of Upper Canada (Draper, C.J., Hagarty, J., and Morrison, J.):—

"Mere words or provoking actions or gestures expressing contempt or reproach, unaccompanied with an assault upon the person, will not reduce the killing from murder to manslaughter, though if immediately upon such provocation the party provoked had given the other a box on the ear or had struck him with a stick or other weapon not likely to kill, and had unfortunately and contrary to his expectation killed him, it would only be manslaughter." 25 U.C.Q.B. at p. 112.

But in the case of a sudden quarrel, where the parties immediately fight, there may be circumstances indicating malice in the party killing, which killing will then be murder.

All questions as to motive, intent, heat of blood, etc., must be left to the jury and should not be dealt with as propositions of law. R. v. McDowell (1865), 25 U.C.Q.B. 108, 115.

If the circumstances of the case shew that the blow causing the death was given in the heat of passion arising on a sudden provocation and before the passion had time to cool, the inference of malice is rebutted. R. v. Eagle (1862), 2 F &. F. 827. As it may be matter of law that a blow is not sufficient to excuse homicide, so it may be matter of law that a blow is not sufficient to reduce the defence to manslaughter; or it may be matter of law that it may be so, supposing the jury find as a matter of fact that it did produce a passion which, as a matter of law, it was legally sufficient to provoke. 2 F. & F. note (*b*) pp. 831, 832.

Although, by sub-sec. (3), no one shall be held to give provocation to another by doing that which he had a legal right to do, it is for the jury,

and not for the judge, to determine any preliminary question of fact upon which the alleged legal right depends. R. v. Brennan (1896), 4 Can. Cr. Cas. 41, 27 Ont. R. 659.

Where the facts shewn were that the prisoner had called at the house of the deceased and, on being forcibly ejected by the latter, drew a revolver and shot him, the jury have to consider whether the deceased before laying hands on the prisoner ordered him to leave the house, and gave him time to leave, and whether, if such were done, the violence used by the deceased in ejecting the prisoner was greater than was necessary for that purpose. It is misdirection for the trial judge in such a case to charge that the deceased had a legal right to eject the prisoner as he did, and that therefore there was no provocation to reduce the crime from murder to manslaughter, and such a direction is the withdrawal from the jury of the questions of fact involved in the determination of the question of legal right, and entitled the prisoner to a new trial. Ibid.

A previous conviction or acquittal on an indictment for murder is a bar to a second indictment for the same homicide charging it as manslaughter. Sec. 633 (2).

230. Manslaughter.—Culpable homicide, not amounting to murder, is manslaughter.

Classes of Homicide.]—Blackstone says: "Homicide is of three kinds: *justifiable*, *excusable*, and *felonious*. The first has no share of guilt at all; the second, very little; but the third is the highest crime against the law of nature that man is capable of committing." And he divides justifiable homicide as follows: "1. Such as is owing to some unavoidable *necessity*, without any will, intention, or desire, and without any inadvertance or negligence, in the party killing; and therefore without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who had forfeited his life by the laws and verdict of his country. But the law must *require* it, otherwise it is not justifiable; therefore wantonly to kill the greatest of malefactors, a felon or a traitor, attainted or outlawed, deliberately, uncompelled, and extrajudicially, is murder. . . . 2. Homicide committed for the advancement of *public justice*," in cases where the act is not commanded, but permitted. And here he mentions, by way of illustration, homicides committed in the prevention of a felony; in the arrest of persons guilty, or accused, of crime; in preventing escapes, or retaking the criminal; in the suppression of breaches of the peace: 4 Black. Com. 178, 179.

Excusable homicide is divided by Blackstone as follows: "1. Homicide *per infortunium* or *misadventure*, where a man, doing a lawful act, without any intention of hurt, unfortunately kills another; as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by; or where a person qualified to keep a gun, is shooting at a mark, and undesignedly kills a man; for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure; for the act of correction is lawful; but, if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder; for the act of immoderate correction is unlawful. To whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he had done nothing unlawful; but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence. And, in general, if death ensues in consequence of an idle, dangerous, and unlawful sport,

the slayer is guilty of manslaughter, and not misadventure only: 4 Black. Com. 182, 183.

The second species of excusable homicide, mentioned by Blackstone, is "homicide in self-defence, or *se defendendo*" (*see* Code sections 45-47). He says: "The self-defence which we are now speaking of, is that whereby a man may protect himself from an assault or the like, in the course of a sudden broil or quarrel, by killing him who assaults him. And this is what the law expresses by the word *chance-medley*, or (as some rather choose to write it) *chaud-medley*, the former of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion; both of them of pretty much the same import; but the former is in common speech too often erroneously applied to any manner of homicide or misadventure; whereas it appears by the statute 24 Hen. 8, ch. 5, and our ancient books, that it is properly applied to such killing as happens in self-defence upon a sudden rencounter": 4 Black. Com. 183, 184.

Manslaughter.]—Homicide under a mistaken Indian belief or superstition that the object shot at was not a human being but an evil spirit which had assumed human form and would attack human beings, is manslaughter. R. v. Machekequonabe (1897), 2 Can. Cr. Cas. 138.

A corporation cannot be guilty of manslaughter. R. v. Union Colliery Co. (1900), 3 Can. Cr. Cas. 523 (B.C.), affirmed 4 Can. Cr. Cas. 400 (S.C. Can.). Code secs. 213 and 220, as to want of care in the maintenance of dangerous things, do not extend the criminal responsibility of corporations beyond what it was at common law. R. v. Great West Laundry Co. (1900), 3 Can Crim Cas. 514, (Man.).

The managing director of a railway company is not liable to indictment for manslaughter by reason of the omission to do something which the company was not bound to do by its charter, though he had personally promised to do it. Ex. p. Brydges (1874), 18 L.C. Jur. 141.

Pleading previous conviction for assault, etc.]—The rule at common law is that where a person has been convicted for an offence by a court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence; the principle is that no man shall be placed in peril of legal penalties more than once on the same accusation. R. v. Miles (1890), 17 Cox C.C. 9.

It is a well-established principle that a series of charges shall not be preferred, and, whether a party accused of a minor offence is acquitted or convicted, he shall not be charged again on the same facts in a more aggravated form. R. v. Elrington (1861), 1 Best & Smith 688, 696 (Cockburn, C.J., and Blackburn, J.).

It was held by the Court for Crown Cases Reserved in R. v. Morris (1867), L.R. 1 C.C.R. 90, that a conviction for assault and the imprisonment consequent thereon are not either at common law or under 24-25 Vict., c. 100, s. 45 (Code sec. 866), a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault; (per Martin, B., and Byles and Shee, JJ.,; Kelly, C.B., dissenting).

In the last-mentioned case, Martin, B., considered the word "cause" in the statute corresponding to s. 866 of the Code, as used synonymously with the words "accusation" or "charge"; while Byles, J., said that the word "cause" may undoubtedly mean "act," but it is ambiguous, and it may also and, perhaps, with greater propriety be held to mean "cause for the accusation"; and in that view the cause for the indictment for manslaughter comprehended more than the cause in the summons before the magistrates, "for it comprehends the death of the party assaulted." L.R. 1 C.C.R. 95.

In a more recent case, at the Durham Assizes, November 23, 1895, the opposite view was taken by Grantham, J., the presiding judge. R. v. Hilton (1895), 59 J.P. (Eng.), 778. In that case it appeared that the defendant Hilton was indicted for the manslaughter of one Robert Jackson. The alleged assault which caused the death of Jackson occurred on the 12th of October. On the 21st of October cross-summonses for assault were heard by the justices and both cases were dismissed. At that time the deceased man's injuries were not considered serious, but on the 2nd of November he died from the effects of a clot of bood on the brain. Hilton was thereupon charged with manslaughter. Counsel for the prisoner produced a certificate of dismissal of the charge of assault by the justices under 24 & 25 Vict., c. 100, s. 45, and raised the plea that the prisoner had already been acquitted of the charge of assault and could not be tried again. The learned judge accepted this view, and the prisoner was discharged.

Verdict for assault not permissible.]—On an indictment for murder or manslaughter if the prisoner is guilty of an assaut which has conduced to the death, he cannot in respect of that assault be convicted of assault merely; and if the assault proved did not conduce to the death, it is distinct from and independent thereof and is therefore not included in the crime charged, and is dehors the indictment; and therefore no verdict of assault can be rendered upon an indictment for homicide in respect of such an assault. R. v. Ganes (1872), 22 U.C.C.P. 185, following R. v. Bird (1851), 5 Cox 1, and R. v. Dingman (1863), 22 U.C.Q.B. 283.

231. Punishment of murder.—Every one who commits murder is guilty of an indictable offence and shall, on conviction thereof, be sentenced to death. R.S.C., c. 162, s. 2.

Code Form FF.]—The following form of stating the offence is provided by Code form FF (*a*):—"A. murdered B. at ——, on ——."

Evidence.]—See note to sec. 227.

Previous conviction or acquittal.]—A previous conviction or acquittal on an indictment for murder shall be a bar to a second indictment for the same homicide charging it as manslaughter; and a previous conviction or acquittal on an indictment for manslaughter shall be a bar to a second indictment for the same homicide charging it as a murder. Sec. 633 (2).

Verdict of Manslaughter.]—On an indictment charging murder, if the evidence proves manslaughter but does not prove murder the jury may find the accused not guilty of murder but guilty of manslaughter, but shall not on that count find the accused guilty of any other offence. Sec. 713 (2).

Verdict of concealment of birth on charge of child murder.]—If any person tried for the murder of any child is acquitted thereof the jury by whose verdict such person is acquitted may find, in case it so appears in evidence, that the child had recently been born, and that such person did, by some secret disposition of such child or of the dead body of such child, endeavour to conceal the birth thereof, and thereupon the court may pass such sentence as if such person had been convicted upon an indictment for the concealment of birth. And see sec. 240.

232. Attempts to commit murder.—Every one is guilty of an indictable offence and liable to imprisonment for life, who does any of the following things with intent to commit murder; that is to say—

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

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

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

(*d.*) attempts to drown, suffocate, or strangle any person; or

(*e.*) destroys or damages any building by the explosion of any explosive substance; or

(*f.*) sets fire to any ship or vessel or any part thereof, or any part of the tackle, apparel or furniture thereof, or to any goods or chattels being therein; or

(*g.*) casts away or destroys any vessel; or

(*h.*) By any other means attempts to commit murder. R.S.C., c. 162, s. 12.

Indictment.]—An indictment multifarious in that it combines a charge of a failure to provide necessaries for a child under sixteen under secs. 210 and 215 with a charge of an attempt to murder the child and to which indictment the prisoners pleaded, is sufficient upon which to base a conviction thereon for the latter offence without a formal amendment of the indictment, where the presiding judge has withdrawn from the jury that portion of the charge based upon secs. 210 and 215. R. v. Lapierre (1897), 1 Can. Cr. Cas. 413 (Que.).

Bail.]—The court will not bail a prisoner accused under this section if the evidence be positive and strong against the prisoner. Ex parte Cheevers (1880), Ramsay's Cases 180.

With intent to commit murder.]—Where the charge is in respect of the administering of poison, evidence of administering at different times may be given to shew the intent. R. v. Mogg (1830), 4 C. & P. 364; and see note to sec. 227.

(*a.*)—"*Administers*" *any poison, etc.*]—Where a servant in preparing breakfast for her mistress put arsenic into the coffee, and afterwards told her mistress that she had prepared the coffee for her, and the mistress drank the coffee, it was held that this was an "administering" within the corresponding English statute, 7 Wm. IV. and 1 Vict., ch. 85, sec. 2, re-enacted 24-25 Vict., ch. 100, sec. 11. R. v. Harley (1830), 4 C. & P. 369. And it has been held that a poisonous berry given with intent to kill is "administered" although by reason of being given entire in the pod which will not dissolve in the stomach no injurious effects followed. R. v. Cluderay (1849), 1 Den. C.C. 514, 4 Cox C.C. 84.

Where the accused with intent to murder gave poison to A. to administer as a medicine to B., but A. neglecting to give it to B., it was by chance given to B. by a child, this was held an administering by the accused. R. v. Michael (1840), 2 Mood. C.C. 120, 9 C. & P. 356. But it is doubtful whether

a conviction can be supported under this section, if the poison be delivered by mistake to and taken by another person than that for whom it was intended. R. v. Ryan (1839), 2 M. & Rob. 213; but see R. v. Lewis (1833), 6 C. & P. 161.

If, however, the poison was intended to reach a certain individual but through a mistake in identity on the part of the accused himself, that individual was not in fact the person against whom his animus existed, it would appear that a conviction would be supported. R. v. Hunt (1825), 1 Mood. C.C. 93; R. v. Stopford (1870), 11 Cox C.C. 643; R. v. Smith (1856), Dears. 559.

Wounds.]—To constitute a wound the continuity of the skin must be broken. R. v. Wood (1830), 1 Mood. C.C. 278. There must be a division not merely of the cuticle or upper skin but of the whole skin. R. v. McLaughlin (1838), 8 C. & P. 635; R. v. Becket (1836), 1 M. & Rob. 526; or of the internal skin, ex. gr., of the lip or cheek. R. v. Smith (1837), 8 C. & P. 173; R. v. Warman (1846), 1 Den. 183.

A wound from a kick with a shoe is within the statute. R. v. Briggs (1831), 1 Mood. C.C. 318. If in self-defence the prosecutor force a part of his body against an instrument in the defendant's hands and so cut or wound himself, the wounding is not within this section. R. v. Becket (1836), 1 M. & Rob. 526.

(*b.*)—*Grievous bodily harm.*]—If the bodily injury be such as seriously to interfere with health or comfort that is sufficient, and it is not necessary that it should be either permanent or dangerous. R. v. Cox (1818), R. & R. 362; R. v. Ashman (1858), 1 F. & F. 88; see also sec. 252.

Upon a charge of causing grievous bodily harm to a child under defendant's care with intent to bring about the child's death, evidence of acts of cruelty by defendants to *another* child also in defendants' care are irrelevant to the case and inadmissible. R. v. Lapierre (1897), 1 Can. Cr. Cas. 413 (Que.).

(*c.*)—*Shooting with intent.*]—If a wound was caused, it seems that a count for wounding with intent to do grievous bodily harm must be added to enable the jury to convict of unlawful wounding should they find the accused not guilty of the more serious crime but are convinced that the lesser offence has been committed. Archbold Cr. Plead. (1900), 785.

Where the accused was charged with wounding T. with intent to murder him, and it appeared in evidence that the defendant intended to murder M. and that he shot at and wounded T., supposing him to be M., and the jury found that he intended to murder the man at whom he shot, supposing him to be M., the conviction was upheld. R. v. Smith (1856), Dears. 559, 25 L.J.M.C. 29; R. v. Stopford (1870), 11 Cox C.C. 643.

(*c.*)—*Attempts to discharge loaded arms.*]—If a person intending to shoot another puts his finger on the trigger of a loaded firearm, but is prevented from pulling the trigger, it is nevertheless an attempt to discharge loaded arms under this section. R. v. Duckworth, [1892] 2 Q.B. 83, 17 Cox C.C. 495; R. v. Brown (1883), 10 Q.B.D. 381; R. v. St. George (1840), 9 C. & P. 483, overruled.

The expression "loaded arms" includes any gun, pistol or other arm loaded with gunpowder, or other explosive substance, and ball, shot, slug or other destructive material, or charged with compressed air and ball, shot, slug or other destructive material. Sec. 3 (*o*).

(*h.*)—*By any other means attempts to commit murder.*]—Where a woman jumped out of a window to avoid the violence of her husband, it was held that to constitute this offence it must be proved that he intended by his conduct to make her jump out. R. v. Donovan (1850), 4 Cox C.C. 401.

The sending or placing of infernal machines with intent to murder is within this sub-section. R. v. Mountford (1835), Mood. C.C. 441, 3 Russ. Cr., 6th ed., 280 (*n*). Attempts to commit suicide are, however, not included. R. v. Burgess (1862), 9 Cox C.C. 302, L. & C. 258, 32 L.J.M.C. 55; but come under sec. 238 of the Code.

233. Threats to murder.—Every one is guilty of an indictable offence and liable to ten years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person. R.S.C., c. 173, s. 7.

Threats verbally made to burn the complainant's buildings are not indictable under the Criminal Code, and give rise only to proceedings to force the offender to give security to keep the peace. Ex parte Welsh (1898), 2 Can. Cr. Cas. 35.

234. Conspiracy to murder.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who—

(*a.*) conspires or agrees with any person to murder or to cause to be murdered any other person, whether the person intended to be murdered is a subject of His Majesty or not, or is within His Majesty's dominions or not; or

(*b.*) counsels or attempts to procure any person to murder such other person anywhere, although such person is not murdered in consequence of such counselling or attempted procurement. R.S.C., c. 162, s. 3.

Counselling murder.]—This offence may be committed by the publication of a newspaper article exulting in the assassination of a foreign monarch and commending it as an example to revolutionists throughout the world; and the counselling need not be directed to any particular person. R. v. Most (1881), 7 Q.B.D. 244; 14 Cox C.C. 583.

To solicit and incite a person to commit a felony was a misdemeanor at common law. Arch. Crim. Plead. (1900), 1224.

Where the indictment is for soliciting another to commit murder it is unnecessary to negative the commission of the murder which, if committed, would render the accused guilty of the principal offence as an accessory before the fact (sec. 61), for it cannot be intended that the principal offence has been committed where it is not charged. 1 Stark. Cr. Plead., 2nd ed., 148; R. v. Higgins (1801), 2 East 5.

235. Accessory after the fact to murder.—Every one is guilty of an indictable offence, and liable to imprisonment for life, who is an accessory after the fact to murder. R.S.C., c. 162, s. 4.

The accused must be proved to have done some act to assist the murderer personally; R. v. Chapple (1840), 9 C. & P. 355; or by employing another person to harbour or relieve him. R. v. Greenacre (1837) 8 C. & P. 35; R. v. Butterfield (1843), 1 Cox C.C. 39; R. v. Lee (1834), 6 C. & P. 536; R. v. Jarvis (1837), 2 M. & Rob. 40. See also note to sec. 63.

236. Punishment of manslaughter.—Every one who commits manslaughter is guilty of an indictable offence, and liable to imprisonment for life. R.S.C., c. 162, s. 5.

There is no power under code sec. 639 or otherwise to impose a fine or any other punishment, in lieu of imprisonment, for the offence of manslaughter, and there is consequently no judgment or sentence applicable to a conviction of a corporation for that offence. R. v. Great West Laundry Co. (1900), 3 Can. Cr. Cas. 514. (Man.).

A previous conviction or acquittal on an indictment for manslaughter is a bar to a second indictment for the same homicide charging it as murder. Sec. 633 (2).

237. Aiding and abetting suicide.—Every one is guilty of an indictable offence and liable to imprisonment for life who counsels or procures any person to commit suicide, actually committed in consequence of such counselling or procurement, or who aids or abets any person in the commission of suicide.

If two persons mutually agree to commit suicide together, and accordingly take poison or attempt to drown themselves together, but only one of them dies, the survivor is guilty of murder. R. v. Dyson (1823), R. & R. 523; R. v. Alison (1838) 8 C. & P. 418; R. v. Jessop (1877), 16 Cox C.C. 204; R. v. Stormonth (1897), 61 J. P. 729.

238. Attempt to commit suicide.—Every one who attempts to commit suicide is guilty of an indictable offence and liable to two years' imprisonment.

Attempted suicide.]—This offence was a misdemeanor at common law. R. v. Burgess (1862), L. & C. 258; 9 Cox C.C. 302, 32 L.J.M.C. 55.

Mere intention to commit the offence does not constitute an attempt; same act immediately connected with the principal offence must be proved to have been done by the accused. R. v. Eagleton (1855) Dears. 515, 538, 24 L.J.M.C. 158; R. v. Roberts (1855) Dears. 539, 25 L.J.M.C. 17; R. v. Cheeseman (1862), L. & C. 140, 9 Cox, C.C. 100.

239. Neglecting to obtain assistance in childbirth. Every woman is guilty of an indictable offence who, with either of the intents hereinafter mentioned, being with child and being about to be delivered, neglects to provide reasonable assistance in her delivery, if the child is permanently injured thereby, or dies, either just before, or during, or shortly after birth, unless she proves that such death or permanent injury was not caused by such neglect, or by any wrongful act to which she was a party, and is liable to the following punishment:—

(*a.*) If the intent of such neglect be that the child shal not live, to imprisonment for life;

(*b.*) If the intent of such neglect be to conceal the fact of her having had a child, to imprisonment for seven years

It has been held that a woman cannot be convicted of manslaughter on evidence that, knowing she was near the time of delivery, she wilfully abstained from taking the necessary precautions to preserve the life of her child after its birth, in consequence of which neglect it died. R. v. Knights (1860), 2 F. & F. 46; but see R. v. Handley (1874), 13 Cox C.C. 79, where Brett, J., held that if the woman, without intending the death of the child, determines to be alone at the birth for the purpose of temporary concealment, and the child afterwards dies by reason of her wicked negligence, she is guilty of manslaughter. Cf. R. v. Middleship (1851), 5 Cox C.C. 275.

240. Concealing dead body of child.—Every one is guilty of an indictable offence, and liable to two years' imprisonment, who disposes of the dead body of any child in any manner, with intent to conceal the fact that its mother was delivered of it, whether the child died before, or during, or after birth. R.S.C., c. 162, s. 49.

Concealment of birth was dealt with by sec. 61 of 32-33 Vict., c. 20. Although the mere denial of the birth will not support a conviction; R. v. Turner (1839), 8 C. & P. 755, it is a factor in proof of the offence. R. v. Piché (1879), 30 U.C.C.P. 409. What is a secret disposition must depend on the circumstances of each particular case. The most complete exposure of the body might be a concealment, ex gr. if placed in a secluded place where the body would not be likely to be found. R. v. Brown (1870), L.R. 1 C.C. 244.

"*Child.*"]—A foetus which has not reached the period at which it might have been born alive is not a "child." R. v. Berriman (1854), 6 Cox C.C. 388; but see R. v. Colmer (1864), 9 Cox C.C. 506.

Evidence.]—The former statutes, R.S.C. 1886, ch. 162, sec. 49 and 24-25 Vict., ch. 100, sec. 60, required that there should be a "secret disposition" of the dead body. A disposal in any manner with the intent here specified is sufficient under the Code.

Under the former law it was held to be a "secret disposition" where the woman placed the dead body of the child of which she had been delivered between a trunk and the wall of a room in which she lived alone, and on being charged with having had a child she at first denied it, but being pressed she pointed out where the body was. R. v. Piché, 30 U.C.C.P. 409.

A final disposition of the body of the child is not essential, and it is an offence if it be hid in a place from which a further removal was contemplated. R. v. Goldthorpe (1841), 2 Moo. C.C. 244; R. v. Perry (1855), Dears. 471.

Where the only evidence was that the woman had been delivered of a child the body of which was taken away by two other persons, but the prisoner did not know where it was put, it was held insufficient. R. v. Bate (1871), 11 Cox C.C. 686.

There must be an identification of the body found as being that of the child of which she is alleged to have been delivered. R. v. Williams (1871), 11 Cox C.C. 684.

It must also be proved that the body concealed was that of a child dead at the time of the disposal or concealment. R. v. Bell (1874), Irish R. 8 C.L. 541; R. v. May (1867), 16 L.T. Rep. 362; 10 Cox. C.C. 448.

The mere denial of the birth is not sufficient proof of intent to conceal. R. v. Turner (1839), 8 C. & P. 755. It must be shewn that the accused did some act of disposal of the body after the child was dead. Ibid.

The fact that the mother had previously allowed the birth to be known to some persons is not conclusive evidence negativing concealment. R. v. Douglas (1836), 1 Mood. C.C. 480; R. v. Cornwall (1817), R. & R. 336.

Confession as evidence.]—A. being questioned by a police constable about the concealment of a birth gave an answer which caused the officer to say to her, "It might be better for you to tell the truth and not a lie"; and it was held that a further statement made by her to the officer was inadmissible in evidence, as not being free and voluntary. She was taken into custody on the same day, placed with two accomplices, and charged with concealment of birth. All three then made statements. It was held that those made by the accomplices could not be deemed to be affected by the previous inducement to A. and were therefore admissible against themselves, although that made by A. was inadmissible. When before the magistrate for the preliminary inquiry the three prisoners received the formal caution (sec. 591) from the magistrate as to anything they wished to say in regard to the charge, and A. then made a statement which was taken down in writing and attached to the deposition, and this latter statement was admissible in evidence against her. R. v. Bate (1871), 11 Cox C.C. 686.

PART XIX.

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

SECT.

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241. Wounding with intent.—Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, unlawfully by any means wounds or causes any grievous bodily harm to any person, or shoots at any person, or, by drawing a trigger, or in any other manner, attempts to discharge any kind of loaded arms at any person. R.S.C., 162, s. 13.

Assault.]—Upon an indictment charging a shooting at a person with a felonious intent, if the prisoner be acquitted of the felony, a verdict for common assault may be rendered. Re Cronan (1874), 24 U.C.C.P. 106.

Indictment.]—If the indictment charges that the accused did "inflict" grievous bodily harm, it sufficiently charges the "causing" of grievous bodily harm. R. v. Bray (1883), 15 Cox C.C. 197.

The instrument or means by which the injury was inflicted need not be stated in the indictment, and if stated need not be proved as laid. R. v. Briggs (1831), 1 Moo. C.C. 318.

Evidence of intent.]—The intent may be inferred from the act committed. R. v. Le Dante, 2 Geldert & Oxley (N.S.) 401.

A person who fires a loaded pistol into a group of persons, not aiming at any one in particular, but intending generally to do grievous bodily harm, and who hits one of them, may be convicted on an indictment charging him with shooting at the person he has hit with intent to do grievous bodily harm to that person. R. v. Fretwell (1864), L. & C. 443, 9 Cox C.C. 471.

Intent against one person; wounding another.]—The statutory form FF., sub-sec. (*f*), shews that this section includes as an offence the causing of actual bodily harm to a person although done with intent to cause such harm to another; and also that where the intent is to prevent a lawful apprehension the person about to be apprehended is not necessarily the person charged with the wounding or other offence under this section.

Not only will an indictment charging the accused with wounding A. with intent to do him grievous bodily injury be supported by evidence that he intended to do grievous bodily harm to the man he wounded, and who, in fact was A., although the accused did not think that he was A., but somebody else, R. v. Stopford (1870), 11 Cox C.C. 643; but it will be sufficient under this section that the defendant wounded, etc., any person with intent to maim, etc., a third person. R. v. Latimer (1886), 17 Q.B.D. 359, 16 Cox 707; Archbold Cr. Plead. (1900), 806. It will be observed that there is a possible distinction in this respect between secs. 232 and 241, for in the former the words "any person" do not follow the words "with intent to commit murder," and it may consequently be inferred that the intent to murder must be directed against the very person wounded, etc. See note to sec. 232.

Maim, disfigure or disable.]—To maim is to injure any part of a man's body which may render him, in fighting, less able to defend himself or to annoy his enemy. 1 Hawk., ch. 44, sec. 1; R. v. Sullivan (1841), C. & Mar. 209. To disfigure is to do some external injury which may detract from his personal appearance. To disable is to do something which creates a permanent disability and not merely a temporary injury. Archbold Cr. Plead. (1900), 807; R. v. Boyce (1824), 1 Mood. C.C. 29.

Grievous bodily harm.]—An injury seriously interfering with health or comfort, although neither permanent or endangering life, is sufficient. R. v. Ashman (1858), 1 F. & F. 88; R. v. Cox (1818), R. & R. 362.

Intent to prevent lawful apprehension.]—It must be shewn that the arrest would have been lawful. As to when an arrest is justified, see sec. 22 et seq. and sec. 552.

Wounds.]—A wounding may be "either with or without any weapon or instrument;" sec. 242; but the skin must be broken. R. v. Wood (1830), 1 Mood. C.C. 278; R. v. Briggs (1831), 1 Mood. C.C. 318; R. v. Withers (1831), 1 Mood. C.C. 294; R. v. Sheard (1837), 7 C. & P. 846.

Attempt to discharge loaded arms.]—See note to sec. 232.

Verdict.]—A charge of wounding or causing grievous bodily harm with intent is inclusive of the offence of common assault and a verdict for the latter offence may be returned by virtue of sec. 713. R. v. Laskey, 1 P. & B. (N.B.) 194; R. v. Taylor (1869), L.R. 1 C.C.R. 194. And likewise, if the jury are not convinced as to the intent, they may find the accused guilty of unlawfully wounding if wounding be charged, or of unlawfully inflicting grievous bodily harm if that be charged, in which case the punishment is under sec. 242. R. v. Waudby, [1895] 2 Q.B. 482.

242. Wounding or grievous bodily harm.—Every one is guilty of an indictable offenee and liable to three years' imprisonment who unlawfully wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument. R.S.C., c. 162, s. 14.

Wounding.]—See notes to secs. 232 and 241.

Powers of justices.]—Justices of the peace have no power on a preliminary investigation before them of a charge of unlawfully wounding, to reduce the charge to one of common assault, over which they would have summary jurisdiction. R. v. Lee (1897), 2 Can. Cr. Cas. 233, per McDougall, Co. J.; Miller v. Lea (1898), 2 Can. Cr. Cas. 282.

A conviction recorded by justiees in such a case upon a plea of guilty to the charge as reduced, is not a bar to an indictment for unlawfully wounding, based upon the same state of facts, and does not support a plea of autrefois convict. Ibid.

Verdict.]—Upon an indictment for assaulting, beating, wounding and inflicting grievous bodily harm, the prisoner may be convicted of a common assault. Sec. 713. R. v. Oliver (1860), Bell C.C. 287; R. v. Yeadon (1862), L. & C. 81; and a verdict for common assault was held good where the indictment charged only the infliction of grievous bodily harm. R. v. Canwell, 20 L.T. 402; 11 Cox C.C. 263, and see R. v. Taylor, 11 Cox C.C. 261.

243. Wounding public officer.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who wilfully—

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

(*b.*) maims or wounds any public officer engaged in the execution of his duty or any person acting in aid of such officer. R.S.C., c. 32, s. 213; c. 34, s. 99.

Public officer.]—This term is inclusive of any inland revenue or customs officer, officer of the army, navy, marine, militia, North-West Mounted Police, or other officer engaged in enforcing the laws relating to the revenue, customs, trade or navigation of Canada. Sec. 3 (*w.*).

Describing the offence.]—To justify a sentence of more than three years' imprisonment for assault and wounding a public officer, the charge must allege that the offence was committed while the officer was engaged in the execution of his duty. R. v. Dupont (1900), 4 Can. Cr. Cas. 566 (Que.).

A mere description of the assaulted party in the information as an acting detective does not justify a sentence of seven years on a plea of guilty, nor does it imply that the assault took place while the officer was engaged in the execution of his duty. Ibid.

244. Attempt to strangle, etc.—Every one is guilty of an indictable offence and liable to imprisonment for life and to be whipped, who with intent thereby to enable himself or any other person to commit, or with intent thereby to assist any other person in committing any indictable offence—

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

(*b.*) unlawfully applies or administers to, or causes to be taken by, or attempts to apply or administer to, or attempts or causes to be administered to or taken by, any person, any chloroform, laudanum or other stupefying or overpowering drug, matter or thing. R.S.C., c. 162, ss. 15 and 16.

See note to sec. 232.

245. Administering poison so as to endanger life.—Every one is guilty of an indictable offence aud liable to fourteen years' imprisonment who unlawfully administers to, or causes to be administered to or taken by any other person, any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm. R.S.C., c. 162, s. 17.

"*Administering.*"]—See note to sec. 232.

Any poison or other destructive or noxious thing.]—Some drugs are noxious only when taken in large quantities; and it is doubtful whether the administering of a drug in so small a quantity as to be incapable of doing harm although a larger quantity of the drug would be a poisonous dose, is administering a "poison." R. v. Hennah (1877), 13 Cox C.C. 547; R. v. Cramp (1880), 5 Q.B.D. 307. In the latter case it is suggested that where the drug administered is a recognized "poison" it may be that the offence is complete although the quantity administered is too small to be noxious.

246. Administering poison with intent to injure.—Every one is guilty of an indictable offence and liable to three years' imprisonment who unlawfully administers to, or causes to be administered to or taken by, any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve or annoy such person. R.S.C., c. 162, s. 18.

If any grievous bodily harm is in fact inflicted, the offence comes under sec. 245. Tulley v. Corrie (1867), 10 Cox C.C. 640.

Any poison or other destructive or noxious thing.]—See note to sec. 245.

Intent to injure, aggrieve or annoy.]—Where the defendant administered cantharides to a woman and the jury found that it was administered with the intent to excite her sexual passion and desire, in order that the defendant might have connection with her, this was held to be an administering with intent to "injure, aggrieve and annoy" her. R. v. Wilkins (1861), L. & C. 89, 9 Cox C.C. 20, 31 L.J.M.C. 72.

247. Causing bodily injuries by explosives.—Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully and by the explosion of any explosive substance burns, maims, disfigures, disables or does any grievous bodily harm to any person. R.S.C., c. 162, s. 21.

Explosive substance.]—This expression includes any materials for making an explosive substance; also any apparatus, machine, implement or materials used, or intended to be used or adapted for causing, or aiding in causing, any explosion in or with any explosive substance, and also any part of any such apparatus, machine or implement. Sec. 3 (i).

Dangerous storing of explosives.]—Keeping naphtha in a populous place in such quantities as to cause terror or danger is a common law nuisance as being an act injurious to public safety. R. v. Lister (1857), D. & B. 209. And so is keeping gunpowder or other explosives in dangerous proximity to streets or houses. R. v. Taylor (1742), 2 Str. 1167; 1 Russ. Cr. 6th ed., 734 (*n*). And where defendants were charged with having unlawfully knowing and willingly deposited in a room in a lodging or boarding house in the city of Halifax near to certain streets or thoroughfares and in close proximity to divers dwelling houses excessive quantities of dynamite by reason whereof the inhabitants were in great danger, it was held that the indictment was not bad for failure to allege either carelessness or that the quantities were so great that care would not produce safety. R. v. Holmes, 5 R. & G. (N.S.) 498.

248. Attempting to cause bodily injuries by explosives.—Every one is guilty of an indictable offence and liable, in case (*a.*) to imprisonment for life and in case (*b.*) to fourteen years' imprisonment, who unlawfully—

(*a.*) with intent to burn, maim, disfigure or disable any person, or to do some grievous bodily harm to any person, whether any bodily harm is effected or not—

(i.) causes any explosive substance to explode;

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

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

(*b.*) places or throws in, into, upon, against or near any building, ship or vessel any explosive substance, with intent to do any bodily injury to any person, whether or not any explosion takes place and whether or not any bodily injury is effected. R.S.C., c. 162, ss. 22 and 23.

Throwing corrosive fluid.]—Unless the contrary be proved the intention will be evidenced by the act; R. v. Rhenwick Williams (1790), 1 Leach 533; and the question of intent is for the jury. R. v. Saunders, 14 Cox C.C. 180.

Throwing oil of vitrol in a person's face has been held not to be a "wounding." R. v. Murrow (1835), Mood. C.C. 456.

Destructive matter.]—Under a similar English statute 7 Wm. IV. and 1 Vict., c. 85, sec. 5, boiling water was held to be "destructive matter." R. v. Crawford (1845), 1 Den. 100, 2 C. & K. 129. In that case the prisoner was indicted for maliciously throwing boiling water upon her husband. Under the influence of jealousy she had boiled a quart of water and while he was asleep she poured it over his face and into one of his ears and ranaw ay boasting that she had boiled him in his sleep. The injury deprived the man of sight for some time and affected his hearing. A conviction was affirmed on a case reserved.

Negligent blasting of stone in a quarry and thereby projecting large pieces of stone so as to endanger the safety of persons in houses and on the highways adjoining the quarry, was indictable at common law as a misdemeanor. R. v. Mutters (1864), L. & C. 491.

249. Setting spring-guns and man-traps.—Every one is guilty of an indictable offence and liable to five years' imprisonment who sets or places, or causes to be set or placed, any spring-gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy, or inflict grievous bodily harm upon, any trespasser or other person coming in contact therewith.

2. Every one who knowingly and wilfully permits any such spring-gun, man-trap or other engine which has been set or placed by some other person, in any place which is in, or afterwards comes into, his possession or occupation, to continue so set or placed shall be deemed to have set or placed such gun, trap or engine with such intent as aforesaid.

3. This section does not extend to any gin or trap usually set or placed with the intent of destroying vermin or noxious animals. R.S.C., c. 162, c. 24.

A similar provision in the English statute 7 & 8 Geo. IV. ch. 18, was held not to be applicable to the setting of dog-spears on a man's own land with no intention to harm human beings and without having brought about such a result. Jordin v. Crump (1841), 8 M. & W. 782.

If death is caused by unlawfully setting a spring gun the person setting it is guilty of manslaughter. R. v. Heaton (1896), 60 J.P. 508.

250. Intentionally endangering the safety of persons on railways.—Every one is guilty of an indictable offence and liable to imprisonment for life who unlawfully—

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

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

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

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

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

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

(*b.*) throws, or causes to fall or strike at, against, into or upon any engine, tender, carriage or truck used and in motion upon any railway any wood, stone or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage or truck, or in or upon any other engine, tender, carriage, or truck of any train of which such first mentioned engine, tender, carriage or truck forms part. R.S.C. c. 162, ss. 25 and 26.

Form FF.—An example of stating one of the offences mentioned in this section is given as follows in Code Form FF: —"A., with intent to injure or endanger the safety of persons on the Canadian Pacific Railway, did an act calculated to interfere with an engine, a tender, and certain carriages on the said railway on —— at —— by *(describe with so much detail as is sufficient to give the accused reasonable information as to the acts or omissions relied on against him, and to identify the transaction.)*

The corresponding English Act, 24-25 Vict., ch. 97, secs. 35-37, has been held to apply to both public and private railways; O'Gorman v. Sweet (1890), 54 J.P. 663; and to railways not yet opened for regular traffic, but in use for the conveyance of workmen and materials. R. v. Bradford (1860), Bell C.C. 268.

An acquittal under this section will not bar an indictment under sec. 251. R. v. Gilmore (1882), 15 Cox C.C. 85.

251. Negligently endangering the safety of persons on railways.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any unlawful act, or by any wilful omission or neglect of duty, endangers or causes to be endangered the safety of any person conveyed or being in or upon a railway, or aids or assists therein. R.S.C., c. 162, s. 27.

Other offences relating to the operation of railways are contained in "The Railway Act" (Can.) 1888, ch. 29; The Railway Amendment Act (Can.), ch. 37, sec. 4, and Code secs. 489-491, 521.

Omission or neglect of duty.]—There must be a duty to do the thing omitted to be done; a promise, not constituting a contract, made by a railway manager to do something which the company were under no legal obligation to do does not constitute a "duty" under this section. Ex parte Brydges, 18 L.C. Jur. 141.

252. Negligently causing bodily injury to any person.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, by any unlawful act, or by doing negligently or omitting to do any act which it is his duty to do, causes grievous bodily injury to any other person. R.S.C., c. 162, s. 33.

Although a corporation cannot be guilty of manslaughter, it may be indicted under this section for having caused grievous bodily injury by omitting to maintain in a safe condition a bridge or structure which it was its duty to so maintain, and this notwithstanding that death ensued at once to the person sustaining the grievous bodily injury. A fine is the punishment which must be substituted under Cr. Code sec. 639 in the case of a corporation, in lieu of the imprisonment mentioned in Cr. Code sec. 252, and the amount is in the discretion of the court (Cr. Code sec. 934). The expression "grievous bodily injury" includes injuries immediately resulting in death, and as a corporation is not amenable to a charge of manslaughter, the death is as to it a circumstance in aggravation of the crime, and does not enlarge the nature of the offence. R. v. Union Colliery Co. (1900), 3 Can. Crim. Cas. 523 (B.C.); affirmed by the Supreme Court of Canada sub. nom., Union Colliery v. The Queen (1900), 4 Can. Cr. Cas. 400.

253. Injuring persons by furious driving.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, having the charge of any carriage or vehicle, by wanton or furious driving, or racing or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person. R.S.C., c. 162, s. 28.

Any carriage or vehicle.]—The same expression appears in the Offences against the Person Act, 1861, 24-25 Vict. (Imp.), ch. 100, sec. 35, and under it it has been decided that bicycles are included. R. v. Parker (1895), 59 J.P. 793, per Hawkins, J.

Wilful misconduct.]—An act is "wilfully" done if the defendant intentionally did it knowing that bodily harm to some person is likely to result. R. v. Holroyd (1841), 2 M. & Rob. 339; or with a reckless disregard of the natural consequences of the act. R. v. Monaghan (1870), 11 Cox C.C. 608. Compare sec. 481, defining the term "wilful" as used in Part XXXVII.

(Amendment of 1893.)

254. Preventing the saving of the life of any person shipwrecked.—Every one is guilty of an indictable offence and liable to seven years' imprisonment

(*a.*) who prevents or impedes, or endeavours to prevent or impede, any shipwrecked person in his endeavour to save his life; or

(*b.*) who without reasonable cause prevents or impedes, or endeavours to prevent or impede, any person in his endeavour to save the life of any shipwrecked person. R.S.C., c. 81, s. 36.

Shipwrecked person.]—This term includes any person belonging to, on board of or having quitted any vessel wrecked, stranded or in distress at any place in Canada. See sec. 3 (*x*).

255. Leaving holes in the ice and excavations unguarded.—Every one is guilty of an offence and liable, on summary conviction, to a fine or imprisonment with or without hard labour (or both) who—

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

(*b.*) being the owner, manager or superintendent of any abandoned or unused mine or quarry or property upon or in which any excavation has been or is hereafter made, of a sufficient area and depth to endanger human life, leaves the same unguarded and uninclosed by a guard or fence of sufficient height and strength to prevent any person from accidentally riding, driving, walking or falling thereinto; or

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

2. Every one whose duty it is to guard such hole, opening, aperture or place is guilty of manslaughter if any person loses his life by accidentally falling therein while the same is unguarded. R.S.C., c. 162, ss. 29, 30, 31 and 32.

(Amendment of 1893.)

256. Sending unseaworthy ships to sea.—Every one is guilty of an indictable offence and liable to five years' imprisonment who sends, or attempts to send, or is a party to sending, a ship registered in Canada to sea, or on a voyage on any of the inland waters of Canada, or on a voyage from any port or place on the inland waters of Canada to any port or place on the inland waters of the United States, or on a voyage from any port or place on the inland waters of the United States to any port or place on the inland waters of Canada, in such unseaworthy state, by reason of overloading or underloading or improper loading, or by reason of being insufficiently manned, or from any other cause that the life of any person is likely to be endangered thereby, unless he proves that he used all reasonable means to insure her being sent to sea or on such voyage in a seaworthy state, or that her going to sea or on such voyage in such unseaworthy state was, under the circumstances, reasonable and justifiable. 52 V., c. 22, s. 3, as amended by 56 V., c. 32.

No person shall be prosecuted for any offence under this section without the consent of the Minister of Marine and Fisheries. Sec. 546 as amended, 56 Viet. (Can.), ch. 32.

Sec. 457 of the Merchant Shipping Act, 1894 (Imp.), 57-58 Viet., ch. 60, also provides as follows:—"If any person sends or attempts to send, or is party to sending or attempting to send a British ship to sea in such unseaworthy state that the life of any person is likely to be thereby endangered, he shall in respect of each offence be guilty of a misdemeanor unless he proves that he used all reasonable means to insure her being sent to sea in a seaworthy state, or that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving such proof he may give evidence in the same manner as any other witness." But a prosecution under that section of the Merchant Shipping Act in a British possession can only be brought by or with the consent of the governor thereof, i.e., in Canada, the Governor-General. Ibid. sec. 457 (3).

257.—Taking unseaworthy ships to sea.—Every one is guilty of an indictable offence and liable to five years' imprisonment who, being the master of a ship registered in Canada knowingly takes such ship to sea, or on a voyage on any of the inland waters of Canada, or on a voyage from any port or place on the inland waters of Canada to any port or place on the inland waters of the United States, or on a voyage from any port or place in the United States to any port or place on the inland waters of Canada, in such unseaworty state, by reason of overloading or underloading or improper loading, or by reason of being insufficiently manned, or from any other

cause, that the life of any person is likely to be endangered thereby, unless he proves that her going to sea or on such voyage in such unseaworthy state was, under the circumstances, reasonable and justifiable. 52 V., c. 22, s. 3.

No person shall be prosecuted for any offence under this or the preceding section without the consent of the Minister of Marine and Fisheries. Sec. 546 as amended, 56 Vict. (Can.), ch. 32.

The Merchant Shipping Act, 1894 (Imp.), 57-58 Vict., ch. 60, sec. 457, makes the following additional provision:—"If the master of a British ship knowingly takes the same to sea in such unseaworthy state that the life of any person is likely to be thereby endangered, he shall in respect of each offence be guilty of a misdemeanor unless he proves that her going to sea in such unseaworthy state was, under the circumstances, reasonable and justifiable, and for the purpose of giving such proof he may give evidence in the same manner as any other witness." A prosecution under that section cannot, however, be brought in Canada without the consent of the Governor-General. Ibid, sec. 457 (3).

PART XX.

ASSAULTS.

SECT.

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258. Assault defined.—An assault is the act of intentionally applying force to the person of another, directly or indirectly, or attempting or threatening, by any act or gesture, to apply force to the person of another, if the person making the threat has, or causes the other to believe, upon reasonable grounds, that he has, present ability to effect his purpose, and in either case, without the consent of the other or with such consent, if it is obtained by fraud.

To discharge a pistol loaded with powder and wadding at a person within such a distance as that the party might have been hit, is an assault. R. v. Cronan (1874), 24 U.C.C.P. 106.

A conviction for unlawfully assaulting V. by standing in front of the horses and carriage driven by the said V. in a hostile manner, and *thereby* forcibly detaining him, the said V. in the public highway against his will, was held bad, in stating the detention as a conclusion and not as part of the charge. R. v. McElligott (1883), 3 O.P. 535. It will not be inferred as a matter of law that standing in front of the horses was a forcible intention, there being no statement that the detention was by any other means than mere passive resistance. Ibid.

An indictment for rape includes the lesser charge of assault, and a verdict thereon of guilty of common assault is properly followed by a conviction although the information was laid more than six months after the offence was committed. R. v. Edwards (1898), 2 Can. Cr. Cas. 96.

Effect of consent in cases of assault.]—No one may consent to any act which is either intended to cause or is likely to cause death or any grievous bodily harm. It is unlawful for a man either to kill or maim himself, and he cannot lawfully consent to be killed or maimed by another person. And so duelling is against the law, and, if two persons deliberately agree to fight a duel and one kill the other, he is guilty of murder. Prize-fighting also is illegal, although no more deadly weapons be used than the naked fists of the combatants; for here the object of each is to do to the other as

much harm as can be done with the hands, so long as he keeps within the rules under which they fight, and to subdue the other until from injury or exhaustion he is unable to fight any more. In the case of Reg. v. Coney (1882), 30 W.R. 678, 8 Q.B.D. 534, which was argued before the whole of the Queen's Bench Division, all the judges were agreed that a prize-fight is illegal, and that the consent of the parties to fight could not make it legal. Stephen, J., said: "When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature or is inflicted under such circumstances that its infliction is injurious to the public as well as to the person injured. But the injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds. Therefore, the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults."

If, whilst playing a game, a player deliberately infringes the rules, and in so doing hurts another, he is guilty of an assault, for the consent of the person injured only extends to acts committed within the rules. East, in his Pleas of the Crown, says: "If two were engaged to play at cudgels, and the one made a blow at the other likely to hurt before he was upon his guard, and without warning, and death ensued, the want of due and friendly warning would make such act amount to manslaughter, but not to murder, because the intent was not malicious." (Sol. Jour.)

And no rules or practice of any game can make that lawful which is unlawful by the law of the land; and the law of the land says you shall not do that which is likely to cause the death of another. R. v. Bradshaw (1878), 14 Cox C.C. 83.

A charge of common assault may in certain cases be completely answered by proof of consent on the part of the person bringing the charge. Thus, if a man strike another with a stick, this is prima facie an offence, although no real harm be done; if, however, the two had agreed to engage in a match of singlesticks, and in the course of the game, and without transgression of its rules and with no intent to inflict harm, the complainant was struck, his consent to run the risk of receiving a blow is a defence to the charge of assault.

259. Indecent assaults on females.—Every one is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped, who—

(*a*.) indecently assaults any female; or

(*b*) does anything to any female by her consent which but for such consent would be an indecent assault, such consent being obtained by false and fraudulent representations as to the nature and quality of the act. 53 V., c. 37, s. 12.

A blow struck in anger or which is intended or is likely to do corporal hurt is a criminal assault, notwithstanding the consent to fight of the person struck. R. v. Buchanan (1898), 1 Can. Cr. Cas. 442 (Man.)

Evidence.]—As to the evidence of children under fourteen who do not understand the nature of an oath see sec. 685.

All such relevant acts of the party as may reasonably be considered explanatory of his motives and purposes, even though they may severally constitute distinct felonies, are clearly admissable in evidence. R. v. Chute (1882), 46 U.C.Q.B. 555; Wills on Circumstantial Evid. 47.

If, on an indictment of rape the jury acquit the accused of that offence, but find him guilty of indecent assault, and the other evidence in the case is ample to warrant the verdict, it should stand notwithstanding the improper admission in evidence of statements made by the prosecutrix by way of complaint following the offence, she having then complained of an assault but not of rape. R. v. Graham (1899), 3 Can. Cr. Cas. 22 (Ont.). The accused may, on an indictment for rape, be convicted of assault with intent to commit rape. John v. The Queen, 15 Can. S.C.R. 384.

It was formerly the law that if the girl consented to the indecent assault, the prisoner could not be convicted of that offence, although the girl was under the age up to which consent is immaterial on a charge of carnally knowing, it being held that there could be no assault on a person consenting. R. v. Connolly (1871), 26 U.C.Q.B. 317; R. v. Paquet, 9 Quebec L.R. 361; R. v. Holmes (1871), L.R. 1 C.C.R. 234, 12 Cox C.C. 137. Now, by sec. 261 of the Criminal Code, 1892, it is provided that "It is no defence to a charge or indictment for any indecent assault on a young person under the age of fourteen years to prove that he or she consented to the act of indecency." But there can be still no conviction for *common* assault where there is consent.

If a medical practitioner unnecessarily strip a female patient naked under the pretence that he cannot otherwise judge of her illness, notwithstanding her continued protests and objections, it is an assault if he assisted to take off her clothes. Rex. v. Rosinski (1824), 1 Moody C.C. 19, 1 Lewin C.C. 11. It is to be left to the jury to say whether the prisoner really believed that the stripping could assist him in enabling him to cure her. Ibid.

Apart from statutory provision there can be in law no assault unless it be against consent. R. v. Martin (1839), 9 C. & P. 215; R. v. Guthrie (1870), L.R. 1 C.C.R. 241; 39 L.J.M.C. 95. Mere submission is not always equivalent to consent. A person may submit to an act done from ignorance, or the consent may be obtained by fraud; and in neither case would it be such consent as the law contemplates. R. v. Lock (1872), L.R. 2 C.C.R. 10. Consent means an active will in the mind of the patient to permit the doing of the act complained of; and knowledge of what is to be done is essential to a consent. Ibid.

Where a school teacher was charged with indecent assault upon one of his scholars, and it appeared that he forbade the prosecutrix telling her parents what had happened, and they did not hear of it for two months, it was held that evidence of the conduct of the prisoner towards her subsequent to the assault was properly admissible as tending to shew the indecent quality of the assault, and as being, in effect, a part or continuation of the same. R. v. Chute, 46 U.C.Q.B. 155.

If a schoolmaster takes indecent liberties with a female scholar without her consent, though she does not resist, he is liable to be punished as for an assault. Rex v. Nichol (1807), Russell & Ryan, C.C. 130. In that case the girl's age was thirteen, and she testified that she knew it was wrong in him to act as he did, and for her to permit him, and that on all the occasions when the indecent liberties had been taken it was against her will. The acts complained of did not amount to carnal knowledge, and were not done with violence. The trial judge, Graham, B., said that the prisoner's authority and influence were likely to have put her still more off her guard than she would naturally have been from her age and inexperience; that a fear and awe of the prisoner might check her resistance and lessen her

natural sense of modesty and decency; and that, under such circumstances, less resistance was to be expected than in ordinary cases. The prisoner's intention was to be presumed from the indecencies and acts of lewdness. The jury were directed that "if they believed the girl, and thought that the acts of the prisoner were against her will, though she had not resisted to the utmost, they might find the prisoner guilty; but if they thought those acts were not against her will, they might acquit him." Rex v. Nichol (1807), Russell & Ry. C.C. 130.

In a prosecution on separate counts for common and indecent assault for a similar offence in respect of a girl of thirteen, Williams, J., in summing up, said to the jury: "No one can doubt that the offence, if done at all, was against the will of the prosecutrix, considering her tender age, and therefore, if you believe the evidence, the case is made out in law." R. v. McGavaran (1852), 6 Cox C.C. 64.

The best evidence possible should be given to prove the age of the girl where the age is material. 3 Russell on Crimes, 6th ed., 240. And where the only evidence of age was simply hearsay, it was held insufficient. R. v. Wedge (1832), 5 C. & P. 298; R. v. Hayes, 2 Cox C.C. 226; R. v. Nicholls, 10 Cox C.C. 476.

If, on an indictment for rape the jury acquit the accused of that offence, but find him guilty of indecent assault, the verdict should stand notwithstanding the improper admission in evidence of the complaint of the prosecutrix made at a time when it was not properly admissible, if the other evidence in the case is ample to warrant the verdict of indecent assault. R. v. Graham (1899), 3 Can. Cr. Cas. 22 (Ont.).

Evidence of young children.]—Where, upon the hearing or trial of any charge for carnally knowing or attempting to carnally know a girl under fourteen or of any charge under sec. 259 for indecent assault, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received though not given upon oath if, in the opinion of the court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth. Sec. 685.

But no person shall be liable to be convicted of the offence, unless the testimony admitted by virtue of this section, and given on behalf of the prosecution, is corroborated by some other material evidence in support thereof implicating the accused. Sec. 685 (2).

Any witness whose evidence is admitted under sec. 685 is liable to indictment and punishment for perjury in all respects as if he or she had been sworn. Sec. 685 (3).

Excluding public from court room.]—At the trial of any person charged with an offence under this and the next section, or with conspiracy or attempt to commit, or being an accessory after the fact to any such offence, the court or judge may order that the public be excluded from the room or place in which the court is held during such trial. Sec. 550A.

Punishment.]—Under this section everyone found guilty of an indecent assault on a female is liable to two years' imprisonment *and* to be whipped; but the court in many cases, acting under the discretion conferred by the special proviso contained in sec. 932 of the Code, does not inflict the whipping, and imposes only an imprisonment. R. v. Robidoux (1898), 2 Can. Cr. Cas. 19.

(Amendment of 1893.)

260. Indecent assaults on males.—Every one is guilty of an indictable offence and liable to ten years' imprisonment and to be whipped who assaults any person with intent to commit sodomy, or who, being a male, indecently assaults any other male person. R.S.C., c. 157, s. 2.

Although a minor under fourteen cannot be convicted of sodomy, he may if the act be committed against the will of the other party be punished for an assault under this section. R. v. Hartlen (1898), 2 Can. Cr. Cas. 12.

Excluding public from court room.]—See note to last preceding section.

261. Consent of child under fourteen no defence.—It is no defence to a charge or indictment for any indecent assault on a young person under the age of fourteen years to prove that he or she consented to the act of indecency. 53 V., c. 37, s. 7.

Proof of age.]—In order to prove the age of a boy, girl, child, or young person for the purposes of this section the following shall be prima facie evidence:—(*a*) Any entry or record by an incorporated society or its officers having had the control or care of the boy, girl, child or young person at or about the time of the boy, girl, child or young person being brought to Canada, if such entry or record has been made before the alleged offence was committed. (*b*) In the absence of other evidence, or by way of corroboration of other evidence, the judge or, in cases where an offender is tried with a jury, the jury before whom an indictment for the offence is tried, or the justice before whom a preliminary inquiry thereinto is held, may infer the age from the appearance of the boy, girl, child or young person. Sec. 701A.

See note to sec. 259.

262. Assaults causing actual bodily harm.—Every one who commits any assault which occasions actual bodily harm is guilty of an indictable offence and liable to three years' imprisonment. R.S.C., c. 162, s. 35.

The original enactment of Code sec. 262 was 32 & 33 Vict., ch. 20, sec. 47, and Code sec. 783 is a re-enactment of 32 & 33 Vict., ch. 32, sec. 27.

Where a person is charged before a "magistrate" as defined by sec. 782, with the offence of "aggravated assault by unlawfully and maliciously inflicting upon any other person either with or without a weapon or instrument any *grievous* bodily harm," the case may be tried by the magistrate under the Summary Trials Part, if the accused consents. Sec. 783 (*c*), 786.

In a prosecution for an assault occasioning actually bodily harm, it is improper to exclude evidence of statements sworn to by a witness for the prosecution at a preliminary enquiry, the record of the depositions upon which had been lost, as to what was said by the accused at the time of the assault, as such statements of the witness had reference to statements of the accused forming a part of the res gestæ. R. v. Troop (1898), 2 Can. Cr. Cas. 22.

A conviction upon a charge of assault occasioning bodily harm tried summarily by a magistrate with the consent of the accused and the undergoing of the punishment imposed do not constitute a bar to a civil action for

prevent a conviction hereunder. R. v. Forbes (1865), 10 Cox C.C. 362; although it will no doubt be taken into consideration in awarding the punishment.

Punishment.]—A fine as well as imprisonment may be imposed on the conviction of the accused, if tried either by a court of criminal jurisdiction or by a "magistrate" under the Summary Trials Procedure (Part LV.). Sec. 958; Ex parte McClements (1895), 32 C.L.J. 39.

Prior conviction or dismissal on common assault charge.]—A summary conviction for assault has been held sufficient to bar a subsequent indictment, charging an assault and wounding with intent to murder, where the accused had been summoned before magistrates by the prosecutor of the indictment for the same assault, and had been imprisoned on his making default of payment of the fine imposed by the magistrates. R. v. Stanton (1851), 5 Cox C.C. 324, per Erle, J. It was said by Coltman, J., in R. v. Walker (1843), 2 Moody & Rob. 446, that there is no difference in principle whether a party has been convicted or acquitted; and that on a complaint for a common assault the justices were to determine whether such assault was accompanied with any *felonious intention*, and on that question they are like any other court of competent jurisdiction, and their decision is of the same finality as if the party had been convicted by a jury.

(Amendment of 1900.)

264. Kidnapping.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, without lawful authority—

(*a.*) kidnaps any other person with intent—

(i.) to cause such other person to be secretly confined or imprisoned in Canada against his will; or

(ii.) to cause such other person to be unlawfully sent or transported out of Canada against his will; or

(iii.) to cause such other person to be sold or captured as a slave, or in any way held to service against his will; or

(*b.*) forcibly seizes and confines or imprisons any other person within Canada.

2. Upon the trial of any offence under this section the non-resistance of a person so unlawfully kidnapped or confined shall not be a defence unless it appears that it was not caused by threats, duress or force, or exhibition of force.

Under the section as it formerly stood, the unlawful and forcible seizure or imprisonment of a person was punishable only where made with the like intent as in the cases of kidnapping provided for in paragraph (*a.*)

Kidnapping.]—Kidnapping is an aggravated species of false imprisonment, the latter offence being always included in the former. 2 Bishop Crim. Law 671. It is "the forcible abduction or stealing away of a man, woman or child from their own country and sending them into another." 4 Bl. Com. 219; 1 East P.C. 430. The offence is an indictable one at common law. R. v. Lesley (1860), 29 L.J.M.C. 97.

Criminal forcible imprisonment.]—The crime of false imprisonment is a species of aggravated assault. 2 Bishop Cr. Law 668. Although it is not necessary that a man's person should be touched. Bird v. Jones (1845), 7 Q.B. 742. A false imprisonment is any unlawful restraint of a man's liberty whether in a place made use of for purposes of imprisonment generally or in one used only on the particular occasion; or by words and an array of force without bolts or bars in any locality whatever. R. v. Webb, 1 W.Bl. 19; Bird v. Jones (1845), 7 Q.B. 742; The State v. Rollins, 8 N.H. 550; Pike v. Hanson, 9 N.H. 491.

To compel a man to go in a given direction against his will may amount to an imprisonment; but if a man merely obstructs the passage of another in a particular direction whether by threats of personal violence or otherwise, leaving him at liberty to stay where he is or go in any other direction if he pleases, he cannot be said to thereby imprison him. Bird v. Jones (1845), 7 Q.B. 742, per Patteson, J.

Detention of a prisoner after expiry of his sentence is false imprisonment. Migotti v. Colville (1869), 4 C.P.D. 233; Moone v. Rose (1869), L.R. 4 Q.B. 486.

Where a person sends for a constable and gives another person in charge for an indictable offence and the constable tells the party charged that he must go with him, on which the other without further compulsion goes to the police office, this is an imprisonment. Peacock v. Moore (1825), Ry. & M. 421. But where the warrant is used merely as a summons and no arrest is made thereon, and the party voluntarily goes before the magistrate, such seems not to be an imprisonment. Arrowsmith v. LeMesurier (1806), 2 B. & P. 211; Berry v. Adamson (1827), 6 B. & C. 528.

Where a man who had an idiot brother bedridden in his house kept him in a dark room without sufficient warmth or clothing it was held not to be an imprisonment; R. v. Smith (1826), 2 C. & P. 449; but a charge might be laid in such a case under Code secs. 209 and 215 for criminally neglecting to supply necessaries.

Justification.]—The seizure and imprisonment may be justified by shewing that there was a lawful arrest and detention under either civil or criminal process or by lawful authority. As to what are matters of justification see Code secs. 15-60.

265. Common assaults.—Every one who commits a common assault is guilty of an indictable offence and liable, if convicted upon an indictment, to one year's imprisonment, or to a fine not exceeding one hundred dollars, and on summary conviction to a fine not exceeding twenty dollars and costs, or to two months' imprisonment with or without hard labour. R.S.C., c. 162, s. 36.

Common assault.]—See sec. 258 for the statutory definition of an "assault" and see also the notes to that section.

Summary conviction.]—Section 864 provides for cases in which a summary conviction may be made for a common assault.

By sub-sec. 8 of sec. 842 it is provided that no justice shall hear and determine any case of assault or battery in which any question arises as to the title to any tenements, hereditaments or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice. Rent payable under a lease of land is an incorporeal hereditament. Kennedy v. MacDonell (1901), 1 O.L.R. 250 (Armour, C.J.O. and MacMahon, J.).

If the justice finds the assault complained of to have been accompanied by an attempt to commit some other indictable offence or is of opinion that the same is from any other circumstance a fit subject for prosecution by indictment, he is not to adjudicate thereupon but must deal with the case in all respects in the same manner as if he had no authority finally to hear and determine the same. Sec. 864 (2) as amended 63 & 64 Vict., ch. 46.

PART XXI

RAPE AND PROCURING ABORTION.

SECT.

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266. Rape Defined.—Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representations as to the nature and quality of the act.

2. No one under the age of fourteen years can commit this offence.

Girls under fourteen.]—When there has been no violence, and the girl is under fourteen and has consented or complied, the offence falls under Art. 269; but when there has been violence, and when the girl has not consented, then, notwithstanding the fact that the girl is under fourteen years of age, the crime is rape, and falls under this section. R. v. Riopel (1898), 2 Can. Cr. Cas. 225, 228.

The words "man" and "woman" in this section are to be taken in a general or generic sense as indicating all males and females of the human race, and not in a restricted sense as distinguished from boys and girls. R. v. Riopel (1898), 2 Can. Cr. Cas. 225.

An indictment for rape lies against one who has ravished a female under the age of fourteen years against her will, notwithstanding the provisions of sec. 269, which enacts that everyone is guilty of an indictable offence and liable to imprisonment for life, and to be whipped, who carnally knows any girl under the age of fourteen years, not being his wife. Ibid.

Carnal knowledge.]—Carnal knowledge is complete upon penetration to any, even the slightest degree, and even without the emission of seed. Code sec. 4 A, formerly sub-sec. 3 of sec. 266, but transferred by the amendment of 1893 to follow sec. 4.

Evidence of young children.]—As to the evidence of children under fourteen who do not understand the nature of an oath. See sec. 685.

Proof of complaint by prosecutrix.]—In R. v. Lillyman, [1896] 2 Q.B. 167, 60 J.P. 536, it was held by the court (Russell, C.J., Pollock, B., Hawkins, Cave and Wills, JJ.), upon a Crown case reserved, that in cases of indecent assault and rape, and similar charges, not only the fact that the prosecutrix made a complaint soon after the occurrence, but the details of the complaint itself, are admissible in evidence, not as proof of the facts complained of, but to shew that her conduct at the time was consistent with her story in the witness box and as negativing consent. Hawkins, J., in delivering the judgment of the court, said: "The general usage has been to limit the evidence of the complaint to proof that the woman made a complaint of something done to her, and that she mentioned in connection with it the name of a particular person. . . . . After very careful consideration, we have arrived at the conclusion that we are bound by no authority to support the existing usage of limiting evidence of a complaint to the bare fact that a complaint was made, and that reason and good sense are against our doing so. . . . . It has been sometimes urged that to admit the particulars of the complaint would be calculated to prejudice the interests of the accused, and that the jury would be apt to treat the complaint as evidence of the facts complained of. Of course, if it were so left to the jury, they would naturally so treat it. But it never could be legally so left, and we think it is the duty of the judge to *impress upon the jury* that they are not entitled to use the complaint as any evidence whatever of those facts, or for any other purpose than that we have stated. With such a direction, we think the interests of an innocent accused would be better protected than they are under the present usage; for, when the whole statement is laid before the jury, they are less likely to draw wrong inferences, and may sometimes come to the conclusion that what the woman said amounted to no real complaint against the accused."

In R. v. Rush (1896), 60 J.P. 777, the prisoner was indicted for carnally knowing a girl under the age of thirteen years. The day after the commission of the alleged offence the girl's mother questioned her, and the girl, in the absence of the prisoner, made a statement in answer. It was proposed to give the particulars of the statement in evidence on behalf of the prosecution on the authority of R. v. Lillyman, [1896] 2 Q.B. 167, 60 J.P. 536. Mr. Justice Wright, presiding at the Central Criminal Court, said that the lapse of time between the committing of the offence and the making of the statement was important in these cases; that, when counsel proposed to open upon and put in evidence such statements, the judge's attention should first be called to the time that had elapsed between the occurrence and the making of the statement, in order that the judge might be enabled to say whether or not the lapse of time would be an objection to the admissibility of the statement. In Rush's case the statement had not been made immediately after the alleged offence was committed, and the trial judge therefore refused to allow evidence of the particulars of the statement to be given.

Upon the trial of a charge of rape the whole statement made by the woman by way of complaint shortly after the alleged offence, including the name of the party complained against and the other details of the complaint, is admissible in evidence as proof of the consistency of her conduct and as confirmatory of her testimony regarding the offence, but not as independent or substantive evidence to prove the truth of the charge. R. v. Riendeau (1900), 3 Can. Cr. Cas. 293 (Que.).

Whether or not the complaint was made within a time sufficiently short after the commission of the offence as to admit evidence of the particulars of the complaint, is a question to be decided by the court under the circumstances of the particular case; but it is nevertheless the province of the jury to take into consideration the time which intervened, in weighing the probability of its truth. Ibid.

In that case the lapse of seven days between the date of the offence and the time of making complaint thereof was held insufficient under the circumstances to exclude testimony of the particulars of the complaint. But see R. v. Ingey (1900), 64 J.P. 106, noted in 3 Can. Cr. Cas., p. 305.

Upon a charge of rape, statements made by the complainant to a police officer on the day after the offence was alleged to have been committed and in response to his inquiries, the complainant having on the day of the offence complained to others of an assault but not of rape, are not admissible in evidence either as part of the res gestæ or as in corroboration. But if the jury acquit the accused of that offence but find him guilty of indecent assault, the verdict should stand notwithstanding the improper admissions in evidence of statements so made by the complainant after the alleged offence, if the other evidence in the case is ample to warrant the verdict of indecent assault. R. v. Graham (1899), 3 Can. Cr. Cas. 22 (Ont.).

Evidence generally.]—The question whether the act of connection was consummated through fear, or merely through solicitation is a question of fact for the jury. R. v. Day (1841), 9 C. & P. 722; R. v. Jones (1861), 4 L.T.N.S. 154; R. v. Cardo (1889), 17 Ont. R. 11.

Proof on behalf of the defence that the injured party or her parents had instituted civil proceedings to recover damages arising from the commission of the alleged rape is properly excluded upon the criminal trial as irrelevant, unless other facts have been disclosed in evidence which tend to shew an intent to thereby wrongfully extort money from the accused. R. v. Riendeau (1900), 3 Can. Cr. Cas. 293 (Que.).

It was formerly considered there was danger in implying force from fraud, and an absence of consent when consent was in fact given though obtained by deception, and that cases might arise, however extreme, when a detected adulteress might to save herself excuse her paramour of a capital felony. R. v. Francis (1852), 13 U.C.Q.B. 116; R. v. Clarke (1854), 6 Cox 412, 18 Jur. 1059; R. v. Jackson, R. & R. 487.

It has been held that, in the case of alleged rape on an idiot or lunatic, the mere proof of connection will not warrant the case being left to the jury; that there must be some evidence that it was without her consent, e.g., that she was incapable, from imbecility, of expressing assent or dissent; and that if she consent from mere animal passion it is not rape. R. v. Connolly (1867), 26 U.C.Q.B. 317.

On a charge of rape evidence is admissible on behalf of the defence to contradict a statement of the complainant, made on her cross-examination, denying that, on an occasion when she met the accused subsequent to the alleged rape, she had refused to put an end to the interview, as requested by her mother, and had struck her mother for the latter's interference. Such evidence is relevant to the charge not only as affecting the credibility of the complainant's testimony generally, but as shewing conduct inconsistent with resistance to the alleged offence. R. v. Riendeau (No. 2), 4 Can. Cr. Cas. 421 (Que.).

The prisoner's statement made at a previous trial through his counsel may be given in evidence by the prosecution if it tends to anticipate a possible defence which might be offered by the prisoner. R. v. Bedere (1891), 21 O.R. 189.

Questions may be put to the complainant tending to elicit the fact that she had previously had connection with other men. R. v. Laliberté (1877), 1 Can. S.C.R. 117.

In that case the prosecutrix, after she had declared she had not previously had connection with a man other than the prisoner, was asked in cross-examination whether she remembered having been in the milk house of G. with two men, D.M. and B.M., one after the other. Held, that the witness may object, or the judge may, in his discretion, tell the witness she is not bound to answer the question. R. v. Laliberté (1877), 1 Can. S.C.R. 117.

The case of R. v. Hodgson (1812), 1 R. & Ryan 211, is the leading case on the subject. The weight of authority and the course of practice by the judges in England is to permit questions of the kind to be asked of a witness on cross-examination in cases of rape. The prosecuting officer is not permitted to raise the objection. The witness may object, or the judge may tell the witness she is not obliged to answer, if he thinks proper, though not bound to do so, and the judge will decide whether the witness is obliged to answer or not, when the point is raised. R. v. Laliberté (1877), 1 Can. S.C. 117, 131. Per Richards, C.J.

In the same case prisoner's counsel afterwards proposed to ask one of the witnesses for the defence, "Did you see the prosecutrix with D.M. and B.M.? if you have, please state on what occasion, and what were they doing?" This question was also disallowed by the judge, and the objection was sustained in the Supreme Court of Canada on the authority of R. v. Cockroft (1870), 11 Cox C.C.C. 410, and R. v. Holmes (1871), L.R. 1 C.C. 234, upon the principle that a witness cannot be contradicted in matters foreign to the issue, which, on the trial of this indictment was, not whether the prosecutrix was unchaste, but whether the prisoner had had connection with her by violence. R. v. Laliberté (1877), 1 Can. S.C.R. 117, 142.

267. Punishment for rape.—Every one who commits rape is guilty of an indictable offence and liable to suffer death, or to imprisonment for life. R.S.C., c. 162, s. 37.

Describing the offence.]—The general mode of describing the offence of rape at common law was that the accused did "feloniously ravish and carnally know," etc, but the words "carnally know" were not considered essential. R. v. Bedere (1891), 21 O.R. 189.

The meaning of the phraseology in an indictment for rape that the prisoner "violently and against her will feloniously did ravish" the prosecutrix is that the woman has been quite overcome by force or terror, accompanied with as much resistance on her part as was possible under the circumstances, and so as to have made the ravisher see and know that she really was resisting to the utmost. R. v. Fick (1866), 16 U.C.C.P. 379.

A prosecution for rape is in fact and in substance a prosecution for any offence of which, on an indictment for rape, the prisoner could have been found guilty; and the maxim "Omne majus continet in se minus" applies. R. v. West, [1898] 1 Q.B. 174; R. v. Edwards (1898) 2 Can. Cr. Cas. 96.

An indictment may now be laid under Cr. Code secs. 626, 713, charging rape and also assault with intent to commit rape. Taschereau's Cr. Code (1893), p. 273.

Form of indictment.]—"—— court, to wit:—The jurors of our Lord the King upon their oath present that J. S. on the —— day of —— in the year of our Lord 19—, in and upon A. N., violently and feloniously did make an assault, and her, the said A. N. then violently and against her will feloniously did ravish and carnally know, against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity."

Excluding public from court room.]—At the trial of any person charged with an offence under this and the next seven sections, or with conspiracy or attempt to commit, or being an accessory after the fact to any such offence, the court or judge may order that the public be excluded from the room or place in which the court is held during such trial. See. 550A.

268. Attempt to commit rape.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who attempts to commit rape.

Attempt to commit rape.]—This offence was a misdemeanor at common law. An attempt to commit a crime is an intent to commit such crime by some overt act, and, in cases of rape, necessarily includes an assault. Stephen's Cr. Law, art. 49; Code sec. 64. The question whether an act done with intent to commit the offence is or is not only preparation for the commission of that offence and too remote to constitute an attempt to commit it is a question of law. Sec. 64 (2).

Evidence.]—If a man has or attempts to have connection with a woman while she is asleep, it is no defence that she did not resist as she is then incapable of resisting. The man can therefore be found guilty of a rape or of an attempt to commit a rape as the case may be. R. v. Mayers (1872), 12 Cox C.C. 311.

Assault with intent.]—An assault with intent to commit rape is also a substantive offence under sec. 263, and is the form in which a charge of attempt to commit rape is usually made. R. v. Riley (1887), 16 Cox C.C. 191.

Excluding public from court room.]—See note to sec. 267.

Jurisdiction.]—By sec. 540 of the Code power to try this offence is taken away from every County Court Judge in the Province of New Brunswick. R. v. Wright (1896), 2 Can. Cr. Cas. 83.

But a County Court in New Brunswick has jurisdiction to try the offence of attempting to have carnal knowledge of a girl under fourteen (Cr. Code 270), although the evidence discloses the offence of attempting to commit rape, as to which said court has no jurisdiction. (Cr. Code 540). Ibid.

269. Defiling children under fourteen.—Every one is guilty of an indictable offence and liable to imprisonment for life, and to be whipped, who carnally knows any girl under the age of fourteen years, not being his wife, whether he believes her to be of or above that age or not. 53 V., c. 37, s. 12.

Jurisdiction.]—The offence of carnal knowledge of a girl under fourteen years includes the offence of indecent assault, and a trial for the greater offence is a trial also for the lesser offence included therein, and the accused may, although found not guilty of the greater offence, be convicted for such lesser offence, if proved, under the same charge or indictment. R. v. Cameron (1901) 4 Can. Cr. Cas. 385 (Ont.).

A police magistrate trying an accused with his consent summarily, upon the charge of carnal knowledge, has the same power to convict of the lesser offence as a Court of General Sessions would have upon a trial under an indictment. Ibid.

An acquittal by the police magistrate on such summary trial is a bar to a charge upon a fresh information for indecent assault in respect of the same occurrence. Ibid.

An indictment for rape under secs. 266 and 267, lies against one who has ravished a female under the age of fourteen years against her will, notwithstanding this section. R. v. Riopel (1898), 2 Can. Cr. Cas. 225; R. v. Ratcliffe (1882), 15 Cox C.C. 127; R. v. Dicken (1877), 14 Cox C.C. 8.

Carnally knows.]—See definition in sec. 4 A.

Verdict.]—Sec. 713 authorizes a verdict of indecent assault, the consent of a girl under fourteen not being material to that offence; sec. 261; R. v. Cameron (1901), 4 Can. Cr. Cas. 385 (Ont.); or if the complete commission of the offence under sec. 269 is not proved, but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly. Sec. 711.

Evidence.]—Carnal knowledge alone constitutes an offence under this section when the girl is under the age of fourteen and her consent to the act is not a defence. R. v. Brice, 7 Man. R. 627; R. v. Chisholm, 7 Man. R. 613.

Proof of age.]—In order to prove the age of a boy, girl, child or young person for the purposes of this and the next section, the following shall be sufficient prima facie evidence:—(*a*) Any entry or record by an incorporated society or its officers having had the control or care of the boy, girl, child or young person at or about the time of the boy, girl, child or young person being brought to Canada, if such entry or record has been made before the alleged offence was committed. (*b*) In the absence of other evidence, or by way of corroboration of other evidence, the judge, or in cases where an offender is tried with a jury, the jury before whom an indictment for the offence is tried, or the justice before whom a preliminary inquiry thereinto is held, may infer the age from the appearance of the boy, girl, child or young person. Sec. 701A.

As to the evidence of children under fourteen who do not understand the nature of an oath, see sec. 685.

Excluding public from court room.]—See note to sec. 267.

270. Attempt to commit such offence.—Every one who attempts to have unlawful carnal knowledge of any girl under the age of fourteen years is guilty of an indictable offence and liable to two years' imprisonment, and to be whipped. 53 V., c. 37, s. 12.

Jurisdiction.]—A County Court in New Brunswick has jurisdiction to try the offence of attempting to have carnal knowledge of a girl under fourteen (Cr. Code 270), although the evidence discloses the offence of attempting to commit rape, as to which said court has no jurisdiction. (Cr. Code 540.) R. v. Wright (1896), 2 Can. Cr. Cas. 83.

Proof of age.]—See note to preceding section.

Excluding public from court room.]—See note to sec. 267.

271. Killing unborn child.—Every one is guilty of an indictable offence and liable to imprisonment for life who causes the death of any child which has not become a human being, in such a manner that he would have been guilty of murder if such child had been born.

2. No one is guilty of any offence who, by means which he in good faith considers necessary for the preservation of the life of the mother of the child, causes the death of any such child before or during its birth.

If the child be born, and die in consequence of injuries received either before or during birth, the offence is homicide. Sec. 219.

Excluding public from court room.]—See note to sec. 267.

272. Procuring abortion.—Every one is guilty of an indictable offence and liable to imprisonment for life who, with intent to procure the miscarriage of any woman, whether she is or is not with child, unlawfully administers to her or causes to be taken by her any drug or other noxious thing, or unlawfully uses any instrument or other means whatsoever with the like intent. R.S.C., c. 162, s. 47.

With intent.]—Supplying a noxious thing with intent to procure abortion is an offence by the terms of this section, although it subsequently appears that the woman was not preguant. See R. v. Titley (1880), 14 Cox C.C. 502; R. v. Goodhall (1846), 1 Den. 187.

Where the instrument alleged to have been used was a quill, which might possibly have been used for an innocent purpose, evidence was allowed to be given, in order to prove the intent, that the prisoner had at other times caused miscarriages by similar means. R. v. Dale (1889), 16 Cox C.C. 703, per Charles, J.

Administers.]—See note to sec. 232.

Causes to be taken.]—Where the prisoner gave the prosecutrix the drug for the purpose of procuring abortion, and the prosecutrix took it for that purpose in the prisoner's absence, it was held that he had "caused it to be taken" within the meaning of a similar English statute. R. v. Wilson (1856), Dears. & B. 127; R. v. Farrow (1857), Dears. & B. 164.

Drug or other noxious thing.]—The statute 32-33 Viet. c. 20, s. 59 as well as the later Act, R.S.C. 1886, c. 162, s. 47, used the phrase any poison or other noxious thing. It was laid down under that statute that while poisons are not noxious things when taken as medicine in ordinary treatment, that if taken or administered in undue and immoderate quantities the excess of the article becomes noxious, and it is not essential to support a conviction that the article should be noxious in itself. R. v. Stitt (1879), 30 U.C.C.P. 30, 33.

The thing administered must be either a "drug" or a "noxious thing," and it is not sufficient that the accused supposed it would have the desired effect. R. v. Hollis (1873), 12 Cox C.C. 463; R. v. Isaacs (1862), 9 Cox C.C. 228, 32 L.J.M.C. 52.

If the article administered is not a "drug" and the quantity administered is innoxious but would be noxious had it been taken in large quantities, there is no administration of a noxious thing within the section. R. v. Hennah (1877), 13 Cox C.C. 547.

If the drug administered produces miscarriage it is sufficient evidence that it is noxious although there is no other evidence of its nature. R. v. Hollis (1873), 12 Cox C.C. 463.

Evidence that quantities of oil of juniper considerably less than half an ounce are commonly taken medicinally without any bad results, but that half an ounce produces ill effects and is to a pregnant woman dangerous, was held sufficient from which a jury might infer that the latter quantity was a noxious thing. R. v. Cramp (1880). 5 Q.B.D. 307.

Excluding public from court room.]—See note to sec. 267.

273. Woman procuring her own miscarriage.—Every woman is guilty of an indictable offence and liable to seven years' imprisonment who, whether with child or not, unlawfully administers to herself or permits to be administered to her any drug or other noxious thing, or unlawfully uses on herself or permits to be used on her any instrument or other means whatsoever with intent to procure miscarriage. R.S.C., c. 162, s. 47.

Excluding public from court room.]—See note to sec. 267.

See note to sec. 272.

274. Supplying means of procuring abortion.—Every one is guilty of an indictable offence and liable to two years' imprisonment who unlawfully supplies or procures any drug or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she is or is not with child. R.S.C., c. 162, s. 48.

Intended to be unlawfully used.]—Even if the intention so to use the same exists only in the mind of the accused, and is not entertained by the woman whose miscarriage it is intended to procure, there is a complete offence. R. v. Hillman (1863), 9 Cox C.C. 386.

Drug or other noxious thing.]—See note to sec. 272.

Excluding public from court room.]—See note to sec. 267.

PART XXII.

OFFENCES AGAINST CONJUGAL AND PARENTAL RIGHTS—BIGAMY—ABDUCTION.

SECT.

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275. Bigamy defined.—Bigamy is—

(*a.*) the act of a person who, being married, goes through a form of marriage with any other person in any part of the world; or

(*b.*) the act of a person who goes through a form of marriage in any part of the world with any person whom he or she knows to be married; or

(*c.*) the act of a person who goes through a form of marriage with more than one person simultaneously or on the same day. R.S.C., c. 37, s. 10.

2. A "form of marriage" is any form either recognized as a valid form by the law of the place where it is gone through, or, though not so recognized, is such that a marriage celebrated there in that form is recognized as binding by the law of the place where the offender is tried. Every form shall for the purpose of this section be valid, notwithstanding any act or default of the person charged with bigamy, if it is otherwise a valid form. The fact that the parties would, if unmarried, have been incompetent to contract marriage shall be no defence upon a prosecution for bigamy.

3. No one commits bigamy by going through a form of marriage—

(*a.*) if he or she in good faith and on reasonable grounds believes his wife or her husband to be dead; or

(*b.*) if his wife or her husband has been continually absent for seven years then last past and he or she is not proved to have known that his or her husband was alive at any time during those seven years; or

(*c.*) if he or she has been divorced from the bond of the first marriage; or

(*d.*) if the former marriage has been declared void by a court of competent jurisdiction. R.S.C., c. 161, s. 4.

4. No person shall be liable to be convicted of bigamy in respect of having gone through a form of marriage in a place not in Canada, unless such person, being a British subject resident in Canada, leaves Canada with intent to go through such form of marriage.

What is a valid marriage.]—It was held in Regina v. Millis, (1844) 10 Cl. & F. 534; 8 Jur. 717, that at common law, a contract of marriage per verba de presenti, though a contract indissoluble between the parties themselves, did not constitute a complete marriage unless made in the presence and with the intervention of a minister in holy orders. Lord Chief Justice Tindal in his judgment in that case says: "There is found no authority to contravene the general position that at all times, by the common law of England, it was essential to the constitution of a full and complete marriage that there must be some religious ceremony; that both modes of obligation should exist together, the civil and the religious: that besides the civil contract, that is, the contract per verba de presenti which has always remained the same, there has at all time been a religious ceremony also which has not always remained the same but has varied from time to time." This case was carried to the House of Lords. The members of that tribunal were equally divided in opinion, the result being that the judgment of Lord Chief Justice Tindal was upheld. It was afterwards followed by the House of Lords in Beamish v. Beamish (1859), 9 H.L. Cas. 274; 8 Jur. N.S. 770. Regina v. Millis was a bigamy case in which class of cases, strict proof of marriage is required.

There are, however, exceptions to the rule laid down in Regina v. Millis. In Dicey's Conflict of Laws, it is stated at p. 625, that a marriage celebrated in the mode or according to the rules and ceremony held requisite by the law of the country where the marriage takes place, is valid so far as formal requisites are concerned; also at pp. 627-34 that a marriage celebrated in accordance with the requirement of the English common law where the use of local form is impossible, such impossibility arising from the country being one where no local form of marriage, recognized by civilized states exists, or where a marriage takes place in a land occupied by savages; also at p. 754, that a marriage made in a strictly barbarous country between British subjects or between a British subject and a citizen of a civilized country and, as it would seem, even between a British subject and a native of such uncivilized country, will be held valid as regards form, if made in accordance with the requirements of the common law of England; and that it is extremely probable that with regard to such a marriage the common law might now be interpreted as allowing the celebration of a marriage per verba de presenti without the presence of a minister in orders; and that a local form also, if such there be, would seem to be sufficient at

any rate where one of the parties is a native. Connolly v. Woolwich, 11 L.C. Jurist 197.

From this it would appear that it is only in cases where the marriage per verba de presenti takes place in a strictly barbarous country, where a marriage according to the English common law, or perhaps according to local rules and customs cannot be effected, that it would be sufficient. Re Sheran, 4 Terr. L.R. 83, 91.

Proof of foreign marriage.]—A marriage celebrated in a foreign country may be proved by any person who was present at it; but circumstances should also be proved from which a jury may presume that it was a valid marriage according to the laws of the country in which it was celebrated or according to the national law of the parties to it, if they do not belong to the state where the marriage is performed. Archbold Cr. Plead. (1900), 1115; Sussex Peerage Case (1844), 6 St. Tr. (N.S.) 79, 11 Cl. & F. 85. And evidence of the second wife that she was married in the foreign country by a priest according to the rites of his church was held sufficient without proof of the foreign marriage law. R. v. Griffin (1879), 14 Cox C.C. 308; but see R. v. Savage (1876), 13 Cox C.C. 178, and R. v. Ray (1890), 20 Ont. R. 212.

On an indictment for bigamy the witness called to prove the first marriage swore that it was solemnized by a justice of the peace in the State of New York, who had power to marry; but this witness was not a lawyer or inhabitant of the United States, and did not shew how the authority of the justice was derived. This evidence was held insufficient. R. v. Smith (1857), 14 U.C.Q.B. 565.

In giving judgment Robinson, C.J., said: "The witness who gave this evidence did not state whether it was by any written law of that country that the authority was given, or whether without any written law marriages by a justice of the peace are or were then held valid in that country. We can as individuals have no doubt that he speaks correctly, for we have heard the authority of justices of the peace to solemnize marriage in the State of New York proved upon various occasions in such a manner as was clearly sufficient according to our law of evidence. But we cannot act in a case of this kind upon the knowledge which we have acquired in other cases. And the question is whether evidence of the foreign law in this respect, given by a person who never at any time for all that appears, was a lawyer, or an inhabitant of the foreign country in question, can be received as sufficient. We are of opinion that it cannot, and that in this case such proof of a valid marriage as the law requires was not given. R. v. Smith (1857), 14 U.C.Q.B. 565.

In order to prove the second marriage, which took place in Michigan, the evidence of the officiating minister, a clergyman of the Methodist Church for twenty-five years, during which time he had solemnized many marriages, that this marriage was solemnized according to the law of the State of Michigan, was held admissible and sufficient. R. v. Brierly (1887), 14 O.R. 525.

(*2*)—*Form of marriage.*]—The defendant is guilty of an offence under this section, although the subsequent marriage would have been void for consanguinity. R. v. Brawn (1843), 1 C. & K. 144. Where a person already bound by an existing marriage goes through a form of marriage known to and recognized by the law as capable of producing a valid marriage, for the purpose of a pretended or fictitious marriage, the case is not the less within the statute by reason of any special circumstances which independently of the bigamous character of the marriage may constitute a legal disability in the particular parties, or which makes the form of marriage resorted to specially inapplicable to their individual case. R. v. Allen (1872), L.R. 1 C.C.R. 367, 369, disapproving; R. v. Fanning (1866), 17 Irish C.L.R. 289, 10 Cox C.C. 411.

(3a.)—*Bona fide belief of death.*]—Where the prisoner relies upon his first wife's lengthened absence, and his ignorance of her being alive, he must shew inquiries made, and that he had reason to believe her dead, more especially when he has deserted her; and this, notwithstanding that the first wife may have married again. R. v. Smith (1857), 14 U.C.Q.B. 565.

(3b.)—*Seven years' absence.*]—If the prisoner and his first wife had lived apart for more than seven years before he married again, mere proof that the first wife was alive at the time of the second marriage is not enough; there must be evidence that the accused was aware that she was alive at some time within the seven years preceding the second marriage. R. v. Fontaine, 15 L.C. Jur. 141; R. v. Curgerwen (1865), L.R. 1 C.C.R. 1, 10 Cox C.C. 152; R. v. Heaton (1863), 3 F. & F. 819.

When the prosecution have proved the two marriages and that the first wife was alive at the time of the second marriage the onus is on the accused to shew that his first wife had been continually absent for seven years before the second marriage. R. v. Willshire (1880), 6 Q.B.D. 366, 14 Cox C.C. 541; R. v. Dwyer, 27 L.C. Jur. 201. And the onus after such proof is then upon the prosecution to shew that he knew that the first wife was alive at some time during those seven years.

(3c)—*Validity of divorce.*]—Jurisdiction in matters of divorce depends upon the domicil of the parties at the time of the commencement of the divorce proceedings. If, therefore, the parties have their domicil in a foreign country and are divorced there without collusion or fraud by a court of competent jurisdiction, such a divorce is valid in Canada, and that quite irrespective of the place of marriage; or of the residence or allegiance of the parties; or of their domicil at the time of the marriage; or of the place in which the offence in respect of which the divorce was granted was committed. Dicey's Conflict of Laws, pp. 269, 391, 755; Stevens v. Fisk, Cassels S.C. Dig. 235; 8 Montreal Legal News, 42; and see an able article by W. E. Raney in 34 C.L.J., pp. 546-553. In Stevens v. Fisk, the parties being natives of the United States and domiciled in New York, were married there. Subsequently they removed to Montreal, where the husband took up his permanent residence. The wife some time afterwards returned to New York to her mother, and instituted proceedings for divorce in that State, on the ground of adultery. The husband was served in Montreal, and appeared by attorney, but filed no defence, and a divorce was accordingly granted. The question of the validity of the divorce in Quebec arose in a civil action brought by the former wife against the former husband for an account. If the divorce was valid, the action was maintainable under the laws of Quebec; otherwise it was not. The trial judge held that the divorce was binding and effective. The Court of Queen's Bench, composed of five judges, held by a majority of one that it was not, and that "notwithstanding such decree, according to the laws of the said Province" the plaintiff was still the wife of the defendant. In the Supreme Court Chief Justice Ritchie and Justices Gwynne and Henry agreed with the trial judge, while Mr. Justice Strong (dissenting) thought the Court of Queen's Bench was "perfectly right." Mr. Justice Gwynne based his opinion, as he did in the later case as to the validity of the bigamy sections of the Code, largely upon grounds of public policy, arguing, however, from rather a different point of view. He said: "That upon one side of the line of 45 degrees of latitude the plaintiff and defendant should be held to be unmarried, with all the incidents of their being sole and unmarried, and that upon the other side of the same line they should be held to be man and wife, is a result so inconvenient, injurious and mischievous, and fraught with such confusion and serious consequences, that in my opinion no tribunal not under a peremptory obligation so to hold should do so. Such a decision would, in my opinion, have the effect of doing great violence to that comitas inter gentes which should be assiduously cultivated by all neighbouring nations, especially

by nations whose laws are so similar, and derived from the same fountain of justice and equity, as are those of the State of New York and Canada, and between whom such constant intercourse and such friendly relations exist."

Where both husband and wife are Canadian born, and were married in Canada and continued to reside therein for many years after marriage, long residence abroad is not of itself sufficient to establish a change of domicil. McNamara v. Constantineau, 3 Rev. de Jur. (Que.) 482. A change of domicil must be animo et facto. Ibid.

Residence abroad is not sufficient to effect a change of domicil, even where such domicil is not the domicil of origin but one acquired of choice, unless it is accompanied by an intention to remain abroad and not to return to the former domicil. Bonbright v. Bonbright (1901), 2 O.L.R. 249.

In King v. Foxwell, L.R. 3 Ch.D., p. 318, Jessel, M.R., holds that "a man in order to change his 'domicil of origin' must choose a new domicil by fixing his sole or principal residence in a new country with the intention of residing there for a period not limited as to time."

Divorces granted by a foreign court having jurisdiction only by reason of a so-called matrimonial domicil, or when resort has been had to the jurisdiction of the foreign court merely for the purpose of divorce, will be treated as invalid. Le Messurier v. Le Messurier, [1895] App. Cas. 517; Shaw v. Gould (1868), L.R. 3 H.L. 55; Green v. Green, [1893] Prob. 89; Harvey v. Farnie (1883), 8 App. Cas. 43.

(4)—*Leaving Canada with intent.*]—The Parliament of Canada has jurisdiction to constitute the leaving Canada by a British subject resident therein with an intent to perform elsewhere a prohibited act an indictable offence, upon the act itself being performed. Re Bigamy sections of Code (1897), 1 Can. Cr. Cas. 172 (S.C. Can., Strong, C.J., dissenting); R. v. Brierly (1887), 14 Ont. R. 525. But see, contra, R. v. Plowman (1894), 25 Ont. R. 656.

A British subject domiciled in Canada, and only temporarily absent, continues to owe to Her Majesty in relation to her government of Canada an obligation to refrain from the completion, whilst absent without any animus manendi, of a prohibited act, a material part of which is committed by him in Canada. Ibid.

The onus is on the Crown to prove the facts that defendant was at the time of the second marriage a British subject, resident in Canada, and had left Canada with intent to commit the offence. R. v. Pierce (1887), 13 Ont. R. 226.

The Imperial Act, 24-25 Vict., ch. 100, sec. 57, would appear to also include the offence described in sub-sec. 4 of sec. 275, so that if the accused were apprehended or in custody in England or Ireland, he might be there tried and punished for the bigamous marriage in a foreign country, although a British subject resident in Canada, who had left Canada with intent to go through such form of marriage. No question of leaving British territory with or without such intent is involved in the Imperial Act, which is as follows:—(Sec. 57). "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland, *or elsewhere*, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years with or without hard labour; and any such offence may be dealt with, inquired of, tried, determined and punished in any county or place in England or Ireland, *where the offender shall be apprehended* or be in custody, in the same manner in all respects as if the offence had been *actually committed* in that county or place. Provided that nothing in this section contained shall extend to any second marriage contracted else-

where than in England and Ireland *by any other than a subject* of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

Evidence.]—It is necessary for the prosecution to prove (1) celebration of the first marriage and identity of the parties; (2) its validity; (3) that it subsisted at the date of the second marriage; (4) celebration of the second marriage. Archbold Cr. Pl. (1900) 1112.

Evidence of a confession by the prisoner of his first marriage is no evidence that that marriage had been lawfully solemnized, and is therefore insufficient to support a conviction. R. v. Ray (1890), 20 Ont. R. 212, following R. v. Savage (1876), 13 Cox 178; R. v. Truman (1795), 1 East P.C. 470; R. v. Flaherty (1847), 2 C. & K. 782; but see, contra, R. v. Newton (1843), 2 M. & Rob. 503, and sub nom. R. v. Simmonsto (1843), 1 C. & K. 164, 1 Cox C.C. 30; R. v. Creamer, 10 Lower Canada R. 404.

The wife or husband, as the case may be, of the person charged is a competent witness, with this exception that no husband is competent to disclose any communication made to him by his wife during their marriage and no wife is competent to disclose any communication made to her by her husband during their marriage. Can. Evid. Act (1893), sec. 4. Before that Act the second wife was a competent witness as soon as the first marriage was proved. 1 Hale 393; 1 Russ. Cr. 6th ed., 715 (*n*).

The offence will be complete though the accused assumed a fictitious name at the second marriage. R. v. Allison (1806), R. & R. 109; R. v. Rea (1872), L.R. 1 C.C.R. 365.

On a trial for bigamy, in proof of a prior marriage, a deed was produced, executed by the prisoner, containing a recital of the prisoner having a wife and child in England, and conveying real property to two trustees to receive and pay over the rents to his wife, but with a power of revocation to the prisoner. B. one of the trustees, proved the execution of the deed, and that at the time of its execution prisoner informed him that he had a wife and child living in England, but that he had never paid over any of the rents to her, nor had he ever written to or heard from such alleged wife. It was held that this was not sufficient evidence to prove the alleged prior marriage. R. v. Duff (1878), 29 U.C.C.P. 255.

Upon trials for bigamy proof is required of a marriage in fact, such as the court can judicially hold to be valid; mere evidence of cohabitation and reputation of being married will not do. R. v. Smith (1857), 14 U.C.Q.B. 565, per Robinson, C.J.

Where the marriage is alleged to have been celebrated according to Jewish law, evidence must be given of a written contract between the parties; Archbold Cr. Plead. (1900), 1114; R. v. Althausen (1893), 17 Cox C.C. 630; and that the witnesses to the marriage were not blood relations of the parties. Nathan v. Woolf (1899), 15 Times L.R. 250.

The fact that the other party to the first marriage is shewn to have been alive at a time prior to the second marriage, may or may not afford a reasonable inference that such party was alive at the date of the second marriage, but it is purely a question of fact for the jury. R. v. Lumley (1869), L.R. 1 C.C.R. 196, 14 Cox C.C. 274.

276. Punishment of bigamy.—Every one who commits bigamy is guilty of an indictable offence and liable to seven years' imprisonment.

2. Every one who commits this offence after a previous conviction for a like offence shall be liable to fourteen years' imprisonment. R.S.C., c. 161, s. 4.

Indictment.]—A count alleging the second marriage "the said A, his former wife, being then alive" was held sufficient without a special averment that he was still married to A. when the offence was committed. Murray v. R. (1845), 7 Q.B. 700; 1 Cox C.C. 202; R. v. Apley (1844), 1 Cox C.C. 71.

277. Feigned marriages.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who procures a feigned or pretended marriage between himself and any woman, or who knowingly aids and assists in procuring such feigned or pretended marriage. R.S.C., c. 161, s. 2.

Corroboration.]—A person accused of an offence under this section shall not be convicted upon the evidence of one witness unless such witness is corroborated in some material particular by evidence implicating the accused. Sec. 684.

(Amendment of 1900.)

278. Polygamy.—Every one is guilty of an indictable offence and liable to imprisonment for five years, and to a fine of five hundred dollars,

(*a*) who practices, or, by the rites, ceremonies, forms, rules or customs of any denomination, sect or society, religious or secular, or by any form of contract, or by mere mutual consent, or by any other method whatsoever, and whether in a manner recognized by law as a binding form of marriage or not, agrees or consents to practice or enter into

(i.) any form of polygamy;

(ii.) any kind of conjugal union with more than one person at the same time; or

(iii.) what among the persons commonly called Mormons is known as spiritual or plural marriage; or

(*b.*) who lives, cohabits, or agrees or consents to live or cohabit in any kind of conjugal union with a person who is married to another, or with a person who lives or cohabits with another or others in any kind of conjugal union; or

(*c.*) celebrates, is a party to, or assists in any such rite or ceremony which purports to make binding or to sanction any of the sexual relationships mentioned in paragraph (*a*) of this section; or

(*d.*) procures, enforces, enables, is a party to, or assists in the compliance with, or carrying out of, any such form, rule or custom which so purports; or

(*e.*) procures, enforces, enables, is a party to, or assists in the execution of, any such form of contract which so purports, or the giving of any such consent which so purports.

The amendment corrects a clerical error, the present paragraph (*b*) having previously stood as sub-paragraph (iv.) of paragraph (*a*).

Indian plural marriages.]—An Indian who according to the customs of his tribe takes two women at the same time as his wives, and cohabits with them, is guilty of an offence under this section. R. v. "Bear's Shin Bone" (1899), 3 Can. Cr. Cas. 329 (N.W.T.).

By the North-West Territories Act (R.S.C. c. 50, s. 11), the laws of England, as of July 15, 1870, in civil aad criminal matters were declared to be in force in the territories *in so far as the same are applicable to the Territories*, and in so far as the same have not been or are not hereafter repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any Ordinance of the Lieutenant-Governor in Council (49 Vict. (Can.), c. 15, s. 3), or of the Legislative Assembly (60-61 Vict. (Can.), c. 28, s. 4.

In The Queen v. Nan-e-qnis-a Ka (1889), 1 N.W.T. Rep., part 2, page 21, it was unanimously held by the Supreme Court of the Territories (Richardson, Macleod, Rouleau, Wetmore and McGuire, JJ.,) that the laws of England respecting the solemnization of marriage were not applicable to the Territories, quoad the Indians, and that a marriage since the Territories Act between Indians by mutual consent and according to Indian custom is a valid marriage, provided that neither of the parties had a consort living at the time, "at any rate so as to render either one, as a general rule, incompetent and not compellable to give evidence against the other on trial charged with an indictable offence" (1 N.W.T. Rep., pt. 2, p. 25), under the rule of law that a wife is not competent or compellable to testify for or against her husband. In that case the prisoner, an Indian, charged with assault, tendered the evidence of two women, whom he called his wives, and the trial judge admitted the testimony of the woman whom the prisoner had first married, but rejected the testimony of the one last married, and this ruling was affirmed by the full court on a Crown case reserved.

Conjugal union.]—The mere fact of cohabitation between a man and a woman, each of whom is married to another, will not sustain a conviction under this section (formerly 53 Vic. (Can.), c. 37, s. 11) to come within the terms of which there must be "some form of contract between the parties which they might suppose to be binding on them, but which the law was intended to prohibit," and the term "conjugal union" in the statute has reference to a form of ceremony joining the parties, a marriage of some sort before cohabiting with one another. The Queen v. Labrie (1891), Montreal Law Reports, 7 Q.B. 211, per Dorion, C.J., Cross, J., Baby, J., Bossé, J., and Doherty, J.

In The Queen v. Liston (noted 34 C.L.J. 546) tried at the Toronto Assizes in 1893, Chief Justice Armour held that section 278 of the Code, which is the only section which it could be argued covers adultery, was intended to apply only to Mormons.

Evidence]—Sec. 706 provides that in the case of any indictment under sub-sections (*b*), (*c*) and (*d*) of sec. 278 no averment or proof of the method in which the sexual relationship charged was entered into, agreed to, or consented to, shall be necessary in any such indictment, or upon the trial of the person thereby charged; nor shall it be necessary upon such trial to prove carnal connection had or intended to be had between the persons implicated.

279. Solemnization of marriage without lawful authority.—Every one is guilty of an indictable offence and liable to a fine, or to two years' imprisonment, or to both, 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 kowingly aids or abets such person in performing such ceremony. R.S.C., c. 161, s. 1.

Limitation of time]—No prosecution for this offence shall be commenced after the expiration of two years from its commission. Sec. 551 (*b*).

280. Solemnization of marriage contrary to provincial law.—Every one is guilty of an indictable offence and liable to a fine, or to one year's imprisonment, who, being lawfully authorized, knowingly and wilfully solemnizes any marriage in violation of the laws of the province in which the marriage is solemnized. R.S.C., c. 161, s. 3.

281. Abduction of a woman. Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to marry or carnally know any woman, whether married or not, or with intent to cause any woman to be married to or carnally known by any other person, takes away or detains any woman of any age against her will. R.S.C., c. 162, s, 43.

With intent.]—The intent may be shewn by the declarations or acts of the defendant or from other circumstances from which the intent may be inferred. R. v. Barratt (1840) 9 C. & P. 387.

So far as the question of "persuasion" involves the question of "intent," evidence is admissible of acts done in a foreign jurisdiction as shewing the intent, which is a mental quality not dependent on jurisdiction. Jackson v. Commonwealth (1897), 38 S.W. Rep. 1091.

Takes away or detains.]—Manual force may not in all cases be necessary. If the taking away was accomplished under the fear and apprehension of a present immediate threatened injury depriving the woman of freedom of action, it will be an offence although no actual force was used. 1 Burn's Justice 9.

If the woman be taken away in the first instance with her own consent, but afterwards refuse to continue with the offender, and is forcibly detained by him, the offence is complete because if she so refuse she may from that time as properly be said to be "taken" against her will as if she had never given her consent at all, for till the force was put upon her she was in her own power. 1 Burn's Justice 8; 1 Hawk, c. 41, s. 7. So, under the old statute of Hen. 7, which did not contain the words "or detain," detaining a person who originally came with her own consent was considered to be within the statute. R. v. Brown (1674), Ventr. 243.

If the woman be taken away and married with her consent obtained by fraud, the case may be within the statute for she cannot while under the influence of fraud be considered a free agent. R. v. Wakefield (1827), 2 Lewin 279.

282. Abduction of an heiress.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, with intent to marry or carnally know any woman, or with intent to cause any woman to be married or carnally known by any person—

(*a.*) from motives of lucre takes away or detains against her will any such woman of any age who has any interest, whether legal or equitable, present or future, absolute, conditional or contingent, in any real or personal estate, or who is a presumptive heiress or co-heiress or presumptive next of kin to anyone having such interest; or

(*b.*) fraudulently allures, takes away or detains any such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her.

2. Every one convicted of any offence defined in this section is incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she has any interest, or which comes to her as such heiress, co-heiress or next of kin; and if any such marriage takes place such property shall, upon such conviction, be settled in such manner as any court of competent jurisdiction, upon any information at the instance of the Attorney-General appoints. R.S.C., c. 162, s. 42.

(*1a*)—*From motives of lucre.*]—Roscoe (Crim. Evid., 11th ed., p. 255) says in reference to the corresponding section of the English Act, 24-25 Vict., ch. 100:—"The abduction must be from 'motives of lucre' by which, it is supposed, is meant that the prisoner when he carried off the woman had in

view the advancement of his own pecuniary position by using the legal rights of a husband over his wife's property. If this is so, why the intent to carnally know was inserted does not clearly appear, because a man can only carnally know a woman from motives of lucre when his plan is thereby to coerce her into a marriage so that if the statute had expressed the intent to marry only, it would have been enough. It is quite clear that carrying off an heiress from motives of lust only would not be an offence under this part of the statute" (sub-sec. *a*).

There may, however, be exceptional cases where the accused commits the offence for money paid or promised to him by a confederate, and in which, as a part of the conspiracy, the accused is himself to marry the woman.

(*1b*)—*Fraudulently allures.*]—It need not be shewn that the accused knew that the woman was an heiress or had such an interest in real or personal estate, etc., as is specified in sub-sec. (*b*). R. v. Kaylor, 1 Dor. Q.B. (Que.) 364.

(*2*)—*Disability to take benefit.*]—It may be doubted whether the Dominion Parliament have the legislative authority to enact the second sub-section, particularly as regards the power purported to be conferred upon a court of competent jurisdiction to make a settlement of the property. The power to legislate as to the "criminal law" is conferred by the British North America Act upon the federal parliament, and the power to legislate as to "property and civil rights" is vested by the same statute in the Provincial legislatures. Quære whether the second sub-section is a matter of criminal law. It has been decided by the Supreme Court of Canada that a statutory provision authorizing a magistrate to adjudge forfeiture to the Crown of money, etc., found in a common gaming house (Code sec. 575) is intra vires and is not an interference with "property and civil rights"; O'Neil v. Attorney-General (1896), 1 Can. Cr. Cas. 303; but this sub-section, adapted from the English statutes, 9 Geo. IV., ch. 31, sec. 19 and 24-25 Vict., ch. 100, sec. 53, is substantially different from Code sec. 575 as well as from sec. 838 as to the restitution of stolen property, which latter would seem to affect the custody of and not the title to goods.

283. Abduction of girl under sixteen.—Every one is guilty of an indictable offence and liable to five years' imprisonment who unlawfully takes or causes to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her.

2. It is immaterial whether the girl is taken with her own consent or at her own suggestion, or not.

3. It is immaterial whether or not the offender believed the girl to be of or above the age of sixteen. R.S.C., c. 162, s. 44.

Evidence.]—To constitute the crime of abducting a girl out of the possession of and against the will of her father under this section, there must be an actual or constructive possession de facto, in the father at the time of the taking. When the girl who was resident with her father in a foreign country left without his consent and with intent to renounce his protection, and came to Canada, the father's possession ceased, and semble, a possession de jure afterwards established by his following her to the place of flight is not the possession contemplated by the section. R. v. Blythe (1895), 1 Can. Cr. Cas. 263 (B.C.).

If the persuasion to leave and remain away operated wholly in the foreign country, there is no jurisdiction to convict in Canada, as persuasion is a necessary element in such cases of abduction. Ibid.

To take a natural daughter under sixteen years of age away from the custody of her putative father may be an offence under this section. R. v. Cornforth (1742), 2 Str. 1162; R. v. Sweeting (1766), 1 East P.C. 457.

The girl is none the less in the "possession" of her guardian by reason of having left her guardian's house for a particular purpose with his sanction. R. v. Mondelet (1877), Ramsay's Cases (Que.), 179, 21 L.C. Jur. 154.

A., a girl under the age of sixteen, who was, with her father's consent, under the care of B., her uncle, was allowed by B. to dine at the house of C., who was married to B.'s sister. C. took A. for a drive and induced her to remain over night with him at an hotel, where he debauched her. The next day he left her at B.'s. It was held that B. had the lawful care of A., and that she was unlawfully taken out of his possession by C. R. v. Mondelet, 21 L.C. Jur. 154.

A girl employed as a barmaid at some distance from her father's house has been held not to be in his possession. R. v. Henkers (1886), 16 Cox C.C. 257.

It is no defence that the act was committed from no bad motive, or even from philanthropic and religious motives. R. v. Booth (1872), 12 Cox C.C. 231.

The only intent which it is necessary to prove under this section is the intent to deprive the parent or other person of the possession of the child. R. v. Timmins (1860), Bell 276, 30 L.J.M.C. 45. In the case last mentioned, the prisoner induced a girl of between fourteen and fifteen years to leave her father's house and cohabited with her for three days and then told her to go home. The jury found the prisoner guilty, but also found that he did not intend when he took the girl away to keep her away from home permanently, and the conviction was affirmed.

Where the prisoner went in the night to the house of B. and placed a ladder against the window and held it for the daughter of B., a girl of the age of fifteen years, to descend, which she did, and then she eloped with him, this was held to be a "taking" of the girl out of the possession of her father, although she herself proposed to the prisoner that he should bring the ladder and that she would elope with him. R. v. Robins (1844), 1 C. & K. 456.

A man intending to emigrate to America privately persuaded a girl under sixteen to go with him, and on the morning of his departure had secretly told her to put up her things in a bundle and meet him at a certain spot, and she accordingly left her father's house and met the prisoner, and the two travelled up to London together; this was held to be a "taking." R. v. Mankletow (1853), 1 Dears. C.C. 159, 22 L.J.M.C. 115. Jervis, C.J., in delivering judgment, said:—It is unimportant under the section on which this indictment is framed whether the girl consented or not to go away with the man. When the prisoner met the girl at the appointed place there was then a taking of her. The statute was framed for the protection of parents. Ibid; R. v. Booth (1872), 12 Cox C.C. 231.

Where a man induces a girl under sixteen by promises of what he will do for her to leave her father's house and live with him, he may be convicted of this offence, although he is not actually present or assisting her at the time she leaves. R. v. Robb (1864), 4 F. & F. 59. If, however, the going away was entirely voluntary on the girl's part there can be no conviction under this section. Ibid. But as to children under fourteen see sec. 284.

So where a girl left her father without any persuasion, inducement or blandishment held out to her by the defendant, so that she had got fairly away from home and then went to the defendant, it may be his moral duty to return her to her father's custody, yet his not doing so is no infringement of this section, for it does not say he shall restore her, but only that he shall not take her away. R. v. Olifier (1866), 10 Cox C.C. 402.

If the jury believe that the mother having the custody of the girl has countenanced the daughter in a lax course of life, by permitting her to go out at night and to dance at public houses, the case is not within the intent of the statute, but is one where what had occurred, though unknown to her, could not be said to have happened against her will. R. v. Primelt (1858), 1 Foster & F. 50, per Cockburn, C.J.

It may be doubted whether it would be an offence to take away a girl against the consent of her parent, but by the consent of one who has the temporary care of her. Archbold's Cr. Plead. 22nd ed. 858; 1 East P.C. 457.

It is also doubtful whether, if the parent once consent, but afterwards dissent, a subsequent taking away can be said to be against the will of the parent. Calthrop v. Axtel (1686), East P.C. 457, 3 Mod. 168.

Where a girl lived with her father and while on the street the prisoner met her and induced her to go with him to a neighboring town where he seduced her, and then brought her back, not knowing who she was or whether she had a father living, but not believing that she was a girl of the town, it was held that as there was no evidence to shew that the prisoner had reason to know that the girl was under her father's protection, a conviction could not be supported. R. v. Hibbert(1869), L.R. 1 C.C.R. 184, 38 L.J.M.C. 61.

And where the prisoners found the girl in the street by herself and invited her to go with them and one of them kept her in an empty house with him all night and had intercourse with her, and there was no evidence as to the purpose for which the girl had left home, an acquittal was directed upon the ground that the girl was not taken out of the possession of anyone. R. v. Green (1862), 3 F. & F. 274.

This offence is distinct from the offence of seduction and a conviction under this section does not preclude a conviction for seduction. R. v. Smith (1890), 19 O.R. 714; following R. v. Handley (1833), 5 C. & P. 565 and R. v. Vandercombe and Abbott (1796) 2 Leach C.C. 708.

Proof of age.]—See sec. 701A.

(Amendment of 1900.)

284. Stealing children.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, with intent to deprive any parent or guardian of any child under the age of fourteen years, of the possession of such child, or with intent to steal any article about or on the person of such child, unlawfully—

(*a.*) takes or entices away or detains any such child; or

(*b.*) receives or harbours any such child knowing it to have been dealt with as aforesaid.

2. Nothing in this section shall extend to any one who gets possession of any child, claiming in good faith a right to the possession of the child.

3. In this section the word "guardian" has the same meaning as it has in ss. 183 and 186, as interpreted by s. 186A.

Evidence.]—It is no excuse that the defendant, being related to the girl's father and frequently invited to the house, made use of no other seduction than the common blandishments of a lover to induce the girl secretly to elope with and marry him, if it appears that it was against the consent of the father. R. v. Twistleton (1668), 1 Lev. 257, 2 Keb. 432. The object of such a law is to prevent children from being seduced from their parents or guardians by flattering or enticing words, promises or gifts, and married in a secret way to their disparagement. Hicks v. Gore, 3 Mod. 84.

The English statute, 24-25 Vict., ch. 100, sec. 56, is more limited in its terms. By it in order to constitute the offence the accused must have "either by force or fraud" led or taken away or decoyed or enticed away or detained any child under the age of fourteen years with intent, etc. It has been held that the offence under that Act may be proved by shewing force or fraud exercised either upon the guardian of the child or upon the child taken or detained, or upon any other person. R. v. Bellis (1893), 62 L.J.M.C. 155, overruling R. v. Barrett (1885), 15 Cox C.C. 658.

And where the prisoner was indicted for that she did feloniously and unlawfully by fraud detain a child under the age of fourteen with intent to deprive the mother of the possession of her, it was held that she was rightly convicted upon evidence that the child had been in the service of the prisoner and was missing and could not be found, and that she gave different accounts of what had become of the child, but implying that she had given her up to some third person although there was no evidence that the child was still in her actual custody, nor indeed any evidence as to where she was. R. v. Johnson (1884), 15 Cox C.C. 481.

Proof of age.]—See sec. 701A.

PART XXIII.

DEFAMATORY LIBEL.

SECT.

(*Amendment of 1900.*)

285. Defamatory libel.—A defamatory libel is matter published, without legal justification or excuse, likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or designed to insult the person of or concerning whom it is published.

2. Such matter may be expressed either in words legibly marked upon any substance whatever, or by any object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony.

Defamatory libel.]—The first sub-section formerly concluded with the words "designed to insult the person *to* whom it is published," and was amended by the Criminal Code Amendment Act 1900, 63 Vict., ch. 46, by substituting the words "of or concerning" for the word "to."

The writing and publishing of defamatory words of any living person or words calculated or intended to expose him to public hatred, contempt or ridicule, or to damage his reputation, or the exhibition of a picture or effigy defamatory of him is defamatory libel, if such publication or exhibition is

calculated to cause a breach of the peace. Monson v. Tussauds, Ld. [1894] 1 Q.B. 671; Odgers on Libel, 3rd ed., 443.

Any malicious defamation of any person, expressed in print or in writing, or by means of pictures or signs, and tending to provoke him to anger and acts of violence, or to expose him to public hatred, contempt or ridicule, amounts to a libel in the indictable sense of the word; and, since the reason is that such publications create ill blood and manifestly tend to a disturbance of the public peace the degree of discredit is immaterial to the essence of the libel since the law cannot determine the degree of forbearance which the party reflected upon will exert. 2 Starkie on Slander, 210, 211.

Libels on the dead.]—The publication of a libel on the character of a dead person is not indictable unless it is intended to injure or provoke living persons. Burb. Cr. Dig. 263. An actual intent to injure or to provoke or annoy living persons of the same family blood or society is essential to the offence, and a mere tendency to provoke, or constructive intention inferred from the fact that the libel was calculated to hurt the feelings of any surviving relations of the deceased is not enough. R. v. Ensor (1877), 3 Times L.R. 366; Burb. Cr. Dig. 263 (*n*). Whether the libel be soon or late after the death of the party, if it be done with malevolent purpose to vilify the memory of the deceased and with a view to injure his posterity then it is done with a design to break the peace and is illegal. R. v. Critchley (1734), 4 T.R. 129 (*n*); R. v. Topham (1791), 4 T.R. 126. But it must be some very unusual publication to justify an indictment for aspersing the character of the dead. R. v. Labouchere (1884), 12 Q.B.D. 320.

Seditious libels.]—See secs. 123 and 124.

Libels on foreign sovereigns.]—See sec. 125.

Blasphemous libel.]—See sec. 170.

At common law.]—At common law criminal proceedings for libel did not lie "unless the offence be of such signal enormity that it may reasonably be construed to have a tendency to disturb the peace and harmony of the community." 1 Hawkins P.C., c. 28, sec. 3. In such a case the public are justly placed in the character of an offended prosecutor to vindicate the common right of all, though violated only in the person of an individual. Ibid.

The criminal remedy for libel is in some respects the more extensive remedy; a libel may be indictable though it be not actionable. Odgers on Libel, 3rd ed. (1896), 444; R. v. Topham (1791), 4 T.R. 126; R. v. Gathercole (1838), 2 Lewin C.C. 237; R. v. Darby, 3 Mod. 139.

Evidence.]—In criminal libel it is not necessary to shew a publication to some third person other than the person defamed, and it is sufficient to prove a publication to the prosecutor himself, provided the obvious tendency of the words be to provoke the prosecutor and excite him to break the peace. R. v. Wegener (1817), 2 Stark. 245; R. v. Brooke (1856), 7 Cox C.C. 251; R. v. Adams (1888), 22 Q.B.D. 66, 16 Cox C.C. 544; Odgers on Libel, 3rd ed., p. 455.

A manuscript of a libel is deemed prima facie to be published, so far as the writer is concerned, when it has passed out of his possession and control. R. v. Burdett (1820), 4 B. & Ald. 143; R. v. Lovett (1839), 9 C. & P. 462.

The directors of a printing company are not criminally liable for a libel contained in a paper printed by the servants of the company, unless they knew of or saw the libel before its publication, or gave express instructions for its appearance. R. v. Allison (1888), 16 Cox C.C. 559.

Apart from statutory enactments in reference thereto, it was held that the proprietor of a newspaper is answerable criminally for the publication

in it of a libel though he has personally nothing to do with the conducting of the paper and leaves its whole management to others. R. v. Walter (1799), 3 Esp., 21, per Lord Kenyon; R. v. Gutch (1829), 1 Moody & Malkin, 433, 438.

And by sec. 297 of the Code, "Every proprietor of any newspaper is *presumed* to be criminally responsible for defamatory matter inserted and published therein, but such presumption may be rebutted by proof that the particular defamatory matter was inserted in such newspaper without such proprietor's cognizance, and without negligence on his part."

On an indictment for a libel published in a newspaper, it appeared that the editor (who was not indicted) before inserting the libel shewed it to the prosecutor, who did not express any wish to suppress the publication, but wrote a reply, which was also inserted. The jury found it to be a malicious libel, and defendants were convicted. The court held that what prosecutor said to the editor, and did, did not hold out any assurance of impunity to the defendants, so as to render the conviction illegal, and a new trial was refused. R. v. McElderry (1860), 19 U.C.Q.B. 168.

Proof of publication.] —Notwithstanding a libel may be written with a real intent to publish it, yet if no publication of it ever takes place, there is no crime, for whatever a man's intent may be, if such intent is followed by no overt act to accomplish his purpose, it would be difficult to say that he is deprived of all locus pœnitentiæ, and may be indicted for what he only intended, but never in fact attempted. The writing and composing a libel, without anything further done, may be considered merely as the private registering of a man's own thoughts; and as it is the publication that is the gist of the offence, it seems reasonable, at all events, to require some evidence of an actual attempt to publish before a party can be charged with an intent to do so. 2 Deacon Crim. Law, 809. And see R. v. Paine (1695), 5 Modern 163, 167.

The publication of a libel is not confined to the actual communication of its contents by the publisher to some other person; for though, in common parlance, the word "publication" may be confined in its interpretation to making the contents known to the public, yet its meaning is not so limited in law; wherein some words are used in a peculiar sense, differing in a certain degree from their popular meaning. Thus, in the language of the law, we speak of the publication of a will and of an award, without meaning to denote by that word any communication of the contents of those instruments, and meaning only a declaration by the testator or arbitrator, in the presence of witnesses, that the instrument is his testament or award. So in the case of a libel, the publication of it may be traditione, when it is delivered over to scandalize any party; and the publication of it is nothing more than doing the last act for the accomplishment of the mischief intended by it. For the moment a man delivers a libel from his hands his control over it is gone; he has shot his arrow, and it does not depend upon him, whether it hits the mark or not. There is an end then of the locus pœnitentiæ. his offence is complete, the mischievous contention is consummated, and from that moment he is liable to be called upon to answer for his act. And though the act of publication may be proved by an actual communication of the contents of the libel, as by singing or reading, or an open exposure of it to other persons, yet these are not the only nor the usual modes of proof. The usual mode is by delivery of the libel, either by way of sale, or otherwise; and upon proof of the purchase of a pamphlet in Fleet street, it is not necessary to prove that the purchaser read the pamphlet either in London or elsewhere. Per Best, J., and Abbott, C.J., in Rex v. Burdett (1820), 4 Barn. & Ald. 126, 160; 2 Deacon, Crim. Law, 808.

A person, who, on the application of a stranger, delivers to him the writing which libels a third person, publishes the libellous matter to him, though he may have been sent for the purpose of procuring the work by that third

person. So far as in him lies, he lowers the reputation of the principal in the mind of the agent, which, although that of an agent, is as capable of being affected by the assertions as if he were a stranger. The act is complete by the delivery; and its legal character is not altered, either by the procurement of that person, or by the subsequent handing over of the writing to him. Brunswick v. Harmer, 14 Q.B. 185. But the reading a libel in the presence of another, without any previous knowledge of its being a libel, does not amount to a publication. "Also it hath been holden," says Hawkins, "that he who repeats part of a libel in merriment without malice and with no purpose of defamation, is in no way punishable; but it seemeth that the reasonableness of this opinion may justly be questioned; for jests of this kind are not to be endured and the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it." 1 Hawkins, P.C., ch. 73, sec. 14. Yet, where a man went to the defendant's house, and requested liberty to see a caricature print, and the defendant thereupon produced it, and pointed out the figures of the persons it ridiculed, Lord Ellenborough ruled that this was not sufficient evidence of a publication. Smith v. Wood, 3 Campbell, 323.

Evidence that the defendant communicated verbally to another the defamatory matter, with a view to its publication, is sufficient to charge him with the publication. In Adams v. Kelly, Ryan & Moody, N.P.C. 157, a witness (at that time a reporter for the Observer newspaper), stated that he had met with the defendant, who communicated to him the slanderous matter set forth in the first count relating to the plaintiff, which the defendant said would make a good case for the newspaper. The reporter desirous of obtaining information for his paper, attended the defendant to an adjoining tavern, and who gave him a more detailed account, for the express purpose of inserting it in the paper with which the reporter was connected. Afterwards, from the particulars communicated by the defendant, the reporter drew up an account which he left at the office of the Observer, to be inserted in that paper. An Observer newspaper was then put into the witness's hands, and he stated that a paragraph in that paper contained exactly the same account which he sent to the editor, with the exception of some slight alterations, not affecting the sense, made by the editor. The counsel for the plaintiff then proposed to read the newspaper.

Abbott, C.J., said: —"This newspaper is proposed to be given in evidence, in order to sustain that count, which charges the defendant with publishing the printed libel set forth in the declaration. The evidence is, that the reporter put something in writing from his conversation with the defendant, and which he gave to the editor. What the reporter published in consequence of what passed with the defendant, may be considered as published by the defendant: but you must shew that what was published is that which was given to the editor by the reporter, which you can only do by producing the paper itself."

There may also be a constructive publication. In Watts v. Fraser, 7 Carrington & Payne, 369, it was held that the printer and editor of a magazine are both liable for a libellous lithographic print which is contained in the work, although the print was not struck off by the printer, provided that the print is referred to in the letter-press of one of the articles.

The mere act of printing is not sufficient evidence of publication. In Watts v. Fraser, 7 Adolphus & Ellis, 223, 233. Lord Denman, C.J., in delivering the opinion said:—"One authority, Baldwin v. Elphinston, 2 Wm. Blackstone, 1037, was cited, where the Court of Exchequer held that printing must prima facie be understood to be a publishing, because the matter must be delivered to a compositor and other workmen; but it does not follow, as of course, from a work being printed, that the party sending it forth employed a compositor or other workmen. We cannot, therefore, act upon that case." If the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed

and published, this is sufficient evidence to go to a jury that it was published by the defendant, although there be no evidence to shew that the printing and publishing were by his direction. Regina v. Lovett, 9 Carrington & Payne, 462; Lamb's Case, 9 Co. Rep. 59. "For when a libel is produced written by a man's own hand," said Lord Holt, "and the author of it is not known; he is taken in the mainer, and that throws the proof upon him; and if he cannot produce the composer, the verdict will be against him." R. v. Bear (1696), 1 Lord Raymond, 417; 2 Salkeld, 419. But it is not a publication if the author takes a copy of the libel, provided he never publishes the copy. Lamb's Case, 9 Co. Rep. 59.

If the libel is contained in a letter addressed to the prosecutor, this is evidence of a publication sufficient to support an indictment, on the first and general principle of preserving orderly and decent conduct in society, that is, technically speaking, for the preventing breaches of the peace. Therefore the indictment must allege that the intention of sending the letter was to provoke the prosecutor and to excite him to break the peace. R. v. Wegener (1817), 2 Starkie Rep. 245; 1 Hawkins, P.C. ch. 73, sec. 11. And where a letter containing a libel is sent to the wife, it ought to be alleged as sent with intent to disturb the domestic harmony of the parties. Rex v. Wegener, ubi supra, per Abbott, J. In Avery v. the State, 7 Connecticut, 266, the information charged that the defendant sent a letter to the wife of another man, stating that she had acted libidinously with him, and had invited him to an adulterous intercourse and connection with her, and sought opportunities to effect it, and that the defendant wrote the letter and sent it to her with intent to insult and abuse her, and to seduce and debauch her affections from her husband, entice her to commit adultery, and bring her into hatred and contempt. It was held that the sending of such a letter, without other publication, was sufficient to support the information on the general principle that it tended to cause a disturbance of the public peace.

The date of a letter is prima facie evidence that it was written at the place where it was dated. Rex v. Hensey, 1 Burrow, 644; Rex v. Burdett, 4 Barnewall & Alderson, 95; and the post mark is prima facie evidence that the letter was in the office at the time and place therein specified. Fletcher v. Braddyll, 3 Starkie Rep. 64; and if a letter properly directed is sent by the post, it is presumed, from the known course in that department of the public service, that it reached its destination at the regular time and was received by the person to whom it was addressed. Warren v. Warren, 1 C. M. & R., 250; 4 Tyrwhitt, 850; approved in Shipley v. Todhunter, 7 Carrington & Payne, 680, 686.

In an action for libel contained in a pamphlet, a witness stated that she had received a copy from the defendant and that she had read certain portions of it; that she had lent it to a third person, who had afterwards given her a copy back, which she believed to be the same she had lent to him, but that she would not swear that it was the same, yet that she had no reason to doubt it. This was held to be sufficient evidence of publication for the jury. Fryer v. Gathercole, 4 Exchequer Rep. 262.

If a libel is written in one county and sent by post addressed to a person in another county, or its publication in another county be in any way consented to, this is evidence of a publication in the latter county. The Seven Bishops' Case, 13 Howell's State Trials, 331, 332. Thus, if a libellous letter is sent by the post, addressed to a party out of the county in which the venue is laid, but it is first received by him within that county, this is a sufficient publication. Rex. v. Watson, 1 Campbell, 215.

But a general confession that the defendant was the writer of a libel, is no evidence that he published it in any particular county. The Seven Bishops' Case, 12 Howell's State Trials, 183.

286. Publishing defined.—Publishing a libel is exhibiting it in public, or causing it to be read or seen, or showing or delivering it, or causing it to be shown or delivered, with a view to its being read or seen by the person defamed or by any other person.

287. Publishing upon invitation.—No one commits an offence by publishing defamatory matter on the invitation or challenge of the person defamed thereby, nor if it is necessary to publish such defamatory matter in order to refute some other defamatory statement published by that person concerning the alleged offender, if such defamatory matter is believed to be true, and is relevant to the invitation, challenge or the required refutation, and the publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

Answer provoked or invited.]—Every man has a right to defend his character against false aspersion; therefore communications made in fair self-defence are privileged. If a person is attacked in a newspaper he may write to that paper to rebut the charges, and he may at the same time retort upon his assailant where such retort is a necessary part of his defence or fairly arises out of the charges made in the former article. O'Donoghue v. Hussey, Irish R. 5 C.L. 124. An attack made in public requires a public answer. Laughton v. Bishop of Sodor and Man, (1872) L.R. 4 P.C. 495.

Even in rebutting an accusation, the defendant may not state what he knows at the time to be untrue, or intrude unnecessarily into the private life or character of his assailant; the privilege extends only to such retorts as are fairly an answer to the plaintiff's attacks. Odgers on Libel 233; R. v. Veley (1867), 4 F. & F. 1117; Kœnig v. Ritchie, 3 F. & F. 413. There can be no set-off of one libel or misconduct against another. Kelly v. Sherlock, L.R. 1 Q.B. 698.

288. Publishing in courts of justice.—No one commits an offence by publishing defamatory matter, in any proceeding held before or under the authority of any court exercising judicial authority, or in any inquiry made under the authority of any statute or by order of His Majesty, or of any of the departments of Government, Dominion or provincial.

This section makes it no longer possible for the court to determine the privileges of Parliament in respect of such publications which it was held in Stockdale v. Hansard, 9 A. & E. 1, the court was competent to do. See also Stockdale v. Hansard (1837), 11 A. & E. 297.

289. Publishing parliamentary papers.—No one commits an offence by publishing to either the Senate, or House of Commons, or to any Legislative Council, Legislative Assembly or House of Assembly, defamatory matter contained in a petition to the Senate, or House of Commons, or to any such Council or Assembly, or by publishing by order or under the authority

of the Senate or House of Commons, or of any such Council or Assembly, any paper containing defamatory matter or by publishing, in good faith and without ill-will to the person defamed, any extract from or abstract of any such paper.

Evidence.]—Sec. 705 provides that in any criminal proceeding commenced or prosecuted under section two hundred and eighty-nine for printing any extract from, or abstract of, any report published by, or under the authority of, the Senate, House of Commons, or any Legislative Council, Legislative Assembly or House of Assembly, or any paper, votes or proceedings, such report, paper, votes or proceedings may be given in evidence, and it may be shewn that such extract or abstract was published bona fide and without malice, and if such is the opinion of the jury a verdict of not guilty shall be entered for the defendant.

The following sections of the Libel Act, R.S.C. 1886, ch. 163, remain in force, these sections having been excepted from the repeal of that chapter made by Code sec. 981:

(6) Every person against whom any criminal proceedings are commenced or prosecuted in any manner for or on account of or in respect of the publication of any report, paper, votes or proceedings, by such person or by his servant, by or under the authority of any Legislative Council, Legislative Assembly or House of Assembly, may bring before the court in which such proceedings are so commenced or prosecuted, or before any judge of the same, first giving twenty-four hours' notice of his intention so to do, to the prosecutor in such proceedings, or to his attorney or solicitor, a certificate under the hand of the speaker or clerk of any Legislative Council, Legislative Assembly or House of Assembly, as the case may be, stating that the report, paper, votes or proceedings, as the case may be, in respect whereof such criminal proceedings have been commenced or prosecuted, was or were published by such person, or by his servant, by order or under the authority of any Legislative Council, Legislative Assembly or House of Assembly, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such criminal proceedings, and the same shall be and shall be deemed and taken to be finally put an end to, determined and superseded by virtue hereof.

(7) In case of any criminal proceedings hereafter commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes or proceedings, the defendant, at any stage of the proceedings, may lay before the court or judge such report, paper, votes or proceedings, and such copy, with an affidavit verifying such report, paper, votes or proceedings, and the correctness of such copy; and the court or judge shall immediately stay such criminal proceedings, and the same shall be and shall be deemed to be finally put an end to, determined and superseded by virtue hereof.

290. Fair reports of proceedings of parliament and courts.—No one commits an offence by publishing in good faith, for the information of the public, a fair report of the proceedings of the Senate or House of Commons, or any committee thereof, or of the public proceedings preliminary or final heard before any court exercising judicial authority, nor by publishing, in good faith, any fair comment upon any such proceedings.

Fair report of judicial or parliamentary proceedings.]—This section is in accordance with the law declared in Wason v. Walter (1869), L.R. 4 Q.B. 73, where it was held that the publication in a public newspaper of a faithful report of a debate in either House of Parliament is privileged, so that the publisher is not responsible for defamatory statements made in the course of the debate and reproduced in such faithful report. In the same case Cockburn, C.J., said: "It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible; the general advantage to the country in having these proceedings made public more than counterbalances the inconvenience to the private persons whose conduct may be the subject of the proceedings.

The section applies even if the judicial proceedings were ex parte. Kimber v. Press Association, [1893] 1 Q.B. 65; R. v. Gray (1865), 10 Cox C.C. 184.

The true criterion of the privilege is not whether the report was or was not ex parte, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public and innocent of all intention to do injury to the reputation of the party affected. Wason v. Walter (1869), L.R. 4 Q.B. 73; Usill v. Hales (1878), 3 C.P.D. 319.

It is only necessary that the effect of the evidence should be fairly stated. Milissich v. Lloyds (1877), 13 Cox C.C. 575. And the judgment may be reported without the evidence. Macdougall v. Knight (1889), 14 App. Cas. 194.

Publication must be in good faith.]—A true report of the proceedings in a court of justice sent to a newspaper from a malicious motive may be the foundation for proceedings against the sender. Stevens v. Sampson (1879), L.R. 5 Ex. D. 53; Coloman v. West Hartlepool Co., 8 W.R. 734.

Contempt of court.]—Nothing is more incumbent upon courts of justice than to preserve their proceedings from being misrepresented. Nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in a cause, before the cause is actually tried. Per Lord Hardwick, Huggonson's Case, 2 Atk. 469. Any publication, whether by parties or strangers, which concerns a cause pending in court, and has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings, or on the parties, the jury, the witnesses or the counsel may be visited as a contempt. R. v. Wilkinson, Re Houston (1877), 41 U.C.Q.B. 42, citing Bishop on Criminal Law, 5th ed., vol. 2, sec. 259.

Secs. 290, 292 and 293 refer to libel and not to contempt of court, and there is still power to commit summarily for constructive contempt, ex gr., a newspaper editorial to the effect that one of the parties to a pending suit will lose the case. Stoddart v. Prentice (1898), 5 Can. Cr. Cas. 103, 6 B.C.R. 308.

Contempt of court is a criminal proceeding. Ellis v. The Queen, 22 Can. S.C.R. 7; Re Scaife, 5 B.C.R. 153. It is therefore necessary that the charge should be proved with particularity. Re Scaife, 5 B.C.R. 153.

Where the alleged contempt consisted in the publishing, in a newspaper, comments on a judgment rendered by a Master in Chambers in a cause in which the writer was solicitor for the defendant, but after the proceedings in the cause before the master were ended, it was held by the Supreme Court of Canada that the relator in the cause could not be prejudiced as a suitor by the publication complained of, and as such prejudice was the only ground on which he could institute proceedings for contempt he had no locus standi, and his application should not have been entertained. Re

O'Brien, Regina ex rel. Felitz v. Howland, 16 Can. S.C.R. 197, reversing 11 Ont. R. 633 and 14 Ont. App. 184.

While a criminal information for libel was pending against one W., H. wrote a letter to a newspaper reflecting upon one of the judges who delivered judgment on the application for the information, and stating that W. was "as certain to be convicted as a libeller ever was before his trial." It was held that such letter was clearly a contempt of court. R. v. Wilkinson, Re Houston (1877), 41 U.C.Q.B. 42.

Where the respondent in a controverted election case applied for an order nisi calling on the defendant, his opponent at the election, to shew cause why he should not be committed for contempt of court for publishing articles in his newspaper reflecting on and prejuding the conduct of the respondent and of the returning officer during the currency of the proceedings on the election petition, it was held, although a prima facie case of contempt had been made out, that as it appears on the same material that the respondent had attended and spoken at a meeting held for the purpose of approving of the conduct of the returning officer and presenting him with a gold watch as a mark of such public approval, the applicant was also in fault, and his application was therefore refused. Re Bothwell Election Case, 4 Ont. R. 224.

In New Brunswick the practice has been to issue an attachment against the person publishing the newspaper comment complained of, the award of the attachment not being a final judgment but a method of bringing the party into court where he may be ordered to answer interrogations, and by his answers purge his contempt if he can. If he were unable to then purge his contempt the court would then pronounce sentence. Ellis v. Baird, 16 Can. S.C.R. 147.

An appeal does not lie to the Supreme Court of Canada from a judgment in proceedings for contempt of court unless it comes within the provisions of the Supreme Court Act as to appeals in criminal cases. Ellis v. The Queen, 22 Can. S.C.R. 7; O'Shea v. O'Shea, L.R. 15 P.D. 59.

Any publication, whether by parties or strangers, which concerns a cause pending in court and has a tendency to prejudice the public respecting its merits and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses or the counsel, may be visited as a contempt. 2 Bishop's Crimina Law, 2nd ed., sec. 216; Littler v. Thomson, 2 Beav. 129; Re Crawford, 13 Jurist 955.

Where the defendant to a proceeding by way of criminal information, immediately before the trial distributed handbills in the assize town vindicating his own conduct and reflecting on that of the prosecutor, the court found that the motive was to influence the jury in his favour at the trial and granted a criminal information against him in respect thereof. R. v. Jolliffe (1791), 4 T.R. 285. And a criminal information has been granted for publishing an invective against judges and juries in general, the court treating such publication as made with intent to bring into suspicion and contempt the administration of justice. R. v. White (1808), 1 Camp. 359.

An advocate who publishes in a newspaper, letters containing libellous, insulting and contemptuous statements and language concerning one of the justices of the court in reference to the conduct of said justice, while acting in his judicial capacity on an application made to him in chambers for a writ of habeas corpus, is guilty of contempt. R. v. Ramsay, L.R. 3 P.C. 427, 11 L.C. Jurist 152. But the proceedings should be taken before the full court. Ibid.

The court has power summarily to commit for constructive contempt notwithstanding secs. 290, 292 and 293 as to fair reports of court proceedings

and fair comment upon public affairs; but the court will not exercise the power where the offence is of a trifling nature, but only when necessary to prevent interference with the course of justice. Stoddard v. Prentice (1898), 5 Can. Cr.Cas. 103, 6 B.C.R. 308.

A statement in a newspaper editorial to the effect that one of the parties to a pending suit will lose the case, is a contempt of court. Ibid.

Fair and impartial reports of the proceedings in Courts of Justice, although incidentally those proceedings may prejudice individuals, are of so great public interest and public advantage that the publishing of them to the world predominates so much over the inconvenience to individuals as to render the reports highly conducive to the public good; but the conditions on which the privilege can be maintained are, that the report shall be fair, truthful, honest and impartial. Per Cockburn, C.J., in Risk-Allah-Bey v. Whitehurst, 18 L.T.N.S. 615; R. v. Wilkinson (1877), 41 U.C.Q.B. 47, 93.

291. Fair reports of proceedings of public meetings.—No one commits an offence by publishing in good faith, in a newspaper, a fair report of the proceedings of any public meeting if the meeting is lawfully convened for a lawful purpose and open to the public, and if such report is fair and accurate, and if the publication of the matter complained of is for the public benefit, and if the defendant does not refuse to insert in a conspicuous place in the newspaper in which the report appeared a reasonable letter or document of explanation or contradiction by or on behalf of the prosecutor.

For the public benefit.]—See note to sec. 299.

292. Fair discussion.—No one commits an offence by publishing any defamatory matter which he, on reasonable grounds, believes to be true, and which is relevant to any subject of public interest, the public discussion of which is for the public benefit.

Any subject of public interest.]—It is a question for the judge and not for the jury whether a particular topic was or was not a subject of public interest. Weldon v. Johnson (1884), per Coleridge, C.J., cited in Odgers on Libel, 3rd ed., 46.

The exemption declared by this section is dependent on (1) a belief by the accused that the matter he published was true; (2) such belief being founded on reasonable grounds; (3) the matter being relevant to a subject of public interest; and (4) such subject of public interest being one the public discussion of which is for the public benefit.

The conduct of all public servants, the policy of the Government, our relations with foreign countries, all suggestions of reforms in the existing laws, all bills before Parliament, the adjustment and collection of taxes, and all other matters which touch the public welfare, are clearly matters of public interest, which come within the preceding rule. Odgers on Libel, 42. Every subject has a right to comment on those acts of public men which concern him as a subject of the realm, if he do not make his commentary a cloak for malice and slander. (Per Parke, B., in Parmiter v. Coupland, 6 M. & W. 108). Those who fill "a public position must not be

too thin-skinned in reference to comments made upon them. It would often happen that observations would be made upon public men which they knew from the bottom of their hearts were undeserved and unjust; yet they must bear with them, and submit to be misunderstood for a time, because all knew that the criticism of the press was the best security for the proper discharge of public duties." (Per Cockburn, C.J., in Seymour v. Butterworth, 3 F. & F. 376, 377; and see the dicta of the judges in R. v. Sir R. Carden, 5 Q.B.D. 1.

Evidence given before a Royal Commission is matter publici juris, and everyone has a perfect right to criticise it. Per Wickens, V.-C., in Mulkern v. Ward, L.R. 13 Eq. 622; 41 L.J. Ch. 464; 26 L.T. 831.

All appointments by the Government to any office are matters of public concern. Seymour v. Butterworth, 3 F. & F. 372.

A newspaper is entitled to comment on the fact (if it be one) that corrupt practices extensively prevailed at a recent Parliamentary election so long as it does not make charges against individuals. Wilson v. Reed and others, 2 F. & F. 149.

A meeting assembled to hear a political address by a candidate at a Parliamentary election, and the conduct thereat of all persons who take any part in such meeting, are fair subjects for bona fide discussion by a writer in a public newspaper. Davis v. Duncan, L.R. 9 C.P. 396; 43 L.J.C.P. 185; 22 W.R. 575; 30 L.T. 464.

The public career of any member of Parliament, or of any candidate for Parliament, is of course a matter of public interest in the constituency. But not his private life and history. "However large the privilege of electors may be," said Lord Denman, C.J., "it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate." Duncombe v. Daniell, 8 C. & P. 222; 2 Jur. 32; 1 W.W. & H. 101.

I apprehend, however, that the electors are entitled to investigate and discuss all matters in the past private life of a candidate which, if true, would prove him morally or intellectually unfit to represent them in Parliament; but not to circulate unfounded charges against him even bona fide. Harwood v. Sir J. Astley, 1 B. & P.N.R. 47; Wisdom v. Brown, 1 Times L.R. 412; Pankhurst v. Hamilton, 3 Times L.R. 500.

The administration of the law, the verdicts of juries, the conduct of suitors and their witnesses, are all matters of lawful comment. See sec. 290.

"That the administration of justice should be made a subject for the exercise of public discussion is a matter of the most essential importance. But, on the other hand, it behoves those who pass judgment, and call upon the public to pass judgment, on those who are suitors to, or witnesses in, courts of justice, not to give reckless vent to harsh and uncharitable views of the conduct of others; but to remember that they are bound to exercise a fair and honest and an impartial judgment upon those whom they hold up to public obloquy." (Per Cockburn, C.J., in Woodgate v. Ridout, 4 F. & F. 223, 4).

"Writers in public papers are of great utility, and do great benefit to the public interests by watching the proceedings of courts of justice, and fairly commenting on them if there is anything that calls for observation; but they should be careful, in discharging that function, that they do not wantonly assail the character of others, or impute criminality to them, and if they do so, and do not bring to the performance of the duty they discharge that due regard for the interests of others which the assumption of so important a censorship necessarily requires, they must take the consequences." Per Cockburn, C.J., in Reg. v. Tanfield, 42 J.P. at p. 424.

The working of all public institutions, such as colleges, hospitals, asylums, homes, is a matter of public interest, especially where such institutions appeal to the public for subscriptions, or are supported by the rates, or are, like our universities, national property. The management of local affairs by the various local authorities, e.g., town councils, school-boards, boards of guardians, boards of health, etc., is a matter of public, though it may not be of universal concern. Odgers on Libel, 46.

293. Fair comment.—No one commits an offence by publishing fair comments upon the public conduct of a person who takes part in public affairs.

2. No one commits an offence by publishing fair comments on any published book or other literary production, or on any composition or work of art or performance publicly exhibited, or any other communication made to the public on any subject, if such comments are confined to criticism on such book or literary production, composition, work of art, performance or communication.

294. Seeking remedy for grievance.—No one commits an offence by publishing defamatory matter for the purpose, in good faith, of seeking remedy or redress for any private or public wrong or grievance from a person who has, or is reasonably believed by the person publishing to have, the right or be under obligation to remedy or redress such wrong or grievance, if the defamatory matter is believed by him to be true, and is relevant to the remedy or redress sought, and such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

295. Answer to inquiries.—No one commits an offence by publishing, in answer to inquiries made of him, defamatory matter relating to some subject as to which the person by whom, or on whose behalf, the inquiry is made has, or on reasonable grounds is believed by the person publishing to have, an interest in knowing the truth, if such matter is published for the purpose, in good faith, of giving information in respect thereof to that person, and if such defamatory matter is believed to be true, and is relevant to the inquiries made, and also if such publishing does not in manner or extent exceed what is reasonably sufficient for the occasion.

296. Giving information.—No one commits an offence by publishing to another person defamatory matter for the purpose of giving information to that person with respect to some subject as to which he has, or is, on reasonable grounds,

believed to have, such an interest in knowing the truth as to make the conduct of the person giving the information reasonable under the circumstances: Provided, that such defamatory matter is relevant to such subject, and that it is either true, or is made without ill-will to the person defamed, and in the belief, on reasonable grounds, that it is true.

297. Selling periodicals containing defamatory libel.—Every proprietor of any newspaper is presumed to be criminally responsible for defamatory matter inserted and published therein, but such presumption may be rebutted by proof that the particular defamatory matter was inserted in such newspaper without such proprietor's cognizance, and without negligence on his part.

2. General authority given to the person actually inserting such defamatory matter to manage or conduct, as editor or otherwise, such newspaper, and to insert therein what he in his discretion thinks fit, shall not be negligence within this section unless it be proved that the proprietor, when originally giving such general authority, meant that it should extend to inserting and publishing defamatory matter, or continued such general authority knowing that it had been exercised by inserting defamatory matter in any number or part of such newspaper.

3. No one is guilty of an offence by selling any number or part of such newspaper, unless he knew either that such number or part contained defamatory matter, or that defamatory matter was habitually contained in such newspaper.

"*Newspaper.*"]—The word "newspaper" here means any paper, magazine or periodical containing public news, intelligence or occurrences, or any remarks or observations thereon, printed for sale and published periodically, or in parts or numbers, at intervals not exceeding thirty-one days between the publication of any two such papers, parts or numbers, and also any paper, magazine or periodical printed in order to be dispersed and made public, weekly or oftener, or at intervals not exceeding thirty-one days, and containing only or principally advertisements. Sec. 3, sub-sec. (*p*-1).

Venue.]—Every proprietor, publisher, editor or other person, charged with the publication in a newspaper of any defamatory libel, shall be dealt with, indicted, tried and punished in the Province in which he resides, or in which such newspaper is printed. Sec. 640 (2).

298. Selling books containing defamatory matter.—No one commits an offence by selling any book, magazine, pamphlet or other thing whether forming part of any periodical or not, although the same contains defamatory matter, if, at the time of such sale, he did not know that such defamatory matter was contained in such book, magazine, pamphlet or other thing.

2. The sale by a servant of any book, magazine, pamphlet or other thing, whether periodical or not, shall not make his employer criminally responsible in respect of defamatory matter contained therein unless it be proved that such employer authorized such sale knowing that such book, magazine, pamphlet or other thing contained defamatory matter, or, in case of a number or part of a periodical, that defamatory matter was habitually contained in such periodical.

299. When truth is a defence.—It shall be a defence to an indictment or information for a defamatory libel that the publishing of the defamatory matter in the manner in which it was published was for the public benefit at the time when it was published, and that the matter itself was true. R.S.C., c. 163, s. 4.

Justifying as true, and published for the public benefit.]—The maxim used to be "the greater the truth the greater the libel," meaning that the injudicious publication of the truth about an individual would be more likely to provoke him to a breach of the peace than if some falsehood were invented about him which he could easily and completely refute. Odgers on Libel, 437. So, on a criminal trial, whether of an indictment or an information, before the statute, 37 Vict. (Can.), ch. 38, secs. 5 and 6, consolidated with the Libel Act, R.S.C. 1886, ch. 163, and now Code sec. 299, no evidence could be received of the truth of the matters charged, not even in mitigation of punishment.

The mere truth is an answer to a civil action, however maliciously and unnecessarily the words were published; but in a criminal case the defendant has to prove not only that his assertions are true but also that it was for the public benefit that they should be published. Odgers on Libel, 438.

To take advantage of this section, it must be pleaded. R. v. Moylan, 19 U.C.Q.B. 521; R. v. Hickson, 3 Montreal Legal News 139; R. v. Laurier, 11 Rev. Legale 184; R. v. Creighton, 19 Ont. R. 339. The section is limited to "defamatory" libels, and does not apply to blasphemous, obscene or seditious words. R. v. Duffy (1848), 7 St. Tr. N.S. 795, 853, 9 Irish C.L. 329, 2 Cox C.C. 45; Ex parte W. O'Brien (1883), 12 L.R. Irish 29, 15 Cox C.C. 180.

The plea of justification must affirm the truth of all the charges, and not merely that some of them are true or that the defendant believed them, or some of them, to be true. R. v. Moylan (1860), 19 U.C.Q.B. 521; R. v. Newman (1853), 1 E. & B. 568.

300. Extortion by defamatory libel.—Every one is guilty of an indictable offence and liable to two years' imprisonment, or to a fine not exceeding six hundred dollars, or to both, who publishes or threatens to publish, or offers to abstain from publishing, or offers to prevent the publishing of, a defamatory libel with intent to extort any money, or to induce any person to confer upon or procure for any person any appointment or office of profit or trust, or in consequence of any person having been refused any such money, appointment or office. R.S.C., c. 163, s. 1.

301. Punishment of defamatory libel known to be false.—Every one is guilty of an indictable offence and liable to two years' imprisonment or to a fine not exceeding four hundred dollars, or to both, who publishes any defamatory libel knowing the same to be false. R.S.C., 163, s. 2.

Knowingly publishing a false defamatory libel.]—This is a common law offence. R. v. Munslow, [1895] 1 Q.B. 758.

An indictment does not lie for mere defamatory words spoken and not reduced to writing, even if the words be such that an action for damages for slander might be sustained without proof of special damage. R. v. Langley (1703), 6 Mod. 125.

A defamatory libel of his wife by the husband has been held not to be indictable because such a libel is not actionable between the parties. R. v. Lord Mayor of London (1886), 16 Q.B.D. 772.

Indictment.]—An indictment charging the publication of a defamatory libel, which does not state that the same was likely to injure the reputation of the libelled person by exposing him to hatred, contempt or ridicule, or was designed to insult him, is bad by reason of the omission of an essential ingredient of the offence. R. v. Cameron (1898), 2 Can. Cr. Cas. 173.

Such an indictment cannot be amended and must be set aside and quashed as the defect is a matter of substance. Ibid.

The law implies malice from the publication but no allegation of malice need be made in the indictment. R. v. Munslow, [1895] 1 Q.B. 758, 762.

Form of indictment.]—

"County of ——, to wit:—The jurors for Our Lord the King upon their oath present, that A.B. on the —— day of —— in the year of our Lord 190—, unlawfully did write and publish and cause and procure to be written and published a false, scandalous, malicious and defamatory libel in the form of a letter directed to one J. N. [*or*, if the publication were in any other manner, according to the tenor and effect following], containing divers false, scandalous, malicious, and defamatory matters and things of and concerning the said J.N., and of and concerning [*here* insert such of the subjects of the libel as it may be necessary to refer to by innuendoes in setting out the libel], according to the tenor and effect following, that is to say: [here set out the libel together with such innuendoes as may be necessary to render it intelligible]; he the said A.B. then well-knowing the said defamatory libel to be false against the form of the statute in that case made and provided [*or*, of the Criminal Code, sec. 301,], to the great damage, scandal and disgrace of the said J.N., to the evil example of all others in the like case offending, and against the peace of our Lord the King, his crown and dignity."

Pleas.]—At common law the accused could plead only the general issue, "not guilty." Archbold Cr. pl. (1900), 1069; but by sec. 299 of the Code, taken from R.S.C. 1886, c. 163, s. 4, it is now a defence that the publishing of the defamatory matter, in the manner in which it was published, was for the public benefit at the time when it was published and that the matter itself was true.

Pleas in abatement are now abolished. Sec. 656.

Any objection to the constitution of the Grand Jury may be taken by motion to the court, and the indictment shall be quashed if the court is of opinion both that such objection is well founded and that the accused has suffered or may suffer prejudice thereby, and not otherwise. Sec. 656.

Plea of justification.]—Every one accused of publishing a defamatory libel may plead that the defamatory matter published by him was true, and that it was for the public benefit that the matters charged should be published in the manner and at the time when they were published. Such plea may justify the defamatory matter in the sense specified, if any, in the count, or in the sense which the defamatory matter bears without any such specification; or separate pleas justifying the defamatory matter in each sense may be pleaded separately to each as if two libels had been charged in separate counts. Sec. 634 (1). Every such plea must be in writing, and must set forth the particular fact or facts by reason of which it was for the public good that such matters should be so published. The prosecutor may reply generally denying the truth thereof. Sec. 634 (2). The truth of the matters charged in an alleged libel shall in no case be inquired into without such plea of justification unless the accused is put upon his trial upon any indictment or information charging him with publishing the libel knowing the same to be false, in which case evidence of the truth may be given in order to negative the allegation that the accused knew the libel to be false. Sec. 634 (3).

The accused may, in addition to such plea, plead not guilty and such pleas shall be inquired of together. Sec. 634 (4).

If, when such plea of justification is pleaded, the accused is convicted, the court may, in pronouncing sentence, consider whether his guilt is aggravated or mitigated by the plea. Sec. 634 (5).

The following form of such a plea of justification added to a plea of not guilty is adapted from form 81 of the English Crown Office Rules, 1886:—

"And now, that is to say on the —— day of —— 190—, before our said Lord the King in the —— (court) at —— comes the said A. B. (the defendant) by —— —— his solicitor [or in his own proper person], and having heard the said indictment read he says that he is not guilty thereof, and hereupon he puts himself upon the country."

"And for a further plea the said A. B. pursuant to the statute in that behalf [*or* to the Criminal Code sec. 299] says that our said Lord the King ought not further to prosecute the said indictment against him because he says that it is true that [*here* allege the truth of every part of the publication charged as a libel set out in the indictment]."

"And the said A. B. further says that before and at the time of the publication in the said indictment mentioned [*here* state facts which rendered the publication of benefit to the public], by reason whereof it was for the public benefit that the said matters so charged in the said indictment should be published, and this he the said A. B. is ready to verify."

"Wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified."

Demurrer.]—An objection to any indictment for any defect apparent on its face must be taken by demurrer, or motion to quash the indictment, before the defendant has pleaded, and not afterwards, except by leave of the court or judge before whom the trial takes place, and every court before which any such objection is taken may, if it is thought necessary, cause the indictment to be forthwith amended in such particular, by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared; and no motion in arrest of judgment shall be allowed for any defect in the indictment which might have been taken advantage of by demurrer, or amended under the authority of the Code. Sec. 629.

The following form of demurrer is adapted from the English Crown Office Rules, 1886, form No. 80:—

"And the said A.B. in his own proper person cometh into court here, and having heard the said indictment read, saith that the said indictment

and the matters therein contained, in manner and form as the same above are stated and set forth, are not sufficient in law, and that he the said A.B. is not bound by the law of the land to answer the same; and this he is ready to verify; wherefore, for want of a sufficient indictment, in this behalf the said A.B. prays judgment and that by the court he may be dismissed and discharged from the said premises in the said indictment specified."

The joinder in demurrer may be in the following form:—

"And —— ——, who prosecutes for our said Lord the King in this behalf, saith that the said indictment and the matters therein contained in manner and form as the same are above stated and set forth are sufficient in law to compel the said A.B. to answer the same; and the said —— —— who prosecutes as aforesaid is ready to verify and prove the same as the court here shall direct and award; wherefore, inasmuch as the said A.B. hath not answered to the said indictment nor hitherto in any manner denied the same, the said —— —— for our said Lord the King prays judgment, and that the said A.B. may be convicted of the premises in the said indictment specified."

Verdict.]—On the trial of any indictment or information for the making or publishing of any defamatory libel, on the plea of not guilty pleaded, the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the court or judge before whom such indictment or information is tried, to find the defendant guilty merely on the proof of publication by such defendant of the paper charged to be a defamatory libel, and of the sense ascribed to the same in such indictment or information; but the court or judge before whom such trial is had shall, according to the discretion of such court or judge, give the opinion and direction of such court or judge to the jury on the matter in issue as in other criminal cases; and the jury may, on such issue, find a special verdict if they think fit so to do; and the defendant, if found guilty, may move in arrest of judgment on such ground and in such manner as he might have done before the passing of this Act." Sec. 719.

Costs in libel prosecutions.]—In the case of an indictment or information by a private prosecutor for the publication of a defamatory libel if judgment is given for the defendant, he shall be entitled to recover from the prosecutor the costs incurred by him by reason of such indictment or information either by warrant of distress issued out of the said court, or by action or suit as for an ordinary debt. Sec. 833.

In a recent Quebec case the plaintiff had been prosecuted by defendant in a criminal court for defamatory libel and acquitted. No demand was made when the verdict was given for a condemnation of defendant for costs, but plaintiff afterwards sought to recover them by action. After hearing the cause in the Superior Court, the presiding judge discharged the délibéré to enable the plaintiff to have his costs taxed before the judge who presided at the criminal trial, which was done, and the cause was reheard. It was held that plaintiff could claim his costs and disbursements from defendant by an ordinary action, though he had not asked for a condemnation against defendant therefor at the time of the verdict. That the judge who presided at the criminal trial could, even after proceedings in such action, tax such costs and disbursements. Mackay v. Hughes (1901), 19 Que. S.C. 367 (Sup. Ct.).

302. Punishment of defamatory libel.—Every one is guilty of an indictable offence and liable to one year's imprisonment, or to a fine not exceeding two hundred dollars, or to both, who publishes any defamatory libel. R.S.C., c. 163, s. 3.

Form FF.—The following example of stating an offence under this section is contained in Code Form FF. :—"A. published a defamatory libel on B. in a certain newspaper, called the ——, on the —— day of —— A.D. —, which libel contained in an article headed or commencing *(describe with so much detail as is sufficient to give the accused reasonable information as to the part of the publication to be relied on against him,)* and which libel was written in the sense of imputing that the said B. was *(as the case may be)*."

Indictment, pleas, etc.]—See note to sec. 301. That section relates to the greater offence of publishing a libel "knowing the same to be false." If the proceeding is under sec. 302 only, the charge of such knowledge by the accused will be omitted from the form of indictment.

Evidence under commission.]—Whenever it is made to appear, at the instance of the Crown, or of the prisoner or defendant, to the satisfaction of the judge of any superior court, or the judge of a county court having criminal jurisdiction, that any person who resides out of Canada is able to give material information relating to any indictable offence for which a prosecution is pending, or relating to any person accused of such offence, such judge may, by order under his hand, appoint a commissioner or commissioners to take the evidence, upon oath, of such person. Sec. 683.

A commission to take the evidence of witnesses abroad in a libel prosecution is properly ordered at the trial where the evidence relates wholly to a plea of justification just entered of record. R. v. Nicol (1898), 5 Can. Cr. Cas. 31 (B.C.).

An order for a commission to take such evidence should not be made before plea. Ibid.

Verdict in libel case.]—See sec. 719.

Suspension of sentence.]—Where a convicted person, instead of being sentenced is discharged from custody upon entering into a recognizance with sureties to appear and receive judgment when called on, it is only on motion of the Crown that the recognizance can be estreated, or judgment moved against him. In Ontario, a private prosecutor in a prosecution for defamatory libel has no locus standi to make the application. R. v. Young (1901), 4 Can. Cr. Cas. 580 (Ont.).

Where fourteen years had elapsed since the conviction, and the only breaches of recognizance charged were the publication of several newspaper articles alleged to be defamatory of the prosecutor, the latter should be left to his remedy by action or indictment in respect of any fresh libels, even if he had a locus standi to enforce the recognizance. Ibid.

Criminal information for libel.]—A party seeking a criminal information against another must himself be free from blame, or he will not be granted leave to take that method of procedure, and will be left to his recourse by indictment or action. R. v. Edward Whelan (1863), 1 P.E.I. Rep. 223, per Peters, J.; R. v. Lawson, 1 Q.B. 486.

A party who wants a criminal information must place himself entirely in the hands of the court. If it appear that the party has put himself into communication with the publisher of the libel, for the purpose of retorting,

or with the view of obtaining redress, or has in any way himself attempted to procure redress, or take the law into his hands, the remedy by criminal information will be refused. R. v. Wilkinson (1877), 41 U.C.Q.B. 1, 25 (citing Ex parte Beauclerk, 7 Jur. 373).

A person alive to the vindication of his character when assailed and entitled to the remedy of criminal information must apply with reasonable promptitude. The general rule is stated by Lord Mansfield in R. v. Robinson (1765), 1 W.Bl. 542, where he said: "There is no precise number of weeks, months or years; but, if delayed, the delay must be reasonably accounted for. The party complaining must come to the court either during the term next after the cause of complaint arose, or at so early a period in the second term thereafter as to enable the accused, unless prevented by the accumulation of business in the court, or other cause within the second term; and this, regardless of the fact whether an assize intervened or not. R. v. Kelly (1877), 28 U.C.C.P. 35; 41 U.C.Q.B. (1877), 1, 24.

It is of the highest importance that the relator should in all cases lay before the court all the circumstances fully and candidly, in order that the court may deal with the matter. R. v. Wilkinson (1877), 41 U.C.Q.B. 1, 25 (citing R. v. Aunger, 28 L.T.N.S. 634, S.C. 12 Cox 407).

The granting of a criminal information is discretionary with the court under all circumstances; the application is not to be entertained on light or trivial grounds. In dealing with such an application, the court has always exercised a considerable extent of discretion in seeing whether the rule should be granted, and whether the circumstances are such as to justify the court in granting the rule for a criminal information. R. v. Wilkinson (1877), 41 U.C.Q.B. 1, 29.

There are two things principally to be considered in dealing with such an application: 1. To see whether the person who applies to conduct the prosecution, the relator or the informer, has been himself free from blame, even though it would not justify the defendant in making the accusation; 2. To see whether the offence is of such magnitude that it would be proper for the court to interfere and grant the criminal information. Both these things have to be considered, and the court would not make its process of any value unless they considered them and exercised a good deal of discretion, not merely in saying whether there is legal evidence of the offence having been committed, but also exercising their discretion as men of the world, in judging whether there is reason for a criminal information or not. R. v. Plimsoll (1873), noted in 12 C.L.J. 227; R. v. Wilkinson (1877), 41 U.C.Q.B. 1, 29.

"The court always considers an application for a criminal information as a summary extraordinary remedy depending entirely on their discretion, and therefore not only must the evidence itself be of a serious nature, but the prosecutor must apply promptly or must satisfactorily account for any apparent delay. He must also come into court with clean hands, and be free from blame with reference to the transaction complained of; he must prove his entire innocence of everything imputed to him, and must produce to the court such legal evidence of the offence having been committed by the defendant as would warrant a grand jury in finding a true bill against the defendants." Per Quain, J., in R. v. Plimsoll (1873), 12 Can. Law Jour. p. 228, cited by Hagarty, C.J., in R. v. Kelly (1877), 28 U.C.C.P. 35.

The court confines the granting of criminal informations for libel to the case of persons occupying official or judicial positions, and filling some offices which gives the public an interest in the speedy vindication of their character, or to the case of a charge of a very grave or atrocious nature; leave was therefore refused to the manager of a large railway company to file a criminal information for libel, on the ground that he did not come within the description of persons referred to. Per Armour, J., "I think the practice of granting leave to file criminal informations in this country,

having regard to the social conditions of its inhabitants and the liberties which they enjoy, is, to say the least of it, of very doubtful expediency, and should, in my opinion, be discontinued and, if necessary, abolished by legislative enactment. The very rule adopted in England, that it will only be granted to what I may call 'a superior person' is the strongest reason, to my mind, why in this country it should never be granted at all. Whatever may be deemed desirable in England, I do not think it desirable that in this country there should exist a remedy for the superior person which is denied to the inferior." R. v. Wilson (1878), 43 U.C.Q.B. 583.

Per Cameron, J., "There is no real necessity, so far as I am aware, for any one seeking this remedy. Any person libelled has a right to lay an information before a magistrate charging any one who may have libelled him with the offence, and may then by his oath deny the truth of the slanderous charges or imputations." Ibid. Hagarty, C.J., added that it was not to be understood that the court laid down any absolute rule as to future applications for criminal informations, or that they meant to fetter their discretion in dealing therewith. Ib. reporter's note. R. v. Wilson (1878), 43 U.C.Q.B. 583.

Where the libel charges the person libelled with having, by a previous writing, provoked it, the latter by his affidavit on which he moves for a criminal information is bound to answer such charge, otherwise the affidavit will be held insufficient. R. v. Edward Whelan (1862), 1 P.E.I. Rep. 220, per Peters, J.

In Trinity term, 1876, an application was made for a criminal information for libel in newspapers published on 23rd and 30th March and 25th May. The delay in not applying to the court during Easter Term, or until 30th August, was not satisfactorily accounted for, and the court refused the application, but, in view of the virulent language of the article, without costs. R. v. Kelly (1877), 28 U.C.C.P. 35.

In answer to an application for a criminal information for libel the defendants filed an affidavit stating that they had no personal knowledge of the matter contained in the alleged libels, but received the information from persons whom they trusted to be reliable and trustworthy; that the Globe newspaper was controlled by the applicant, who was an active politician, and had published a number of articles violently attacking one S., who was a candidate for a public office, and the libels in question were published with a view of counteracting the effect of these articles, and believing them to be true, and without malice. This was held to be no ground for the court refusing to the applicant leave to file a criminal information for the reiterated publication in a newspaper of matter not pretended either to be not libellous, or to be true in fact. R. v. Thompson (1874), 24 U.C.C.P. 252.

Quære whether a criminal information is the course to be adopted for wilful and corrupt misconduct of a judge holding an inferior court of record. R. v. Ford (1853), 3 U.C.C.P. 209, 218.

TITLE VI.

OFFENCES AGAINST RIGHTS OF PROPERTY AND RIGHTS ARISING OUT OF CONTRACTS, AND OFFENCES CONNECTED WITH TRADE.

PART XXIV.

THEFT DEFINED.

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303. Things capable of being stolen.—Every inanimate thing whatever which is the property of any person, and which either is or may be made movable, shall henceforth be capable of being stolen as soon as it becomes movable, although it is made movable in order to steal it: Provided, that nothing growing out of the earth of a value not exceeding twenty-five cents shall (except in the cases hereinafter provided) be deemed capable of being stolen.

At common law.]—Nothing but personal goods could be the subject of larceny at common law. Archbold Cr. Plead. (1900), 486. Things real or which 'savoured of the realty' were excluded, and title deeds could therefore not be the subject of larceny. 1 Hale 510. Nor could bonds, bills of exchange, etc., they being mere choses in action. 1 Hawk., ch. 33, sec. 35; R. v. Watts (1854), Dears. 326. And there could not be a larceny of a corpse, as it was not the subject of property. R. v. Haynes (1614), 12 Co. Rep. 113. But see Code sec. 206 as to improper interference with a dead human body or human remains.

Water supplied by a water company to a consumer and standing in his pipes, might also be the subject of larceny at common law. Ferens v. O'Brien (1883), 11 Q.B.D. 21.

There could be no larceny of things which adhere to the freehold, such as corn, grass, trees and the like, or lead or other thing attached to a house. Archbold Cr. Plead. (1900), 406. The severance of them was a mere trespass. Ibid. But if the owner or a stranger severed them and another man came and stole them, or if the thief severed them at one time, and after abandoning same came at another time and took them away, it was larceny. R. v. Foley (1889), 17 Cox C.C. 142. But the mere severance by the wrongdoer at one time and the taking away by him at another were not sufficient to constitute larceny unless he had, between the severance and the taking away, intended to abandon his wrongful possession of the article severed. If the wrongdoer did not intend to abandon his possession, but merely left the article concealed on the land after severance, until he could conveniently return and carry it away, then the severance and carrying away were treated as one continuous act although a considerable time may have elapsed between the severance and taking away, and there is no larceny at common law. R. v. Townley (1871), L.R. 1 C.C.R. 315.

304. Animals capable of being stolen.—All tame living creatures, whether tame by nature or wild by nature and tamed, shall be capable of being stolen; but tame pigeons shall be capable of being stolen so long only as they are in a dovecote or on their owner's land.

2. All living creatures wild by nature, such as are not commonly found in a condition of natural liberty in Canada, shall, if kept in a state of confinement, be capable of being stolen, not only while they are so confined, but after they have escaped from confinement.

3. All other living creatures wild by nature, shall, if kept in a state of confinement, be capable of being stolen, so long as they remain in confinement or are being actually pursued after escaping therefrom, but no longer.

4. A wild living creature shall be deemed to be in a state of confinement so long as it is in a den, cage, or small inclosure, stye or tank, or is otherwise so situated that it cannot escape and that its owner can take possession of it at pleasure.

5. Oysters and oyster brood shall be capable of being stolen when in oyster beds, layings, and fisheries which are the property of any person, and sufficiently marked out or known as such property.

6. Wild creatures in the enjoyment of their natural liberty shall not be capable of being stolen, nor shall the taking of their dead bodies by, or by the orders of, the person who killed them before they are reduced into actual possession by the owner of the land on which they died, be deemed to be theft.

7. Every thing produced by or forming part of any living creature capable of being stolen, shall be capable of being stolen.

Larceny of animals at common law.]—Animals feræ naturæ, or wild animals, were not the subject of larceny at common law unless reclaimed, and then only in case they were animals fit for food. 4 Bl. Com. 235, 2 Bishop Cr. Law 683.

Hawks kept for sport were excepted from this limitation, and to steal them was larceny, because, say Hawkins, "of the very high value which was formerly set upon that bird." 1 Hawkins P.C. There could be no larceny of the following at common law, although reclaimed—dogs, cats, ferrets, squirrels, parrots, singing birds. 2 Bishop Cr. Law 684. Or of ferrets, though tame and saleable. R. v. Searing (1818), R. & R. 250.

Birds, bees and silkworms, kept respectively for food, labour or profit, were the subjects of larceny as well as their produce. 2 Russ. Cr., 5th ed., 233.

The taking of tame pigeons from a dovecote might be larceny at common law. R. v. Cheafor (1851), 2 Den. 361. And this section declares that they shall constitute the subjects of theft so long only as they are in a dovecote, or on their owner's land.

305. Theft defined.—Theft or stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, anything capable of being stolen, with intent—

(*a*) to deprive the owner, or any person having any special property or interest therein, temporarily or absolutely of such thing or of such property or interest; or,

(*b*) to pledge the same or deposit it as security; or

(*c*) to part with it under a condition as to its return which the person parting with it may be unable to perform; or

(*d*) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time of such taking and conversion.

2. The taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment.

3. It is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of the conversion, in the lawful possession of the person converting.

4. Theft is committed when the offender moves the thing or causes it to move or to be moved, or begins to cause it to become movable, with intent to steal it.

5. Provided, that no factor or agent shall be guilty of theft by pledging or giving a lien on any goods or document of title to goods intrusted to him for the purpose of sale or otherwise, for any sum of money not greater than the amount due to him from his principal at the time of pledging or giving a lien on the same, together with the amount of any bill of exchange accepted by him for or on account of his principal.

6. Provided, that if any servant, contrary to the orders of his master, takes from his possession any food for the purpose of giving the same, or having the same given to any horse or other animal belonging to or in the possesion of his master, the servant so offending shall not, by reason thereof, be guilty of theft. R.S.C., c. 164, s. 63.

Larceny at common law.]—Larceny at common law is the wrongful or fraudulent taking and carrying away the personal goods of another from any place with a felonious intent to convert them to the taker's own use and make them permanently his own property without the consent of the owner. 2 East P.C. 553. The intent referred to was one to deprive the owner permanently, and not only temporarily, of his property and without colour of right to excuse the act. R. v. Thurborn (1849), 1 Den. 388, 2 C. & K. 831; R. v. Guernsey (1858), 1 F. & F. 394. Sub-sec. (*a*) supra, extends the common law doctrine so as to include a taking with intent to temporarily deprive the owner.

To constitute larceny there must have been either an actual or constructive "taking" of the goods. And where one of the tenants in common of a personal chattel carried away and disposed of it, this was held not to be larceny at common law. 1 Hale 513. Theft under the Code may be committed by one of several joint owners, tenants in common or partners of or in anything capable of being stolen (sec. 303), against the other persons interested therein (sec. 311); or by the directors of a corporation against the corporation, or by the members of an unincorporated society, if the purposes of the society be lawful, against such society. Sec. 311.

There must not only have been a taking but also an asportation or carrying away; but a bare removal from the place in which the thief found the goods, though he did not make off with them, was a sufficient carrying away. 4 Bl. Com. 231. So where a thief intending to steal plate took it out of a chest in which it was and laid it down upon the floor, but was surprised before he could make his escape with it, this was larceny. R. v. Simpson, Kel. J. 31, 1 Hawk., ch. 33, s. 25. And where the defendant drew a book from the inside pocket of the prosecutor's coat about an inch above the top of the pocket, but whilst the book was still about the person of the prosecutor, the latter suddenly put up his hand, and the defendant then let the book drop and it fell back into the prosecutor's pocket, this was held a sufficient asportation to constitute larceny. R. v. Thompson (1825), 1 Mood. C.C. 78. There must be a severance to constitute an asportation. 2 Russ. Crim., 6th ed., 122. And where the accused could not carry off the purse he laid hold of, intending to steal it, because some keys attached to the strings of the purse got entangled in the owner's pocket and held it fast, it was held that there was no larceny. R. v. Wilkinson (1598), 1 Hale 508. And likewise where the goods were attached by a string to the counter. Anon, 2 East P.C. 556. Sub-sec. 4, supra, makes the offence of theft complete when the offender moves the thing or causes it to move or to be moved or *begins* to cause it to become moveable, with intent to steal it.

The article must also have been of *some* value, but not necessarily of the value of any coin known to the law. R. v. Morris (1839), 9 C. & P. 349; R. v. Edwards (1877), 13 Cox 384.

The abandonment of the term 'larceny' in Canadian jurisprudence on the enactment of the Criminal Code of Canada subsequent to an extradition convention including such offence, does not affect the liability to extradition of a person charged with what was larceny at common law and is by the Criminal Code still an offence in Canada under the name of 'theft' or 'stealing.' Re Gross (1898), 2 Can. Cr. Cas. 67 (Ont.).

Proof of ownership.]—To prove a right of property in a representative capacity such as administratrix parol evidence of a son of the person alleged to be administratrix that she was so in fact is insufficient. R. v. Jackson (1869), 19 U.C.C.P. 280.

A prisoner may be indicted for stealing the property of some persons unknown, if facts be proved from which the jury may fairly presume that the goods were stolen, but not if it appear that the owner is really known or might easily have been discovered. 2 Russell Crim., 6th ed., 296.

It is not essential that direct proof of loss be given if the quantity of goods in a warehouse or shop is so great as to prevent the prosecutor knowing whether any part be missing. Presumptive evidence in support of such fact is admissible, as that the prisoner threw down the articles when stopped on coming out of one of the rooms, and said, "I hope you will not be hard with me." R. v. Burton (1854), 23 L.J.M.C. 52; R. v. Wright (1858), 30 L.T. Rep. 292; R. v. Mockford (1868), 11 Cox 16; 32 J.P. 133.

This section, in defining theft, does not limit the offence to the mere stealing of the right of ownership, but extends to the stealing of any special right of property or interest in it. R. v. Tessier (1900), 5 Can. Cr. Cas. 73, 78 (Que.).

Fraudulent conversion by bailee, etc.]—Before the Code it had been held that money was property of which a person could be a bailee so as to make him guilty of theft if he appropriated it to his own use; R. v. Massey (1863), 13 U.C.C.P. 484; but the bailment must have been for the re-delivery of the identical money and not merely its equivalent in currency. R. v. Hoare (1859), 1 F. & F. 647; R. v. Garrett (1860), 2 F. & F. 14. See now sec. 308 by which, subject to a proviso as to what shall be deemed an accounting, the fraudulent conversion is now made theft although the party in default was not required to deliver over in specie the identical money.

Defendant held the title of land belonging to A., who lived in the United States. A. exchanged it with H. for other land, and gave an order on defendant to convey to H. When H. presented this order defendant represented that a claim having been made against him for A.'s debts, he had sworn that the farm belonged to himself; and to keep up the appearance of this being true, it was agreed between H. and the defendant that a certain sum should be paid over by H. to defendant on receiving the deed, as for the purchase money, and immediately returned. H. borrowed $700 for the purpose, and they, with H.'s brother and others, went to a solicitor's office, when the deed was drawn, with a consideration expressed of $3,150. The $700 was handed to defendant, and counted over by him as if it were $2,000, and notes given by H. and his brother for the balance of $1,150. Defendant, instead of returning the money and notes, ran away with them. The court held that though, if no public interests were concerned, H. should not be admitted to state that when he gave the defendant the money openly as a payment, and with the intent that it should be so understood by those who were present, he yet was not in fact paying, but only pretending to do so, as the defendant and he both well understood; this kind of estoppel does not apply to prevent the defendant from being brought to justice for his fraudulent and felonious conduct. R. v. Ewing (1862), 21 U.C.Q.B. 523.

Where a minor procured furniture on a hire-purchase agreement, and after having paid four instalments, sold the furniture without the knowledge of the lessor of same, it was held by a majority of the thirteen judges before whom the case finally came for review, that although the hire-purchase contract was not binding on the minor because of his minority, the bailment created a special property in the furniture whilst in his possession and that he was properly convicted of larceny under the English statute 24-25 Vict., ch. 96, sec. 3. R. v. Macdonald (1885), 15 Q.B.D. 323.

On an indictment of the husband for the theft of furniture which his wife had obtained on a hire-purchase contract, made by her, it must be shewn that he knew the terms on which his wife obtained possession of the goods. R. v. Halford, 32 J.P. 421.

Goods lost and found.]—If a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not theft; but if he takes them with like intent though lost or reasonably supposed to be lost but reasonably believing that the owner can be found, it is theft. R. v. Thurborn (1849), 1 Den. 388, 2 C. & K. 831; R. v. Shea (1856), 7 Cox C.C. 147.

Where property has been left by a passenger in a train it seems always to have been treated as larceny if a servant of the railway company appropriated it instead of taking it to the lost property department of the railway service. R. v. Pierce (1852), 6 Cox C.C. 117.

In R. v. Moore (1860), L. & C. 1, 30 L.J.M.C. 77, a customer dropped his purse containing a bank note in a hairdresser's shop and the hairdresser picked it up. The jury found that at the time he picked it up he did not know nor had he reasonable means of knowing who the owner was: that he afterwards acquired knowledge of who the owner was and then converted the bank note to his own use; that he intended when he found the note to take it to his own use and deprive the owner of it, whoever he was; and that he believed when he found it that the owner could be found. It was held that he was rightly convicted of larceny. It will, of course, be borne in mind that bank notes are not as commonly used as currency in England as they are in Canada, a point very material in ascertaining the prisoner's belief as to the probability of finding an owner. The proper question to be put to the jury is not whether *they* are satisfied that the prisoner could have found the owner, but whether they are satisfied that the prisoner himself believed that he could have found the owner. R. v. Knight (1871), 12 Cox C.C. 102.

The innocent receipt of a chattel coupled with its subsequent fraudulent appropriation was not a larceny at common law; R. v. Ashwell (1885), 16 Q.B.D. 190; but is covered by the statutory definition contained in this section.

It is no longer material whether the fraudulent conversion was concurrent with the taking or occurred subsequently. Sub-sec. 3, supra.

If there is any mark upon the property by which the owner may be traced, and the finder instead of restoring the property converts it to his own use such conversion will amount to larceny. R. v. Pope (1834), 6 C. & P. 346; R. v. Mole (1844), 1 C. & K. 417; R. v. Preston (1851), 2 Den. 353.

In R. v. West (1854), Dears. 402, 24 L.J.M.C. 4, a purse with money in it was left by mistake on the prisoner's stall in a market, and on it being pointed out to her by a stranger, she took possession of it, but denied all knowledge of it when the customer returned to claim it; the jury found that when the prisoner took it she intended to appropriate the purse to her own use, and did not then know the owner. The court in that case drew a distinction between "left" property and "lost" property, and it was therefore unnecessary to ask the jury whether the prisoner, when she took the purse, reasonably believed the owner could be found. The prisoner was not justified in treating the purse as lost, and as she took it with intent to appropriate to her own use a conviction for larceny was supported.

Presumption from recent possession.]—Although the mere fact of possession may not suffice to raise a presumption of guilt by reason of lapse of time, it may be considered when combined with other circumstances, such as a misrepresentation by the prisoner as to his occupation, a sale of the

stolen articles at price much below their value. R. v. Starr (1876), 40 U.C.Q.B. 268.

The recent possession of stolen goods is recognized by the law as affording a presumption of guilt, and therefore, in one sense, is a presumption of law, but it is still, in effect, a mere natural presumption; for, although the circumstance may weigh greatly with the jury, it is to operate solely by its natural force, for a jury are not to convict unless they be actually convinced in their consciences of the truth of the fact. 2 Starkie on Evidence 684; R. v. Smith (1825), Ryan & Moody N.P. Cases 295.

The question of what is or is not a recent possession of stolen property is to be considered with reference to the nature of the article stolen; therefore where two ends of woollen cloth in an unfinished state were lost and were found in the possession of the prisoner two months after their being stolen, and were still in an unfinished condition, it was held that their possession by the prisoner was recent enough to raise a presumption against him of having stolen it. Rex v. Partridge (1836), 7 C. & P. 551. Mr. Justice Patteson said in the same case: "If the articles are such as pass from hand to hand readily, two months would be a long time; it is a question for the jury."

In Reg. v. Langmead (1864), 9 Cox C.C. 464, it was held by the Court of Criminal Appeal (Pollock, C.B., Martin, B., Byles, Blackburn and Mellor, JJ.,) that it is a presumption of fact and not an implication of law, from evidence of recent possession of stolen property unaccounted for, whether the offence of stealing or of feloniously receiving has been committed. Blackburn, J., there said: "If a party is in possession of stolen property recently after the stealing, it lies on him to account for his possession, and if he fails to account for it satisfactorily, he is reasonably presumed to have come by it dishonestly; but it depends on the surrounding circumstances whether he is guilty of receiving or stealing. Whenever the circumstances are such as render it more likely that he did not steal the property the presumption is that he received it.

Pollock, C.B., in the same case said: "All that appears is that the prisoner was found very recently in possession of the stolen sheep. That, prima facie, is evidence of stealing rather than of receiving, but in no case can it be said to be exclusively such, unless the party is found so recently in possession of stolen property and under such circumstances as to exclude the probability of receiving--as where a party is stopped coming out of a room with a gold watch which has been taken from the room; but if he has left the room so long as to render it probable that he may have received it from someone else, then it may be evidence either of stealing or of feloniously receiving."

It has been held that the possession of stolen property consisting of an axe, a saw and a mattock three months after it was lost is not such a recent possession as to put it upon the prisoner to shew how he came by it, unless there be evidence of something more than the mere fact of possession at such a distance of time after the loss. R. v. Adams (1829), 3 C. & P. 600; 2 Russell on Crimes (1896), 6th ed. 288.

Proving the intent.]—To demand and obtain possession of goods from a debtor for the purpose of holding them as security for a debt actually owing, is not a demand with menaces made with "intent to steal," although such possession is obtained by means of an unjustified threat of the debtor's arrest made by the creditor's agent without any honest belief that the debtor was liable to arrest. R. v. Lyon (1898), 2 Can. Cr. Cas. 242 (Ont.).

Evidence of other similar criminal acts may be relevant in charge of theft if it bears upon the question whether the taking was designed or accidental. R. v. Collyns (1898), 4 Can. Cr. Cas. 572.

Where such evidence is relevant to the issue, it is not necessary for its admission in evidence that it should establish conclusively that the accused had been guilty of such other criminal acts, but it will be received if it *tends* to shew that the accused had been so guilty. Ibid.

Where the prisoner, being the manager of a branch store for the sale of goods supplied by the factory of his employers, arranged with the checker at the factory to load certain goods on a waggon going to the branch store without charging them or keeping the usual check on them which his employers' system required, and had the goods delivered to a customer of his branch without charging the customer, the prisoner stating that for the benefit of his employers he had merely postponed the charging of the goods in order to give the customer a longer credit than was customary and to so retain the customer's trade; these facts will constitute "theft" under the Code if credence is not given to the prisoner's explanation. R. v. Clark (1901), 5 Can. Cr. Cas. 235 (Ont.).

The goods having been taken by the prisoner with knowledge that his doing so was contrary to the employers' rules and regulations and with intent to deprive the owner thereof, the taking was fraudulent and without colour of right within Code sec. 305. Ibid.

Attempt to steal.]—Sec. 64 declares that one who, having an intent to commit an offence, does an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended, whether under the circumstances it was possible to commit such offence or not. If, with an intent to steal, the accused puts his hand into an empty pocket, he may be convicted of an attempt to steal, although he could not have committed the complete offence of theft. R. v. Ring (1892), 17 Cox C.C. 491; R. v. Brown (1890), 24 Q.B.D. 357; overruling R. v. Collins (1864), L. & C. 471, contra.

(Amendment of 1900.)

306. Theft of things under seizure.—Every one commits theft and steals the thing taken or carried away, who, whether pretending to be the owner or not, secretly or openly, takes or carries away, or causes to be taken or carried away, without lawful authority, any property under lawful seizure and detention by any peace officer or public officer in his official capacity.

The section formerly stopped at the word "detention." The amendment in 1900 added the words "by any peace officer or public officer in his official capacity."

It was said that the section had been taken advantage of to try private rights at the expense of the Crown, and to brand as a criminal a party to a mere civil dispute arising out of a more or less doubtful question of law or fact. It had been decided in R. v. Hollingsworth (N.W.T.), 2 Can. Cr. Cas. 291, that a guest at a hotel, who, without leave, removed his baggage after the same had been placed under "lawful seizure and detention" by the hotelkeeper in respect of the latter's common law lien, was punishable under sec. 306 of the Code, although the guest was permitted to have access to the room where the baggage was kept. The section as it now stands excludes such cases from its operation.

The ordinary and natural meaning of the word "seizure" is a forcible taking possession. Johnston v. Hogg, 52 L.J.Q.B. 343, 10 Q.B.D. 432.

Punishment.]—The limit of punishment is seven years' imprisonment, except where the offender has been previously convicted of some of the offences declared by the Code to be "theft," in which case the punishment for this offence may be 10 years imprisonment. Sec. 356.

307. Theft of animals.—Every one commits theft, and steals the creature killed who kills any living creature capable of being stolen, with intent to steal the carcase, skin, plumage, or any part of such creature.

See secs. 331, 331A, 332 and 499.

308. Theft by agent.—Every one commits theft who, having received any money or valuable security, or other thing whatsoever, on terms requiring him to account for or pay the same, or the proceeds thereof, or any part of such proceeds, to any other person, though not requiring him to deliver over in specie the identical money, valuable security or other thing received, fraudulently converts the same to his own use, or fraudulently omits to account for or pay the same or any part thereof, or to account for and pay such proceeds or any part thereof, which he was required to account for or pay as aforesaid.

2. Provided, that if it be part of the said terms that the money or other thing received, or the proceeds thereof, shall form an item in a debtor and creditor account between the person receiving the same and the person to whom he is to account for or pay the same, and that such last mentioned person shall rely only on the personal liability of the other as his debtor in respect thereof, the proper entry of such moneys or proceeds, or any part thereof, in such account, shall be a sufficient accounting for the money, or proceeds, or part thereof, so entered, and in such case no fraudulent conversion of the amount accounted for shall be deemed to have taken place.

The offence of fraudulent conversion of the proceeds of a valuable security, mentioned in this section, consists of a continuity of acts—the reception of the valuable security, the collection of the proceeds, the conversion of the proceeds, and lastly, the failure to account for the proceeds; and where the beginning of the operation is in one district and the continuation and completion are in another district, the accused may be arrested and proceeded against in either district. R. v. Hogle (1896), 5 Can. Cr. Cas. 53, R.J.Q. 5 Q.B. 59. So where the valuable security in respect of which a charge of fraudulent conversion was laid was received and the terms were agreed to in the district of Iberville, and the person to whom the accused was to account for the proceeds resided in that district, but the accused collected the money in the district of Bedford, proceedings taken in the district of Iberville were held good. Ibid.

Agency has been defined in the case of Pole v. Leask, 33 L. J. Ch. 155 (H.L.), per Lord Cranworth, thus:—"As to the constitution by principal of another to act as his agent. No one can become the agent of any person except by the will of that other person. His will may be manifested in writing or orally, or simply by placing another in a situation in which, according to ordinary rules of law, or perhaps it would be more correct to say according to the ordinary usages of mankind, that other is understood to represent and

act for the person who has so placed him; but in every case it is only by will of the employer that an agency can be created. Another proposition to be kept constantly in view is that the burden of proof is on the person dealing with anyone as an agent through whom he seeks to charge another as principal. He must shew that the agency did exist and that the agent had the authority he assumed to exercise or otherwise that the principal is estopped from disputing it."

Valuable security.]— See definition of this term in sec. 3 (*c.c.*).

On terms requiring him to account.]—This means the terms on which the accused held the money, etc., and is not restricted to cases in which the terms were imposed by the person from whom the money was received. R. v. Unger (1894), 30 C.L.J. 428; 14 C.L.T. 294; 5 Can. Cr. Cas.

Punishment.]—Every one is guilty of an indictable offence and liable to fourteen years imprisonment who steals anything by any act or omission amounting to theft under the provisions of this section. Sec. 320.

309. Theft by person holding power of attorney.—Every one commits theft who, being intrusted, either solely or jointly with any other person, with any power of attorney for the sale, mortgage, pledge, or other disposition of any property, real or personal, whether capable of being stolen or not, fraudulently sells, mortgages, pledges, or otherwise disposes of the same or any part thereof, or fraudulently converts the proceeds of any sale, mortgage, pledge or other disposition of such property, or any part of such proceeds, to some purpose other than that for which he was intrusted with such power of attorney. R.S.C., c. 164, s. 62.

The power of attorney must be in writing, and evidence of a verbal power will not bring the accused within the scope of this section. R. v. Choinard (1874), 4 Que. Law Rep. 220.

An indictment for stealing under a power of attorney which charges that the money appropriated was the proceeds of a sale made by the defendant while acting under a power of attorney will not be quashed for failure to allege that the power of attorney was one for the sale or disposition of property, but particulars will be ordered as to the date, nature or purport of the alleged power of attorney. The defect, being only a partial one, was cured by verdict, and cannot be given effect to upon a reserved case as to whether a verdict of guilty on such indictment was valid or not. R. v. Fulton (1900), 5 Can. Cr. Cas. 36; R.J.Q. 10 Q.B. 1.

A count in an indictment charging that the defendant acting under a power of attorney fraudulently sold certain bank shares and fraudulently converted the proceeds "and did thereby steal the said proceeds" is not bad as charging two offences, and the reference to the fraudulent sale and fraudulent conversion are to be taken as descriptive of the means whereby the offence of stealing under a power of attorney was committed. Ibid.

Punishment.]—See sec. 320.

310. Misappropriating proceeds held under direction.—Every one commits theft who, having received, either solely or jointly with any other person, any money, or valuable security, or any power of attorney for the sale of any property, real or personal, with a direction that such money, or any part

thereof, or the proceeds, or any part of the proceeds of such security, or such property, shall be applied to any purpose or paid to any person specified in such direction, in violation of good faith and contrary to such direction, fraudulently applies to any other purpose or pays to any other person such money or proceeds, or any part thereof.

2. Provided, that where the person receiving such money, security, or power of attorney, and the person from whom he receives it, deal with each other on such terms that all money paid to the former would, in the absence of any such direction, be properly treated as an item in a debtor and creditor account between them, this section shall not apply unless such direction is in writing.

Valuable security.—See definition in sec. 3 (*c.c.*). A document which is a complete bill of exchange in all respects except that it lacks the signature of the drawer is, when in the hands of the intended drawer, a "security for the payment of money"; R. v. Bowerman, [1891] 1 Q.B. 112; and therefore within the statutory definition above referred to.

Property, real or personal.]—See definition in sec. 3 (*v.*).

The direction to apply proceeds.]—Defendant, a broker, had from time to time gratuitously made investments in bonds, etc., on the stock exchange as agent for the prosecutrix. He wrote to her enclosing a contract-note for three Japanese bonds at £112 each, saying he was fortunate in securing them for her, and that he had no doubt of her ratifying what he had done. The contract-note was signed by the defendant in the form of a sold-note from him to the prosecutrix. On the same day the prosecutrix wrote to the defendant that she had received the contract-note for three Japanese bonds and his letter, and that she "enclosed a cheque for £336 in payment." The cheque was payable to the defendant's order and was endorsed and cashed by him but he never paid for the bonds which after being carried over from time to time were sold by his order and he applied the proceeds of the cheque to his own use. It was held that the letter from the prosecutrix saying that she enclosed the cheque for £336 *in payment*, was a sufficient direction to apply the cheque or its proceeds to take up the Japanese bonds by paying the seller if not delivered, and if delivered by paying himself the defendant, and the conviction of the defendant was confirmed. R. v. Christian (1873), L.R. 2 C.C.R. 94, 12 Cox C.C. 502.

Punishment.]—See sec. 320.

311. Theft by co-owner.—Theft may be committed by the owner of anything capable of being stolen against a person having a special property or interest therein, or by a person having a special property or interest therein against the owner thereof, or by a lessee against his reversioner, or by one of several joint owners, tenants in common, or partners of or in any such thing against the other persons interested therein, or by the directors, public officers or members of a public company, or body corporate, or of an unincorporated body or

society associated together for any lawful purpose, against such public company or body corporate or unincorporated body or society. R.S.C., c. 164, s. 58.

Semble, that this section would be applicable to the case of a partner defrauding his co-partner. Major v. McCraney (1898), 2 Can. Cr. Cas. 547, 554 (S.C. Can.).

As to the meaning of the phrase "anything capable of being stolen" see sec. 303 and note to sec. 354.

Punishment.]—The limit of punishment under this section is seven years imprisonment, unless the offender has been previously convicted of "theft," in which case the limit is ten years. Sec. 356.

Agreement for stifling a prosecution.]—In Jones v. Merionethshire Permanent, [1892] 1 Ch. 173, affirming [1891] 2 Ch. 587, the facts shewn were that the secretary of a building society, who had made default in accounting for money paid to him, was threatened by the society with a prosecution for embezzlement. He thereupon applied to certain relatives for assistance, and they gave a written undertaking to the society to make good the greater part of the amount due from the secretary, the expressed consideration being the forbearance of the society to sue the secretary for the sum for which the relatives made themselves responsible. In pursuance of that undertaking they gave two promissory notes and some title deeds as collateral security to the society. The relatives in giving the undertaking were actuated by a desire to prevent the prosecution, and that was known to the directors of the society, but no express promise was made that there should be no prosecution. It was held by the Court of Appeal (Lindley, Bowen, and Fry, L.JJ.,) that it was an implied term of the agreement that there should be no prosecution; that the agreement was, therefore, founded on an illegal consideration and void; and that the society could not recover on the promissory notes or enforce the securities. "Bowen, L.J., there said: "Reparation is a duty which the offender owes quite imdependently of his fear of prosecution or otherwise, and it would be absurd to lay down as an impossible counsel of perfection, that the relative of an offender, and his friends are not justified, nay, even are not bound, in certain instances, to assist him to make reparation to those whom he has injured. . . . The law certainly is not anxious to discourage reparation; but you must come back, after reparation made, to the one dominant test in each case. It is a circumstance which may be lawfully taken into consideration that the offender has done his best himself, or with the assistance of his friends, to make good his wrong. But the test is, what is the moral duty of the person who has been injured to himself and to others? He must make no bargain about that. If reparation takes the form of a bargain then, to my mind, the bargain is one which the court will not enforce."

The mere expectation on the part of the relatives who aid the offender to make reparation that a prosecution would not take place, would not be sufficient to nullify the transaction: Ward v. Lloyd (1843), 6 Man. & G. 785. In order to amount to a defence on the ground of illegality there must be an agreement not to prosecute. Jones v. Merionethshire, [1892] 1 Ch. 173, 182, per Lindley, L.J.

There is no distinction between getting a security for a debt from the debtor himself and getting it from a third person who is under no obligation to the creditor. A threat to prosecute is not of itself illegal, and does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt which he justly owes to his creditor, although the transaction out of which the debt arises possibly involves a criminal as well as a civil liability. Flower v. Sadler (1882), 10 Q.B.D. 572 (C.A.).

If the agreement be made upon the understanding that the accused shall be discharged from custody, although not so stated in express terms, it is illegal and void. Leggatt v. Brown (1898), 29 Ont. R. 530, affirmed (1899) 30 Ont. R. 225.

312. Concealing gold or silver with intent to defraud partner in claim.—Every one commits theft who, with intent to defraud his co-partner, co-adventurer, joint tenant or tenant in common, in any mining claim, or in any share or interest in any such claim, secretly keeps back or conceals any gold or silver found in or upon or taken from such claim. R.S.C., c. 164, s. 31.

Search warrant for mined gold, etc.]—On complaint in writing made to any justice of the county, district or place, by any person interested in any mining claim, that mined gold or gold-bearing quartz, or mined or unmanufactured silver or silver ore, is unlawfully deposited in any place, or held by any person contrary to law, a general search warrant may be issued by such justice, as in the case of stolen goods, including any number of places or persons named in such complaint; and if, upon such search, any gold or gold-bearing quartz, or silver or silver ore is found to be unlawfully deposited or held, the justice shall make such order for the restoration thereof to the lawful owner as he considers right. Sec. 571.

The decision of the justice in such case is subject to appeal as in ordinary cases coming within the provisions of Part LVIII. Sec. 571 (2).

Punishment.]—The offence is declared indictable and a limit of punishment fixed by sec. 343 at two years imprisonment.

313. Husband and wife.—No husband shall be convicted of stealing, during cohabitation, the property of his wife, and no wife shall be convicted of stealing, during cohabitation, the property of her husband; but while they are living apart from each other, either shall be guilty of theft if he or she fraudulently takes or converts anything which is, by law, the property of the other in a manner which, in any other person, would amount to theft.

2. Every one commits theft who, while a husband and wife are living together, knowingly—

(*a*) assists either of them in dealing with anything which is the property of the other in a manner which would amount to theft if they were not married; or

(*b*) receives from either of them anything, the property of the other, obtained from that other by such dealing as aforesaid.

In the case of R. v. Streeter, [1900] 2 Q.B. 601, two prisoners, a man and a woman, were indicted for stealing property in a dwelling house, and also for receiving the same property. The woman was the prosecutor's wife and the man had lodged in the house. After he left, the woman

packed up the property in question which belonged to her husband, and sent it to the man and afterwards left the house and joined him, and the two lived together. The property was found in their possession. It was held that the man could not be convicted of receiving, although he knew the goods were the husband's, because the stealing by a wife of her husband's property did not amount to a felony at common law, and was only made a criminal offence by the English Married Woman's Property Act 1882. But under sub-section (2) of this section the man would be guilty of theft by his complicity in receiving the goods.

PART XXV.

RECEIVING STOLEN GOODS.

SECT.

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314. Receiving property dishonestly obtained.—Every one is guilty of an indictable offence, and liable to fourteen years' imprisonment, who receives or retains in his possession anything obtained by any offence punishable on indictment, or by any acts wheresoever committed, which, if committed in Canada after the commencement of this Act, would have constituted an offence punishable upon indictment, knowing such thing to have been so obtained. R.S.C., c. 164, s. 82.

Receiving stolen property.]—In the offence of receiving stolen goods the stolen goods must have been taken and stolen by a person other than the person accused of receiving. R. v. Lamoureux (1900), 4 Can. Cr. Cas. 101.

The essential elements of the offence of receiving stolen goods are not included in the offence of "housebreaking and theft," and a conviction for receiving stolen goods cannot be rendered on the "speedy trial" of a person charged only with housebreaking and theft. Ibid.

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

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

(ii.) having in any place (whether belonging to or occupied by one's self or not) for the use or benefit of one's self or of any other person. Sec. 3 (*k*).

Evidence of guilty knowledge may consist of proof that the accused bought the stolen property at very much under its value; 1 Hale 619; or falsely denied his possession of it. Archbold Cr. Ev. 519.

A person having a joint possession with the thief may be convicted as a receiver. Sec. 317; McIntosh v. R. (1894), 23 Can. S.C.R. 180, 193; R. v. Smith (1855), Dears. C.C. 494; R. v. Wiley (1850), 2 Den. C.C. 37. And so may the person who aids in concealing or disposing of it. Sec. 317.

When the principal has been previously convicted, such conviction is presumptive evidence that everything in the former proceeding was rightly and properly transacted, but it is competent to the receiver to controvert the guilt of the principal. Per Taschereau, J., in McIntosh v. R. (1894), 23 Can. S.C.R. at p. 189; 2 Russell on Crimes, 4th ed., 571.

The confession of the thief is not evidence against the receiver unless made in the presence of and concurred in by the latter. R. v. Cox (1858), 1 F. & F. 90; R. v. Turner (1832), 1 Mood. 347. But the evidence of the thief was admissible against the receiver even before the Canada Evidence Act; R. v. Haslam 2 Leach C.C. 467, subject, however, to proper directions being given to the jury as to its weight if uncorroborated, it being the evidence of an accomplice. R. v. Robinson (1864), 4 F. & F. 43.

As to receiving after restoration to owner see sec. 318.

Indictment.]—Every one charged with receiving any property knowing it to have been stolen, may be indicted, whether the person by whom such property was obtained has or has not been indicted or convicted, or is or is not amenable to justice. Sec. 627. When any property has been stolen any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive offences in the same indictment, and may be tried together, whether the person by whom the property was so obtained is or is not indicted with them, or is or is not in custody or amenable to justice. Sec. 627 (2).

Previous conviction as evidence of knowledge.]—See sec. 717 as to cases where the stolen property is found in the possession of an accused person who has been previously convicted "of any offence involving fraud or dishonesty."

Recent possession as evidence.]—Upon an indictment for receiving stolen goods, there should be some evidence to shew that the goods were in fact stolen by some other person, and a conviction for receiving should not be had on such evidence of taking possession as would ordinarily prove the defendant guilty of the theft. R. v. Densley (1834), 6 C. & P. 399. In the latter case the evidence was that the goods, having been discovered, after the loss, concealed in an old engine-house, several persons kept watch, and one of the prisoners came alone in the night and took the goods out of the engine-house. He was immediately seized and dropped the bag in which the goods were, in a field of grain, and shortly afterwards the other prisoners came up and carried the bag away. Patteson, J., in summing up to the jury on a trial for receiving, said that this was evidence on which persons are constantly convicted of stealing; that if the jury were of opinion that some other person stole it, and that the prisoners knew of that fact, and planned together in order to get the goods away, they might be convicted of receiving; there was no evidence that any other person stole the property, but "if there had been evidence that some *one* person had been seen near the house from which the property was taken, or there had been strong suspicions that some *one* person stole it, then those circumstances would have been evidence that the prisoners received it, knowing it to have been stolen." Patteson, J., in R. v. Densley (1834), 6 C. & P., at page 400.

In Deer's case (1862), 1 Leigh & Cave's Crown Cases, 240, the prisoner had been a lodger in the prosecutor's house and left the same. On the following day the prosecutor's wife also left, taking with her a small bundle. Two days afterwards the prisoner was found in company with the prosecutor's wife, who was passing by the prisoner's name, on board a ship bound from England to Canada. Property belonging to the prosecutor of a bulk *greater than* could have been comprised in the bundle *taken by the wife*, was found in the prisoner's possession on the ship, some part being upon his person. It was held by the court for Crown cases reserved, composed of Pollock, C.B., Wightman, J., Williams, J., Channell, B., and Mellor, J., that such was *some* evidence to support a conviction for receiving the property knowing it to have been stolen.

A person may steal, hand over to another, and afterwards receive from him again, and so be both a principal and a receiver, just as a person may be an accessory before the fact, and afterwards receive the goods knowing them to have been stolen. R. v. Hughes (1860), Bell C.C. 242.

Where, on the trial of an indictment for receiving a stolen shirt, it appeared doubtful whether the principal felony had not been committed by several persons, and the only evidence against the prisoner was the possession of the shirt and a statement made by her that she had received it from another person, it was objected that there was no evidence of receiving, with knowledge that it had been stolen, Littledale, J., said:—"In a case on the early part of this circuit, the only evidence was recent possession, and the counsel for the prosecution urged that that was evidence of receiving, but I held that it was not. I hold it essential to prove that the property was in the *possession of some one else* before it came to the prisoner; here the prisoner said some one brought the shirt to her; that is an admission that it had been in the possession of some one else; that is evidence of receiving." R. v. Sarah Cordy (1832), Gloucester Assizes, Littledale, J., cited 2 Russell on Crimes, 6th ed., 438.

Where the thief, who had pleaded guilty, had admitted to a constable *in the presence of the prisoner*, who was indicted as receiver, that he had stolen the property, and this was the principal evidence of the larceny, it was held that the thief's confession was evidence to go to the jury against the receiver. R. v. Cox (1858), 1 F. & F. 90, per Crowder, J. But a confession of the principal in the absence of the receiver is not evidence against the latter. R. v. Turner (1832), 1 Moo. C.C. 347. The necessary evidence that the offender knew the goods which he has received to have been originally stolen, may be collected from the circumstances of the particular case. 2 Russell on Crimes, 440. And the buying goods at an undervalue is presumptive evidence that the buyer knew they were stolen. 1 Hale 619, 2 East P.C., ch. 16, sec. 153, p. 765.

Recent possession of stolen property is evidence either that the person in possession stole the property or that he received it knowing it to be stolen, according to the circumstances of the case. So, where goods have been stolen from a dwelling house, if the defendant were apprehended a few yards from the outer door with the stolen goods in his possession, there would arise a violent presumption of his having stolen them; but if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, *together with* proof that they were actually stolen, would amount not to a violent, but to a probable presumption merely. Archbold's Crim. Pleading (1900), 312. But if the property were not found recently after the loss, as for instance not until sixteen months after, it would be but a light or rash presumption and entitled to no weight. Anon (1826), 2 C. & P. 459; R. v. Adams (1829), 3 C. & P. 600; R. v. Cooper (1852), 3 C. & K. 318.

If the prisoner give a *reasonable account* of the manner in which he became possessed of the goods, this will so far rebut the presumption as to throw it upon the prosecutor to negative that account. R. v. Crowhurst (1844), 1 C. & K. 370; R. v. Smith (1845), 2 C. & K. 207; R. v. Harmer (1848), 2 Cox C.C. 487.

Where, on a charge of receiving, it was proved that the prisoner had told the constable who found the stolen property in his possession, that he had purchased it from a tradesman in the same town, and that tradesman, although known, was not called for the prosecution, it was held to be unnecessary to call the tradesman if the jury could fairly infer from the other circumstances of the case that the prisoner's statement was false. R. v. Ritson (1884), 15 Cox C.C. 478 (Grove, Hawkins, Stephen, W. Williams and Matthew, JJ.). It is a question in each case, under the particular circumstances of the case, whether it is necessary to call the third party vouched by the prisoner. Ibid.

Finding of other stolen property.]—It is provided by sec. 716 that when proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given, at any stage of the proceedings, that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property which forms the subject of the proceedings taken against him to be stolen: Provided, that not less than three days' notice in writing has been given to the person accused that proof is intended to be given of such other property, stolen within the preceding period of twelve months, having been found in his possession; and such notice shall specify the nature or description of such other property, and the person from whom the same was stolen. See note to sec. 716.

315. Receiving stolen post letter or post letter bag.—Every one is guilty of an indictable offence, and liable to five years' imprisonment who receives or retains in his possession, any post letter, post letter bag, or any chattel, money or valuable security, parcel or other thing, the stealing whereof is hereby declared to be an indictable offence, knowing the same to have been stolen. R.S.C., c. 35, s. 84.

This section is taken from the "Post Office Act" and the words "any chattel, etc., the stealing whereof is hereby declared to be an indictable offence," have reference to the Post Office Act and not to the Code.

Indictment.]—Sec. 624 provides that when an offence is committed in respect of a post letter bag, or a post letter, or other mailable matter, chattel, money or valuable security sent by post, the property of such post letter bag, post letter, or other mailable matter, chattel, money or valuable security may, in the indictment preferred against the offender, be laid in the Postmaster-General; and it shall not be necessary to allege in the indictment, or to prove upon the trial or otherwise, that the post letter bag, post letter or other mailable matter, chattel or valuable security was of any value.

The property of any chattel or thing used or employed in the service of the post office, or of moneys arising from duties of postage, shall, except in the cases aforesaid, be laid in His Majesty, if the same is the property of His Majesty, or if the loss thereof would be borne by His Majesty, and not by any person in his private capacity. Sec. 624 (2).

In any indictment against any person employed in the post office of Canada for any offence against this Act, or against any person for an offence committed in respect of any person so employed, it shall be sufficient to allege that such offender or such other person was employed in the post office of Canada at the time of the commission of such offence, without stating further the nature or particulars of his employment. Sec. 624 (3).

The expression "post letter" means any letter transmitted by the post or delivered through the post, or deposited in any post office, or in any letter box put up anywhere under the authority of the Postmaster General, whether such letter is addressed to a real or a fictitious person or not, and whether it is intended for transmission by the post or delivery through the post or not; and a letter shall be deemed a post letter from the time of its being so deposited to the time of its being delivered to the person to whom it is addressed, or so long as it remains in the post office or in any such letter box or is being carried through the post: and a delivery to any person authorized to receive letters for the post shall be deemed a delivery

at the post office, and a delivery of any letter or other mailable matter at the house or office of the person to whom the letter is addressed, or to him, or to his servant or agent, or other person considered to be authorized to receive the letter or other mailable matter, according to the usual manner of delivering that person's letters, shall be a delivery to the person addressed. 1 Edw. VII., ch. 19, sec. 1, amending the Post Office Act, R.S.C. ch. 35, sec. 2 (c).

316. Receiving property obtained by offence punishable on summary conviction.—Every one who receives or retains in his possession anything, knowing the same to be unlawfully obtained, the stealing of which is punishable, on summary conviction, either for every offence, or for the first and second offence only, is guilty of an offence, and liable, on summary conviction, for every first, second, or subsequent offence of receiving, to the same punishment as if he were guilty of a first, second, or subsequent offence of stealing the same. R.S.C., c. 164, s. 84.

317. When receiving is complete. — The act of receiving anything unlawfully obtained is complete as soon as the offender has, either exclusively or jointly, with the thief or any other person, possession of or control over such thing, or aids in concealing or disposing of it.

318. Receiving after restoration to owner.—When the thing unlawfully obtained has been restored to the owner, or when a legal title to the thing so obtained has been acquired by any person, a subsequent receiving thereof shall not be an offence, although the receiver may know that the thing had previously been dishonestly obtained.

The leading English case on the subject—R. v. Villensky, [1892] 2 Q.B. 597—is in accordance with the law as here declared.

PART XXVI.

PUNISHMENT OF THEFT AND OFFENCES RESEMBLING THEFT COMMITTED BY PARTICULAR PERSONS IN RESPECT OF PARTICULAR THINGS IN PARTICULAR PLACES.

SECT.

(Amendment of 1894.)

319. Theft by clerks and servants.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment, who—

(*a*) being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, steals anything belonging to or in the possession of his master or employer; or

(*b*) being a cashier, assistant cashier, manager, officer, clerk or servant of any bank, or savings bank, steals any bond, obligation, bill obligatory or of credit, or other bill or note, or any security for money, or any money or effects of such bank or lodged or deposited with any such bank; or

(*c*) being employed in the service of His Majesty, or of the Government of Canada or the Government of any Province of Canada, or of any municipality, steals anything in his possession by virtue of his employment. R.S.C., c. 164, ss. 51, 52, 53, 54, and 59.

Evidence.]—Section 319 deals with the offence of theft by a clerk or servant while sec. 308 includes cases of misappropriation in which the accused though he may not have been either a clerk or a servant of the person to whom he was to account, and though not bound to deliver over the identical money or valuable security received by him, fraudulently converts the same to his own use or fraudulently omits to account for the same or the proceeds, having received the same "on terms requiring him to account for or pay the same or the proceeds thereof, or any part of such proceeds to any other person."

The test as to whether a person is a "clerk or servant" is: was he under the control of and bound to obey his alleged master? R. v. Negus

(1873), L.R. 2 C.C.R. 34, 12 Cox 492. To constitute the offence formerly designated "embezzlement" there must have been an employment as clerk or servant, the receipt of the money by him must have been for and on behalf of the master, and the fraudulent appropriation by him must have taken place before the money got into the master's possession. Ferris v. Irwin, 10 U.C.C.P. 117.

Where the accused was employed by the prosecutor to solicit orders and collect monies, for which he was paid by commission, being at liberty to get orders when and where he pleased, but to be exclusively in the employ of the prosecutor and to give his whole time to the prosecutor's service, it was held that he was the "servant" of the prosecutor. R. v. Bailey (1871), 12 Cox 56. And where a director of a joint stock company was employed at a salary to superintend its business and collect monies due to the company, he is a servant of the company. R. v. Stuart, [1894] 1 Q.B. 310. But a person employed by the prosecutors as their agent for the sale of coal on commission and to collect money in connection with his orders, but who was at liberty to dispose of his time as he thought best and to get or abstain from getting orders as he might choose was held not to be a "clerk" or "servant." R. v. Bowers (1866), L.R. 1 C.C.R. 41, 10 Cox C.C. 250.

And where the accused was a collector and accountant carrying on an independent business, and was employed by the prosecutors to collect certain accounts for them on commission, and he was to pay over the net proceeds as the collections were made, but time and mode of collecting were left to the discretion of the collector, it was held that he was not a "clerk" or "servant" of the prosecutors. R. v. Hall (1875), 13 Cox C.C. 49.

In Regina v. Topple, 3 Russell & Chesley (Nova Scotia), 566, the accused, not having been in the employ of the prosecutor, was sent by him to one M. with a horse, as to which M. and the prosecutor, who owned the horse, and had some negotiations, with an order to M. to give the bearer a cheque if the horse suited. Owing to a difference in the price the horse was not taken, and the accused brought it back. Shortly afterwards the accused, without any authority from the prosecutor, took the horse to M. and sold it as his own property or professing to have the right to dispose of it, and received the money. It was held the money was not received by the accused as clerk or servant of the prosecutor, and a conviction for embezzlement was set aside. Regina v. Topple, 3 Russell & Ches. 566.

A charge against a city officer for collecting sums of money upon the pretence that they were payable to the city and not thereafter accounting for the same is not sustainable as a charge of theft, if in fact the sums collected were not payable to the city. To constitute the offence of theft (sec. 305), or of theft by a clerk (sec. 319 (*a*)), or of theft by municipal employees (sec. 319 (*c*)), the person alleged to have been defrauded by the taking must have had a right at the time of the taking either to the ownership or to the possession of the property taken. R. v. Tessier (1900), 5 Can. Cr. Cas. 73 (Que.).

An indictment against a Government or municipal officer for theft or embezzlement under Code sec. 319 (*c*) would be demurrable if it did not allege that the officer had received the money by virtue of his employment, but on such being alleged and proved, the wrongful appropriation is an offence under sec. 319 (*c*) whether the property be public (or municipal) property or not. Ibid.

The relationship of servant or clerk, etc., is essential to this offence and should be proved by the prosecution with proper evidence. If the contract of hiring was in writing, and the writing is still in existence, it should be produced. R. v. Taylor (1867), 10 Cox C.C. 544. The prisoner's answer to the charge may be that by the terms of the hiring, he was entitled to retain money received by him for the firm to be spent for the firm's purposes and in that case it is essential that the written contract should be produced if the firm have it. R. v. Dodson, 33 L.J. (Eng.) 547.

A false account or false entries of the expenditure of money will afford evidence from which a jury may say that a clerk who had money entrusted to him by his master has been guilty of embezzling it, just as much as not accounting for money received from others for the master will, if the receipt of it or the like be denied, afford evidence from which to infer embezzlement. R. v. Cummings (1858), 16 U.C.Q.B. 15, 31.

Evidence only of a general deficiency in the clerk's books will not support the indictment; R. v. Glass (1877), Ramsay's Cases (Que.) 186; but if in addition to the evidence of general deficiency there is evidence of unlawful appropriation, though no precise sum paid by any particular person is proved to have been taken, it will be sufficient. R. v. Glass (1877), 1 Leg. News, Montreal, 141.

A director of a corporation may also be its clerk or servant and amenable as such to the provisions of sec. 319. R. v. Stuart, [1894] 1 Q.B. 310.

320. Agents and attorneys.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals anything by any act or omission amounting to theft under the provisions of sections three hundred and eight, three hundred and nine and three hundred and ten.

See notes to secs. 308, 309 and 310.

321. Public servants. — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, being employed in the service of His Majesty or of the Government of Canada, or the Government of any Province of Canada, or of any municipality, and intrusted by virtue of such employment with the keeping, receipt, custody, management or control of any chattel, money, valuable security, book, paper, account or document, refuses or fails to deliver up the same to any one authorized to demand it. R.S.C., c. 164, s. 55.

Municipality.]—The expression "municipality" includes the corporation of any city, town, village, county, township, parish or other territorial or local division of any province of Canada, the inhabitants whereof are incorporated or have the right of holding property for any purpose. Sec. 3 (*p*).

Valuable security.]—This term is defined by sec. 3 (*cc*) ante p. 10.

322. Tenants and lodgers. — Every one who steals any chattel or fixture let to be used by him or her in or with any house or lodging is guilty of an indictable offence and liable to two years' imprisonment, and if the value of such chattel and fixture exceeds the sum of twenty-five dollars to four years' imprisonment. R.S.C., c. 164, s. 57.

An indictment may be preferred against any person who steals any chattel let to be used by him in or with any house or lodging, or who steals any fixture so let to be used, in the same form as if the offender was not a tenant or a lodger, and in either case the property may be laid in the owner or person letting to hire. Sec. 625.

It is also an offence under sec. 504 for any person, being possessed of any dwelling house or other building or part of any dwelling house or other building, which is held for any term of years or other less term or at will, or held over after the termination of any tenancy, wilfully and to the prejudice of the owner to pull down or sever from the freehold any *fixture* fixed in or to such dwelling house or building or part of such dwelling house or building.

As to stealing metal fences, area guards, etc., see sec. 335.

323. Testamentary instruments. — Every one is guilty of an indictable offence and liable to imprisonment for life who, either during the life of the testator, or after his death, steals the whole or any part of a testamentary instrument, whether the same relates to real or personal property, or to both. R.S.C., c. 164, s. 14.

Every one who destroys, cancels, conceals or obliterates any document of title to goods or lands, or any valuable security, testamentary instrument, or judicial, official or other document, for any fraudulent purpose, is guilty of an indictable offence and liable to the same punishment as if he had stolen such document, security or instrument. Sec. 353.

Testamentary instrument.]—The expression "testamentary instrument" includes any will, codicil, or other testamentary writing or appointment, as well during the life of the testator whose testamentary disposition it purports to be as after his death, whether the same relates to real or personal property, or both. Sec. 3 (*aa*).

324. Document of title to lands. — Every one is guilty of an indictable offence and liable to three years' imprisonment, who steals the whole or any part of any document of title to lands or goods. R.S.C., c. 164, s. 13.

Document of title.] — The expression "document of title to goods" includes any bill of lading, India warrant, dock warrant, warehousekeeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, authorizing, or purporting to authorize, either by endorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to. Sec. 3 (*g*).

The expression "document of title to lands" includes any deed, map, paper or parchment written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real property, or to any interest in any real property, or any notarial or registrar's copy thereof, or any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada respecting registration of titles, and relating to such title. Sec. 3 (*h*).

See also note to preceding section.

325. Judicial or official documents. — Every one is is guilty of an indictable offence and liable to three years' imprisonment who steals the whole or any part of any record, writ, return, affirmation, recognizance, *cognovit actionem*, bill,

petition, answer, decree, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney, or of any original document whatsoever of or belonging to any Court of Justice, or relating to any cause or matter begun, depending or terminated in any such Court, or of any original document in any wise relating to the business of any office or employment under His Majesty, and being or remaining in any office appertaining to any Court of Justice, or in any Government or public office. R.S.C., c. 164, s. 15.

See note to sec. 323.

326. Stealing post letter bags, etc.—Every one is guilty of an indictable offence and liable to imprisonment for life, or for any term not less than three years, who steals—

(*a*) a post letter bag; or

(*b*) a post letter from a post letter bag, or from any post office, or from any officer or person employed in any business of the post office of Canada, or from a mail; or

(*c*) a post letter containing any chattel, money or valuable security; or

(*d*) any chattel, money or valuable security from or out of a post letter. R.S.C. c. 35, ss. 79, 80, and 81.

Evidence.]—A confession by an accused person charged with stealing post-letters, induced by a false statement made to him by a detective employed by the prosecution, in presence of a post office inspector, that the accused had been seen taking the letters, will render the confession inadmissible in evidence against the accused. R. v. MacDonald (1896), 2 Can. Cr. Cas. 221.

Post letter.]—The expression "post letter" means any letter transmitted by the post or delivered through the post, or deposited in any post office, or in any letter box put up anywhere under the authority of the Postmaster-General, whether such letter is addressed to a real or a fictitious person or not, and whether it is intended for transmission by the post or delivery through the post or not; and a letter shall be deemed a post letter from the time of its being so deposited to the time of its being delivered to the person to whom it is addressed, or so long as it remains in the post office or in any such letter box or is being carried through the post; and a delivery to any person authorized to receive letters for the post shall be deemed a delivery at the post office, and a delivery of any letter or other mailable matter at the house or office of the person to whom the letter is addressed, or to him, or to his servant or agent, or other person considered to be authorized to receive the letter or other mailable matter, according to the usual manner of delivering that person's letters, shall be a delivery to the person addressed. 1 Edw. VII., ch. 19, sec. 1, amending the Post Office Act R.S.C. ch. 35, sec. 2 (*i*).

Post letter bag.]—The expression "post letter bag" includes a mail bag, basket or box, or packet or parcel, or other envelope or covering in which mailable matter is conveyed, whether it does or does not actually contain mailable matter. Sec. 4; Post Office Act R.S.C., c. 35; 52 Vict. (Can.), c. 20; (sec. 2 (*k*)).

In the Territories.]—In the North West Territories it is held that the accused is entitled to ask for a jury under sec. 67, N.W.T. Act, as the offence is not one comprised in the list of cases mentioned in sec. 66, N.W.T. Act, not being larceny either at common law or under the Larceny Act, nor declared to be larceny under the Act originally creating the offence. (38 Vict. (Can.) c. 7, s. 72); R. v. MacDonald (1896), 32 C.L.J. 327, per Scott, J. Regina v. Allen, decided by Rouleau J., on Nov. 16, 1895, dissented from.

327. Stealing post letters, packets and keys.—Every one is guilty of an indictable offence and liable to imprisonment for any term not exceeding seven years, and not less than three years, who steals—

(*a*) any post letter, except as mentioned in paragraph (*b*) of section three hundred and twenty-six;

(*b*) any parcel sent by parcel post, or any article contained in any such parcel; or

(*c*) any key suited to any lock adopted for use by the Post Office Department, and in use on any Canada mail or mail bag. R.S.C. c. 35, ss. 79, 83, and 88.

A person improperly inducing a postman to deliver letters to persons not entitled to have them, to enable them to commit a fraud, may be convicted as a principal with the postman for stealing them. R. v. James (1890), 24 Q.B.D. 439.

Destroying post letter.]—Every one is guilty of the indictable offence of mischief who wilfully destroys or damages a post letter bag or post letter or any street letter box, pillar box or other receptacle established by authority of the Post Master General for the deposit of letters or other mailable matter; sec. 499 (D.); and for such offence is liable to five years imprisonment. Ibid.

Post letter.]—See note to last preceding section.

Other postal offences.]—Sec. 89 of the Post Office Act R.S.C. 1886, c. 35 is still in force. Sec. 981, schedule II. It provides as follows:—

Every one who unlawfully opens, or wilfully keeps, secretes, delays or detains, or procures, or suffers to be unlawfully opened, kept, secreted or detained, any post letter bag or any post letter—whether the same came into the possession of the offender by finding or otherwise howsoever—or after payment or tender of the postage thereon, if payable to the person having possession of the same, neglects or refuses to deliver up any post letter to the person to whom it is addressed or who is legally entitled to receive the same—is guilty of a misdemeanor.

The same statute also contains the following enactments:

Every one who encloses a letter or letters, or any writing intended to serve the purpose of a letter or post card, in a parcel posted for the parcel post—or in a packet of samples or patterns posted to pass at the rate of postage applicable to samples and patterns—or encloses a letter or post card, or any writing to serve the purpose of a letter or post card, or encloses any other thing, in a newspaper posted to pass as a newspaper at the rate of postage applicable to newspapers (except in the case of the accounts and receipts of newspaper publishers, which will be permitted to pass folded within the newspapers sent by them to their subscribers)—or encloses a letter or any writing intended to serve the purpose of a letter or post card,

in any mail matter sent by post not being a letter, shall incur a penalty not exceeding forty dollars and not less than ten dollars in each case. R.S.C. c. 35, s. 93.

Every one who, with fraudulent intent, removes from any letter, newspaper or other mailable matter sent by post, any postage stamp which has been affixed thereon, or wilfully, with intent aforesaid, removes from any postage stamp or post card, post band or wrapper which has been previously used, any mark which has been made thereon at any post office, is guilty of a misdemeanor. R.S.C. 1886, c. 35, s. 94.

Every one who abandons, or obstructs or wilfully delays the passing or progress of any mail, or any car, train, locomotive engine, tender, carriage, vessel, horse or animal employed in conveying any mail on any railway, public highway, river, canal, or water communication, is guilty of a misdemeanor: Provided always, that nothing in this section contained shall prevent any person from being liable, under any other Act or otherwise, to any other or greater punishment than is provided for any offence under this section: but no person shall be punished twice for the same offence. R.S.C. 1886, c. 35, s. 95.

The punishment for offences under sections 89, 94 and 95 of the Post Office Act is regulated by sec. 951 of the Code, which declares that every person convicted of an indictable offence for which no punishment is specially provided shall be liable to imprisonment for five years.

328. Stealing mailable matter other than post letters.—Every one is guilty of an indictable offence and liable to five years' imprisonment who steals any printed vote or proceeding, newspaper, printed paper or book, packet or package of patterns, or samples of merchandise, or goods, or of seeds, cuttings, bulbs, roots, scions or grafts, or any post card or other mailable matter (not being a post letter) sent by mail. R.S.C., c. 35, s. 90.

Destroying mailable matter.]—Every one is guilty of the indictable offence of mischief who wilfully destroys or damages any parcel sent by parcel post, any packet or package of patterns or samples of merchandise or goods, or of seeds, cuttings, bulbs, roots, scions or grafts, or any printed vote or proceeding, newspaper, printed paper or book, or other mailable matter not being a post letter, sent by mail; sec. 499 (D.); and for such offence is liable to five years' imprisonment. Ibid.

Evidence.]—A confession by the accused person charged with stealing post-letters from a post-office box is not admissible in evidence against him if it were induced by a false statement made to him by a detective employed by the prosecution in presence of a post office inspector, that the accused had been seen taking the letters. R. v. MacDonald (1896), 2 Can. Cr. Cas. 221, per Scott, J.

329. Election documents.—Every one is guilty of an indictable offence and liable to a fine in the discretion of the Court, or to seven years' imprisonment, or to both fine and imprisonment, who steals, or unlawfully takes from any person having the lawful custody thereof, or from its lawful place of deposit for the time being, any writ of election, or any return

to a writ of election, or any indenture, poll-book, voters' list, certificate, affidavit, or report, ballot or any document or paper made, prepared or drawn out according to or for the requirements of any law in regard to Dominion, Provincial, municipal or civic elections. R.S.C. c. 8, s. 102; c. 164, s. 56.

The offences of destroying, injuring or obliterating poll books, voters' lists, etc., are provided for by sec. 503.

330. Railway tickets.—Every one is guilty of an indictable offence and liable to two years' imprisonment who steals any tramway, railway or steamboat ticket, or any order or receipt for a passage on any railway or in any steamboat or other vessel. R.S.C., c. 164, s. 16.

331. Cattle stealing.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any cattle. R.S.C., c. 164, ss. 7 and 8.

Summary trial in N.W.T.]—The indictable offence of "stealing cattle" is theft within the provisions of the North-West Territories Act respecting summary trials without a jury. Although the punishment which may be awarded on a conviction for stealing cattle is greater than that which may be awarded on a conviction for stealing certain other classes of property, a person charged with having stolen cattle the value of which does not, in the opinion of the trial Judge, exceed $200, has not the right in the N.W. Territories to be tried by jury. R. v. Pachal (1899), 5 Can. Cr. Cas. 34 (N.W.T.).

Any cattle.]—The expression "cattle" includes any horse, mule, ass, swine, sheep or goat, as well as any neat cattle or animal of the bovine species, and by whatever techical or familiar name known, and shall apply to one animal as well as to many. Sec. 3 (*d.*).

Killing with intent to steal.]—Every one commits theft and steals the creature killed who kills any living creature capable of being stolen, with intent to steal the carcase, skin, plumage, or any part of such creature. Sec. 307.

Killing or wounding cattle.]—Every one is guilty of the indictable offence of "mischief," who wilfully destroys or damages any cattle or the young thereof, if the damage be caused by killing, maiming, poisoning or wounding; sec. 499 (B. (*b.*)); and is liable for such offence to fourteen years' imprisonment. Ibid.

Attempt to injure cattle.]—Every one is guilty of an indictable offence and liable to two years' imprisonment who wilfully attempts to kill, maim, wound, poison or injure any cattle or the young thereof, or wilfully places poison in such a position as to be easily partaken of by any such animal. Sec. 500. Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not. Sec. 64.

Threats to injure cattle.]—Every one is guilty of an indictable offence and liable to two years' imprisonment who sends, delivers or utters, or directly or indirectly causes to be received, knowing the contents thereof, any letter or writing threatening to kill, maim, wound, poison or injure any cattle. Sec. 502.

(Amendments of 1900 and 1901.)

331A. Cattle frauds.—Every one is guilty of an indictable offence and liable to three years' imprisonment who—

(*a*) without the consent of the owner thereof fraudulently takes, holds, keeps in his possession, conceals, receives, appropriates, purchases or sells, or fraudulently causes or procures, or assists in taking possession, concealing, appropriating, purchasing or selling of any cattle which are found astray; or

(*b*) fraudulently refuses to deliver up any such cattle to the proper owner thereof, or to the person in charge thereof on behalf of such owner, or authorized by such owner to receive such cattle; or

(*c*) without the consent of the owner, fraudulently, wholly or partially obliterates, or alters or defaces, or causes or procures to be obliterated, altered or defaced, any brand or mark on any cattle, or makes or causes or procures to be made any false or counterfeit brand or mark on any cattle.

Evidence.]—Sec. 707 A of the Code (amendment of 1901), is as follows:—In any criminal prosecution, proceeding or trial, the presence upon any cattle of a brand or mark, which is duly recorded or registered under the provisions of any Act, ordinance or law, shall be prima facie evidence that such cattle are the property of the registered owner of such brand or mark; and where a person is charged with theft of cattle, or with an offence under paragraph (*a*) or paragraph (*b*) of section 331 A respecting cattle, possession by such person or by others in his employ or on his behalf of such cattle bearing such a brand or mark of which the person charged is not the registered owner, shall throw upon the accused the burden of proving that such cattle came lawfully into his possession or into the possession of such others in his employ or on his behalf, unless it appears that such possession by others in his employ or on his behalf was without his knowledge and without his authority, sanction or approval.

(Amendment of 1900.)

332. Stealing domestic animals.—Every one who steals any dog, or any bird, beast or other animal ordinarily kept in a state of confinement, or for any domestic purpose, or for any lawful purpose of profit or advantage, is, if the value of the property stolen exceeds twenty dollars, guilty of an indictable offence and liable to a penalty not exceeding fifty dollars over and above the value of the property stolen, or to two years' imprisonment, or to both, and if the value of the property stolen does not exceed twenty dollars, is guilty of an offence and liable upon summary conviction to a penalty not exceeding twenty dollars over and above such value, or to one month's imprisonment with hard labour.

2. Every one who, having been previously convicted of an offence under this section, is summarily convicted of another offence thereunder, is liable to three months' imprisonment with hard labour.

Injuries to dogs, birds, etc.]—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding one hundred dollars over and above the amount of injury done, or to three months' imprisonment with or without hard labour, who wilfully kills, maims, wounds, poisons or injures any dog, bird, beast, or other animal, not being cattle, but being either the subject of larceny at common law, or being ordinarily kept in a state of confinement; or kept for any lawful purpose. Sec. 501. For the second offence the offender is liable to a fine or imprisonment, or both, in the discretion of the court. Ibid.

333. Pigeons.—Every one who unlawfully and wilfully kills, wounds or takes any house-dove or pigeon, under such circumstances as do not amount to theft, is guilty of an offence and liable, upon complaint of the owner thereof, on summary conviction, to a penalty not exceeding ten dollars over and above the value of the bird. R.S.C., c. 164, s. 10.

Sec. 304 declares that in contemplation of law tame pigions are capable of being stolen so long only as they are in a dovecote or on their owner's land.

334. Oysters.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals oysters or oyster brood.

2. Every one is guilty of an indictable offence and liable to three months' imprisonment who unlawfully and wilfully uses any dredge or net, instrument or engine whatsoever, within the limits of any oyster bed, laying or fishery, being the property of any other person, and sufficiently marked out or known as such, for the purpose of taking oysters or oyster brood, although none are actually taken, or unlawfully and wilfully with any net, instrument or engine, drags upon the ground of any such fishery.

3. Nothing herein applies to any person fishing for or catching any swimming fish within the limits of any oyster fishery with any net, instrument or engine adapted for taking swimming fish only. R.S.C. c. 164, s. 11.

Indictment.]—An indictment under this section shall be deemed sufficient if the oyster bed, laying or fishery is described by name or otherwise, without stating the same to be in any particular county or place. Sec. 619 (*e*).

335. Things fixed to buildings or in land.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively fixed in or to any building whatsoever, or anything made of metal fixed in any land, being private property, or for a fence to any dwelling-house, garden or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial ground. R.S.C. c. 164, s. 17.

This is a statutory offence and was not larceny at common law. R. v. Millar (1837), 7 C. & P. 665.

A wharf may be a building under this section. R. v. Rice (1859), 28 L.J.M.C. 64; and so may an unfinished structure intended for a dwelling, the roof of which has not been completed. R. v. Worrall (1836), 7 C. & P. 516.

The evidence of a house agent that he managed the property for a non-resident and collected the rents for him is sufficient evidence of the ownership of such non-resident in proving an offence under this section. R. v. Brummitt (1861), L. & C. 9.

336. Trees, etc.—Every one is guilty of an indictable offence and liable to two years' imprisonment who steals the whole or any part of any tree, sapling or shrub, or any underwood, the thing stolen being of the value of twenty-five dollars, or of the value of five dollars if the thing stolen grows in any park, pleasure ground, garden, orchard or avenue, or in any ground adjoining or belonging to any dwelling-house. R.S.C., c. 164, s. 18.

Unlawful possession of tree.]—See sec. 340.

337. Trees of the value of twenty-five cents.—Every one who steals the whole or any part of any tree, sapling or shrub, or any underwood, the value of the article stolen, or the amount of the damage done, being twenty-five cents at the least, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty-five dollars over and above the value of the article stolen or the amount of the injury done.

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

3. Every one who, having been twice convicted of any such offence, afterwards commits any such offence, is guilty of an

indictable offence and liable to five years' imprisonment. R.S.C., c. 164, s. 19.

The amount of the damage done.]—This refers to the actual damage to the tree itself not consequential injury resulting from the act of the accused, and in estimating the amount regard cannot be had to the extra expense of replacing part of a hedge. R. v. Whiteman (1854), Dears. 353, 23 L.J.M.C. 120.

If several trees be stolen at the same time, or so continuously as to form one transaction, it will be sufficient if the value or damage in the aggregate is of the statutable amount. R. v. Shepherd (1868), L.R. 1 C.C.R. 118, 11 Cox C.C. 119.

Bona fide claim.]—If the taking of the trees is done upon a bona fide claim of right in respect of the title to the land upon which they are growing, the criminal intent will be negatived. Robichaud v. La Blanc (1898), 34 C.L.J. 324 (N.B.).

Wilfully damaging trees or shrubs.]—Every one is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty-five dollars over and above the amount of the injury done, or to two months' imprisonment with or without hard labour, who wilfully destroys or damages the whole or any part of any tree, sapling or shrub, or any underwood, wheresoever the same is growing, the injury done being to the amount of twenty-five cents at the least. Sec. 508. Every one who, having been convicted of any offence under sec. 508 afterwards commits any such offence, is liable, on summary conviction, to a penalty not exceeding fifty dollars over and above the amount of the injury done, or to four months' imprisonment with hard labour. Sec. 508 (2).

3. Every one who, having been twice convicted of any offence under sec. 508 afterwards commits any such offence, is guilty of an indictable offence and liable to two years' imprisonment. Sec. 508 (3).

Unlawful possession of tree.]—See sec. 340.

338. Timber found adrift.—Every one is guilty of an indictable offence and liable to three years' imprisonment who—

(*a*) without the consent of the owner thereof:

(i.) fraudulently takes, holds, keeps in his possession, collects, conceals, receives, appropriates, purchases, sells or causes or procures or assists to be taken possession of, collected, concealed, received, appropriated, purchased or sold, any timber, mast, spar, saw-log or other description of lumber which is found adrift in, or cast ashore on the bank or beach of, any river, stream or lake;

(ii.) wholly or partially defaces or adds, or causes or procures to be defaced or added, any mark or number on any such timber, mast, spar, saw-log or other description of lumber, or makes or causes or procures to be made any false or counterfeit mark on any such timber, mast, spar, saw-log or other description of lumber; or

(*b*) refuses to deliver up to the proper owner thereof, or to the person in charge thereof, on behalf of such owner, or authorized by such owner to receive the same, any such timber, mast, spar, saw-log, or other description of lumber. R.S.C., c. 164, s. 87.

By the Timber Marking Act, R.S.C. 1886, ch. 64 it is enacted that every person engaged in the business of lumbering or getting out timber, and floating or rafting the same on the inland waters of Canada, within the Provinces of Ontario and Quebec, shall, within one month after he engages therein, select a mark or marks, and having caused such mark or marks to be registered in the manner hereinafter provided, shall put the same in a conspicuous place on each log or piece of timber so floated or rafted; and that every one who violates such provision shall incur a penalty of fifty dollars. Sec. 1.

The Minister of Agriculture is directed by that statute to keep at the Department of Agriculture, at Ottawa, a book to be called the "Timber Mark Register," in which any person engaged in the business of lumbering or getting out timber as aforesaid, may have his timber mark registered by depositing with the Minister a drawing or impression and description in duplicate of such timber mark, together with a declaration that the same is not and was not in use, to his knowledge, by any other person than himself at the time of his adoption thereof; and the Minister, on receipt of the fee hereinafter provided, shall cause the said timber mark to be examined, to ascertain whether it resembles any other mark already registered; and if he finds that such mark is not identical with, or does not so closely resemble any other timber mark already registered as to be confounded therewith, he shall register the same, and shall return to the proprietor thereof one copy of the drawing and description, with a certificate signed by the Minister or the deputy of the Minister of Agriculture, to the effect that the said mark has been duly registered in accordance with the provisions of this Act; and such certificate shall further set forth the day, month and year of the entry thereof, in the proper register; and every such certificate shall be received in all courts in Canada as evidence of the facts therein alleged, without proof of the signature. Ibid, sec. 2.

3. The person who registers such timber mark shall thereafter have the exclusive right to use the same, to designate the timber got out by him and floated or rafted as aforesaid. Ibid, sec. 3.

Every person, other than the person who has registered the same, who marks any timber of any description with any mark registered under the provisions of that Act, or with any part of such mark, shall, on summary conviction before two justices of the peace, be liable, for each offence, to a penalty not exceeding one hundred dollars and not less than twenty dollars,—which amount shall be paid to the proprietor of such mark, together with the costs incurred in enforcing and recovering the same: Provided always, that every complaint under this section shall be made by the proprietor of such timber mark, or by some one acting on his behalf, and thereunto duly authorized. Ibid, sec. 7.

Sec. 708 of the Code provides that in any prosecution, proceeding or tria for any offence under sec. 338, a timber mark, duly registered under the statute just quoted, on any timber, mast, spar, saw-log or other description of lumber, shall be prima facie evidence that the same is the property of the registered owner of such timber mark; and possession by the offender, or by others in his employ or on his behalf of any such timber, mast, spar, saw-log or other description of lumber so marked, shall, in all cases, throw upon the offender the burden of proving that such timber, mast, spar, saw-log or other description of lumber came lawfully into his possession, or into the possession of such others in his employ or on his behalf. Sec. 708.

339. Fences, stiles and gates.—Every one who steals any part of any live or dead fence, or any wooden post, pale, wire or rail set up or used as a fence, or any stile or gate, or any part thereof respectively, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the article or articles so stolen, or the amount of the injury done.

2. Every one who, having been convicted of any such offence afterwards commits any such offence, is liable, on summary conviction, to three months' imprisonment with hard labour. R.S.C., c. 164, s. 21.

Unlawful possession.]—See sec. 340.

340. Unlawful possession.—Every one who, having in his possession, or on his premises with his knowledge, the whole or any part of any tree, sapling or shrub, or any underwood, or any part of any live or dead fence, or any post, pale, wire, stile or gate, or any part thereof, of the value of twenty-five cents at the least, is taken or summoned before a justice of the peace, and does not satisfy such justice that he came lawfully by the same, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding ten dollars, over and above the value of the article so in his possession or on his premises. R.S.C., c. 164, s. 22.

A conviction stated that C. had on his premises a quantity of chopped wood, to wit, about half a cord, belonging to F. which said F. states was stolen from him, and that said C. could not satisfactorily account for its possession. It was held that the conviction was bad, because the enactment 32 & 33 Vict., ch. 21, sec. 25, under which it was made, (re-enacted in sec. 340) applied to trees attached to the freehold, not to trees made into cordwood, and because cordwood is not "the whole or any part of a tree" within the statute. Re Caswell (1873), 33 U.C.Q.B. 303.

341. Roots, plants, etc., growing in gardens, etc.—Every one who steals any plant, root, fruit or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hot-house, green-house or conservatory, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding twenty dollars over and above the value of the article so stolen or the amount of the injury done, or to one months' imprisonment with or without hard labour.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence, is guilty of an indictable offence, and liable to three years' imprisonment. R.S.C., c. 164, s. 23.

342. Roots, plants, etc., growing elsewhere than in gardens, etc.—Every one who steals any cultivated root or plant used for the food of man or beast, or for medicine, or for distilling, or for dyeing, or for or in the course of any manufacture, and growing in any land, open or inclosed, not being a garden, orchard, pleasure ground, or nursery ground, is guilty of an offence and liable, on summary conviction, to a penalty not exceeding five dollars over and above the value of the article so stolen or the amount of the injury done, or to one month's imprisonment with hard labour.

2. Every one who, having been convicted of any such offence, afterwards commits any such offence, is liable to three months' imprisonment with hard labour. R.S.C. c. 164, s. 24.

343. Ores of metals.—Every one is guilty of an indictable offence and liable to two years' imprisonment who steals the ore of any metal, or any quartz, lapis, calaminaris, manganese, or mundic, or any piece of gold, silver or other metal, or any wad, black cawk, or black lead, or any coal, or cannel coal, or any marble, stone or other mineral, from any mine, bed or vein thereof respectively.

2. It is not an offence to take, for the purposes of exploration or scientific investigation, any specimen or specimens of any ore or mineral from any piece of ground uninclosed and not occupied or worked as a mine, quarry or digging. R.S.C., c. 164, s. 25.

Search warrants for mined ore.]—See sec. 571.

344. Stealing from the person.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals any chattel, money or valuable security from the person of another. R.S.C., c. 164, s. 32.

The offence of stealing, i.e., theft, is committed when the offender moves the thing or causes it to move or to be moved or begins to cause it to become movable, with intent to steal it. Sec. 305 (4). It is therefore submitted that if the offender merely begins to cause the thing to become movable from the person, the offence of stealing from the person is complete.

The removal caused or begun to be caused must be a removal from the person. So it was held that where a man went to bed with a prostitute, leaving his watch in his hat on the table, and the woman stole it while he was asleep, such was not a stealing from the person but stealing in a dwelling-house. R. v. Hamilton (1837), 8 C. & P. 49.

Before the enactment of sec. 305 (4) it was necessary in order to constitute the offence that the thing taken should be completely removed from the person.

Where it appeared that the prosecutor's pocket-book was in the inside front pocket of his coat, and the prosecutor felt a hand between his coat and

waistcoat attempting to get the book out, and the prosecutor thrust his right hand down to his book, and in doing so brushed the prisoner's hand; the book was just lifted out of the pocket, an inch above the top of the pocket, but returned immediately into the pocket; it was held by majority of the judges that the prisoner was not rightly convicted of stealing from the person, because from first to last the book remained about the person of the prosecutor; but the judges all agreed that the simple larceny was complete. R. v. Thompson (1825), R. & M. 78.

Although to constitute the offence there must be a removal of the property from the person, yet a hair's breadth will do it. Per Alderson, B., in R. v. Simpson (1854), Dears. C.C. 421; 24 L.J.M.C. 7. Upon an indictment for stealing a watch from the person it appeared that the watch was carried by the prosecutor in his waistcoat pocket, and the chain, which was attached to the watch at one end, was at the other end passed through a button-hole of his waistcoat, where it was kept by the watch-key turned, so as to prevent the chain slipping through. The prisoner took the watch out of the prosecutor's pocket and forcibly drew the chain out of the button-hole, but his hand was seized by the prosecutor's wife; and it then appeared that, although the chain and watch-key had been drawn out of the button-hole, the point of the key had caught upon another button and was thereby suspended. It was contended that the prisoner was guilty of an attempt only; but the Court thought that, as the chain had been removed from the button-hole, the felony was complete, notwithstanding a subsequent detention by its contact with the button; and, upon a case reserved, it was held that the conviction was right. Ibid.

Theft from the person is an indictable offence, although the amount is less than $10, and notwithstanding that the case might have been summarily tried by a magistrate without the prisoner's consent. R. v. Conlin (1897), 1 Can. Cr. Cas. 41.

If in such case the prisoner consents to be tried by a *police* magistrate having the extended powers of a Court of General Sessions, where such consent is given, he is liable to sentence for the more onerous punishment which the General Sessions might impose in excess of the powers of a "magistrate," as the term is used in the Summary Trials part, sec. 782. Ibid.

Where in a charge of pocket picking the evidence in the opinion of the Court of Appeal goes no further than to support a reasonable surmise or suspicion that the accused was guilty of the offence and lacks the material ingredients necessary to establish guilt, the conviction will be quashed upon appeal under Cr. Code secs. 744 and 746. R. v. Winslow, 3 Can. Cr. Cas. 215 (Man.).

A conviction on summary trial that the accused "attempted to pick the pocket" of a person named, sufficiently describes the offence of attempting to commit theft. R. v. Morgan (1901), 5 Can. Cr. Cas. 63 (Ont.).

345. Stealing in dwelling-houses. — Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who—

(*a*) steals in any dwelling-house any chattel, money or valuable security to the value in the whole of twenty-five dollars or more; or,

(*b*) steals any chattel, money or valuable security in any dwelling-house, and by any menace or threat puts any one therein in bodily fear. R.S.C., c. 164, ss. 45 and 46.

A theft by the owner or occupier of the house is covered by this section. R. v. Bowden, 2 Mood. C.C. 285; R. v. Taylor, R. & R. 418. But goods which are under the protection of the person of the prosecutor at the time they are stolen are not within it. So where the prosecutor was induced by the trick of ring dropping to lay down his money upon a table and the defendant took it up and carried it away, it was held not to be the offence of "stealing in a dwelling house." R. v. Owen, 2 Leach 572. And where money was delivered to the defendant for a particular purpose by his procurement, and he forthwith ran away with it, it is not an offence under this section. R. v. Campbell, 2 East P.C. 644. But if a person on going to bed puts his clothes and money by his bedside they are under the protection of the dwelling house and not of the person. R. v. Thomas, Car. Supp. 295; R. v. Hamilton, 8 C. & P. 49.

It is a question for the Court and not for the jury whether goods are under the protection of the dwelling house or in the personal care of the owner. R. v. Thomas, Car. Supp. 295. The section corresponds with sec. 60 of the Imperial Act, 24 and 25 Vict. c. 96, under which it is said that it is necessary that the goods should be under the protection of the house and be deposited in it for safe custody. Archbold Cr. Pl. (1900), 612. But property left at a house for a person supposed to reside there will be under the protection of the house, and the stealing of them will be stealing in a dwelling house. R. v. Carroll, 1 Mood. C.C. 89.

346. Stealing by picklocks, etc.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who, by means of any picklock, false key or other instrument steals anything from any receptacle for property locked or otherwise secured.

If upon a summary trial for the theft of money from a locked box on a ship in port, effected by picking the lock, it is shewn that the accused, one of the ship's seamen, had access in common with the other seamen to the place where the box was kept, that shortly before the theft was committed he had borrowed a small sum of money on the plea that he had none, that shortly after the stolen money was missed he had considerably more money on him, that he had meanwhile received nothing in respect of wages, that on the money being missed he suggested that he should not be suspected as he had borrowed money from another party named, which latter statement was shewn to be untrue, such constitutes legal evidence to support a conviction. R. v. MacCaffery (1900), 4 Can. Cr. Cas. 193 (N.S.).

If, however, the trial judge in making his finding, bases the same upon the theory that, as a matter of law, it would be presumed that it was possible for him to shew how he had come by the money seen in his possession and that the onus was upon him to do so, such is an error in law entitling the accused to a new trial. Ibid.

347. Stealing in manufactories, etc.—Every one is guilty of an indictable offence and liable to five years' imprisonment who steals, to the value of two dollars, any woollen, linen, hempen or cotton yarn, or any goods or articles of silk, woollen, linen, cotton, alpaca, or mohair, or of any one or more of such materials mixed with each other or mixed with any other material while laid, placed or exposed, during any stage, process or progress of manufacture, in any building, field or other place. R.S.C., c. 164, s. 47.

Stage, process or progress of manufacture.]—Goods may be within this section though the texture is complete if they have not yet been brought into saleable condition. R. v. Woodhead, 1 M. & Rob. 549.

On an indictment under the English statute, 18 George II. c. 27, for stealing yarn out of a bleaching ground, the evidence was that the yarn had been spread upon the ground, but was afterwards taken up and thrown into heaps in order to be carried into the house, in which state some of it was stolen by the prisoner, Thompson, B., held that the case did not come within the statute, as there was no occasion to leave the yarn upon the ground in the state in which it was taken by the prisoner as a stage, process or progress of manufacture. Hugill's Case, 2 Russell Cr. 6th ed. 403.

348. Fraudulently disposing of goods intrusted for manufacture.—Every one is guilty of an indictable offence and liable to two years' imprisonment, when the offence is not within the next preceding section, who, having been intrusted with, for the purpose of manufacture, or for a special purpose connected with manufacture, or employed to make, any felt or hat, or to prepare or work up any woollen, linen, fustian, cotton, iron, leather, fur, hemp, flax or silk, or any such materials mixed with one another, or having been so intrusted, as aforesaid, with any other article, materials, fabric or thing, or with any tools or apparatus for manufacturing the same, fraudulently disposes of the same or any part thereof. R.S.C., c. 164, s. 48.

349. Stealing from ships, wharfs, etc.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who—

(*a*) steals any goods or merchandise in any vessel, barge or boat of any description whatsoever, in any haven, or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river or canal; or

(*b*) steals any goods or merchandise from any dock, wharf or quay adjacent to any such haven, port, river, canal, creek or basin. R.S.C., c. 164, s. 49.

FORM FF.—The following form of stating the offence is provided for by Code form FF. (*b*):—"A stole a sack of flour from a ship called the —— at —— on ——"

Goods or merchandise.]—The words "goods, wares and merchandise" in a similar statute, 24 Geo. II. c. 45 (Imp.) were held to extend to such goods only as are usually lodged in vessels or on wharves and quays. R. v. Grimes, Fost. 79 (*a*), 2 East P.C. 647; R. v. Leigh, 1 Leach C.C. 52. A passenger's luggage is included. R. v. Wright, 7 C. & P. 159.

Steals from any dock, etc.]—Theft is committed when the offender moves the thing or causes it to move or to be moved, or begins to cause it to become movable, with intent to steal it. Sec. 305 (4). It is, therefore, submitted that an actual removal of the thing from the dock, etc., is not essential to the offence.

350. Stealing wreck.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals any wreck. R.S.C. c. 81, s. 36 (*c*).

Wreck.—The expression "wreck" includes the cargo, stores and tackle of any vessel and all parts of a vessel separated therefrom, and also the property of shipwrecked persons. Sec. 3 (*dd*).

351. Stealing on railways.—Every one is guilty of an indictable offence and liable to fourteen years' imprisonment who steals anything in or from any railway station or building, or from any engine, tender or vehicle of any kind on any railway.

A conviction for stealing "in or from" a building charges only one offence and is not, because of the disjunctive, void for duplicity and uncertainty. R. v. Patrick White (1901), 4 Can. Cr. Cas. 430 (N.S.).

352. Stealing things deposited in Indian graves.—Every one who steals, or unlawfully injures or removes, any image, bones, article or thing deposited in or near any Indian grave, is guilty of an offence and liable, on summary conviction, for a first offence, to a penalty not exceeding one hundred dollars, or to three months' imprisonment, and for a subsequent offence to the same penalty and to six months' imprisonment with hard labour. R.S.C., c. 164, s. 98.

353. Destroying, etc., documents.—Every one who destroys, cancels, conceals or obliterates any document of title to goods, or lands, or any valuable security, testamentary instrument, or judicial, official or other document, for any fraudulent purpose, is guilty of an indictable offence, and liable to the same punishment as if he had stolen such document, security or instrument. R.S.C. c. 164, s. 12.

Maliciously destroying an information or record of a Police Court is an offence within this section. R. v. Mason (1872), 22 U.C.C.P. 246.

For the statutory definitions of the terms "valuable security," "testamentary instrument," "document of title," see sec. 3.

354. Concealing.—Every one is guilty of an indictable offence and liable to two years' imprisonment who, for any fraudulent purpose, takes, obtains, removes or conceals anything capable of being stolen.

The words at the end of the section "anything capable of being stolen" do not mean anything capable of being stolen *by the accused*. They include anything which comes within the definition given in sec. 303. R. v. Goldstaub (1895), 10 Man. R. 497. The same expression is used in sec. 311, where theft by a co-owner is dealt with. The gist of the offence created by sec. 354 is the concealing for a fraudulent purpose and it is not incumbent on the prosecution to shew that the fraudulent purpose was accomplished. R. v. Goldstaub (1895), 10 Man. R. 497.

355. Bringing stolen property into Canada.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, having obtained elsewhere than in Canada, any property by any act which, if done in Canada, would have amounted to theft, brings such property into or has the same in Canada. R.S.C., c. 164, s. 88.

The receiver of property obtained out of Canada by any acts which would if committed in Canada constitute an indictable offence, is liable under sec. 314, if he knew such thing to have been so obtained.

Property.]—Deeds and instruments relating to or evidencing the title or right to any property real or personal or giving a right to recover or receive any money or goods, are included in the term "property." Sec 3 (*v*).

356. Stealing things not otherwise provided for.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who steals anything for the stealing of which no punishment is otherwise provided, or commits in respect thereof any offence for which he is liable to the same punishment as if he had stolen the same.

2. The offender is liable to ten years' imprisonment if he has been previously convicted of theft. R.S.C., c. 164, ss. 5, 6, and 85.

This section was enacted to cover all cases under sec. 305 et seq., the punishment for which is not specially otherwise provided for.

Procedure.]—Where it is sought to make the accused liable to ten years' imprisonment, it is sufficient, after charging the subsequent offence, to state in the indictment that the offender was at a certain time and place, or at certain times and places, convicted of theft and to state the substance and effect only, omitting the formal part of the indictment and conviction, or of the summary conviction, as the case may be, for the previous offence, without otherwise describing the previous offence or offences. Sec. 628.

An indictment is not bad by reason of an omission to state who is the owner of any property therein mentioned, but the court may, if satisfied that it is necessary for a fair trial, order that a particular further describing the property be furnished by the prosecutor. Sec. 613 (*b*).

The form of procedure when a previous conviction for theft is charged, is regulated by sec. 676.

Evidence.]—M. was convicted of stealing goods, the property of S. The evidence to convict the prisoner with the crime was that of a policeman who had him in charge and who stated in cross-examination that he said to the prisoner that S. was a good-hearted man, and he (the policeman)

thought that if S. got his goods back he might not prosecute. About an hour after this the prisoner told the policeman that if he went to a certain place in the woods, which he described particularly, he would find the goods. The policeman went to the place described and found the goods. It was held, following the rule laid down by Lord Eldon in Harvey's case (2 East's P.C. 658), that the prisoner's statement to the policeman was improperly admitted. R. v. McCafferty (1886), 25 N.B.R. 396.

Sec. 716, allowing evidence of guilty knowledge to be given by shewing the finding in the possession of accused of other stolen property, is limited to cases where the charge is either "receiving" or "having in possession stolen property" (sec. 314) and, if a charge of theft is joined therewith, it would appear that such evidence must then be excluded. See note to sec. 716.

357. Additional punishment when value of property exceeds $200.—If the value of anything stolen, or in respect of which any offence is committed for which the offender is liable to the same punishment as if he had stolen it, exceeds the sum of two hundred dollars, the offender is liable to two years' imprisonment, in addition to any punishment to which he is otherwise liable for such offence. R.S.C., c. 164, s. 86.

PART XXVII.

OBTAINING PROPERTY BY FALSE PRETENSES AND OTHER CRIMINAL FRAUDS AND DEALINGS WITH PROPERTY.

SECT.

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358. Definition of false pretense.—A false pretense is a representation, either by words or otherwise, of a matter of fact either present or past, which representation is known to the person making it to be false, and which is made with a fraudulent intent to induce the person to whom it is made to act upon such representation.

2. Exaggerated commendation or depreciation of the quality of anything is not a false pretense, unless it is carried to such an extent as to amount to a fraudulent misrepresentation of fact.

3. It is a question of fact whether such commendation or depreciation does or does not amount to a fraudulent misrepresentation of fact.

By words or otherwise.]—The false pretence need not be made in words or writing, it may be made "otherwise" and it will suffice if it is signified by the conduct and acts of the accused. R. v. Létang (1899), 2 Can. Cr. Cas. 505. As put by Bishop (on Crimes, vol. 2, par. 430): "The pretence need not be in words, but it may be sufficiently gathered from the acts and conduct of the party."

False pretence by conduct.]—A false pretence need not be in words or in writing but may be in the conduct and acts of the accused. R. v. Létang (1899), 2 Can. Cr. Cas. 505. (Würtele, J., Montreal). In that case a debtor had made a judicial abandonment for the benefit of his creditors whereby his property became vested in another, and, knowing that he was no longer entitled to receive the rent, he presented himself afterwards as the landlord to a tenant of the property and received the rent as he had formerly been accustomed to do. It was held that he was properly found guilty of a false pretence by his acts and conduct.

A workman employed by clothiers was to keep an account of the number of shearmen employed, and the amount of their earnings and wages which he was weekly to deliver in, in writing, to a clerk who paid him the amount. He delivered in a false memorandum of the total alleged wages of shearmen for the week giving no details and received the amount. The prisoner was not allowed to draw any sum that he thought fit on account but only so much as had been actually earned by the shearmen. It further appeared that the prisoner was required to keep a book with the names of the men employed and of the work they had done, and that he had entered in this book the names of several men who had not been employed as having earned various sums of money, and had overstated the amount of work done by those who were employed so as to make out the total mentioned in the memorandum handed in by him. It was held that as the prisoner would not have obtained the custody of the particular sum of money but for the false memorandum, he was properly convicted, distinguishing it from a case of money paid generally on account. R. v. Witchell (1878), 2 East P.C. 830.

In R. v. Eagleton (1855), 1 Dears. C.C. 515, 6 Cox C.C. 559, the defendant contracted in writing with the guardians of a parish to supply and deliver for a certain term to the out-door poor, at such times the guardians should direct, loaves of bread, each of a specified weight. The guardians were, during such period, to pay certain prices for the bread so supplied, on being furnished with a bill of particulars. On a poor person applying for relief, the relieving officer gave the applicant a ticket for "bread, one loaf," the presentation of which to the defendant entitled the applicant to receive a loaf. The defendant received the tickets and gave to the poor persons presenting them loaves of bread deficient in weight as he well knew. The defendant would then return the tickets in the following week with a statement in writing of the number of loaves he had supplied, and the relieving officer would credit the defendant's account with the guardians with the amount, and the money would then be paid to him at the time stipulated in the contract. Tickets were returned by the defendant and he was credited with same, but the fraud was discovered before the stipulated time for payment of the money had arrived. The jury found that the defendant intended to defraud the out-door poor and that by returning the tickets to the relieving officer he intended to represent that he had delivered the loaves mentioned in them of the weights contracted for. It was held that, as no false weights or tokens had been used, the defendant could not be convicted as for a common law misdemeanour in supplying to the poor persons loaves deficient in weight with intent to injure and defraud such persons and to deprive them of proper sustenance and endanger their healths. But it was held that the defendant was properly convicted on other counts, of attempting to obtain money by false pretences, his obtaining the credit in account being the last act depending on himself towards obtaining the money. Parke, B., in delivering the judgment of the court (Jervis, C.J., Parke, B., Maule, J., Wightman, J., Erle, J., Platt, B., Williams and Crompton, JJ.) said:—"We think that the contingency of the whole sum due to him, being subject to deductions in a future event, does not the less make the obtaining credit an attempt to obtain money, if it would be so without that contingency; but our doubt has been whether the obtaining that credit, though undoubtedly a necessary step towards obtaining the money, can be deemed an attempt to do so? The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit, but acts immediately connected with it are; and if, in this case, after the credit with the relieving officer for the fraudulent overcharge, any further step on the part of the defendant had been necessary to obtain payment, as the making out a further account, or producing the vouchers to the board, we should have thought that the

obtaining credit in account with the relieving officer would not have been sufficiently proximate to the obtaining the money. But, on the statement in this case, no other act on the part of the defendant would have been required. It was the last act, depending on himself, towards the payment of the money, and therefore it ought to be considered as an attempt. The receipt of the money appears to have been prevented by a discovery of the fraud by the relieving officer; and it is very much the same case, as if, supposing rendering an account to the guardians at their office, with the vouchers annexed, were a preliminary necessary step to receiving the money, the defendant had gone to the office, rendered the account and vouchers, and then been discovered, and the money consequently refused."

It is a fraudulent obtaining of goods by false pretences if delivery of the goods was obtained by the purchaser giving in payment his cheque upon a bank with which he had no account, or, even where there is an account, if there are insufficient funds there to meet it and he knows that it will not be paid. R. v. Jackson (1813), 3 Camp. 370. The giving of a cheque on bankers is a representation of authority to draw, or that it is a valid order for payment of the amount. R. v. Hazelton (1874), L.R. 2 C.C.R. 134.

If the money is parted with from a desire to secure the conviction of the prisoner there is no obtaining by false pretences. R. v. Mills (1857), Dears. & B. 205, 26 L.J.M.C. 79; R. v. Gemmell, 26 U.C.Q.B. 315. The false pretence must have been the inducing cause to the defrauded party to part with his property. Ibid.

If a person offers in exchange for goods the promissory note of another, he is to be taken to affirm, although he says nothing, that the note has not to his knowledge been paid either wholly or to such an extent as to almost destroy its value. R. v. Davies, 18 U.C.Q.B. 180.

Where an attorney who had been struck off the rolls obtained money out of court under such circumstances as amounted to a false pretence practised on the court, his object being to obtain the fund that he might retain his costs out of it, it was held that it was none the less a false pretence by reason of the fact that the accused had intended to pay and did in fact pay over the balance to the person properly entitled. P. v. Parkinson, 41 U.C.Q.B. 545.

A person who is present when a false representation is made by another person acting in conjunction with him, and who knows it to be false, and gets part of a sum of money obtained by such false pretence, is guilty of obtaining such sum of money by false pretences. R. v. Cadden (1899), 5 Can. Cr. Cas. 45 (N.W.T.).

Evidence.]—Where prisoners were indicted for obtaining money by false pretences, and the evidence shewed that W., one of the prisoners, asked H., another of the prisoners, for tobacco, and H. handed W. a box, saying, "plenty of tobacco there," and W. said he would bet $50 the box could not be opened without taking a screw-nail out; H. asked prosecutor to step aside, and when he had done so asked the loan of $50 for a few minutes, which prosecuter loaned to him; W. immediately slipped the money out of H's hands, and went away with it; prosecutor asked H. for the money and the latter said: "Come to the hotel and I will give you a cheque," which he did, telling prosecutor it was a bank thirty miles away, the Court held that the offence proved was a larceny and not a false pretence, pointing out the distinction there is between the possession merely being gained by fraud, and the property as well as the possession being parted with by fraud: (citing R. v. McKale (1868), L.R. 1 C.C.R. 125 and R. v. Prince (1868), Ib. 150); R. v. Haines (1877), 42 U.C.Q.B. 208.

If by means of any trick or artifice the owner of property is induced to part with the *possession* only, still meaning to retain the right of property, the taking by such means will amount to theft; but if the owner part with, not only the possession of the goods, but the *right of property* in them also,

the offence of the party obtaining them will not be theft, but the offence of obtaining goods by false pretences. Roscoe Cr. Evid., 12th ed. (1898) 562; R. v. Middleton (1873), L.R. 2 C.C.R. 38.

If a person is convicted upon an indictment for obtaining goods by false pretences or other fraud, he cannot afterwards be lawfully tried upon an indictment for theft of the same goods. Reg. v. King, [1897] Q.B. 214, 75 L.T. 392. On a trial for false pretences, where the alleged pretence is an untrue statement as to the prisoner's position and occupation, the opinion of the prosecutor as to such position and occupation, based on a letter received by him from the prisoner, is admissible (though not conclusive) as evidence of the belief of the prosecutor in the truth of such false statement. Ibid. It has been held that a false pretence may consist of being garbed in a university cap and gown for the purpose of fraudulently obtaining credit. R. v. Barnard (1837), 7 C. & P. 784. Or falsely pretending to be one of a class of traders at a market. R. v. Burrows (1869), 11 Cox C.C. 258.

Many cases of obtaining goods by false pretences have been tried in which the pretence was contained in a letter ordering the goods, which made no *direct* pretence, but which was meant to convey, and did in fact convey, the impression that the writer was a person in a large way of business. Thus, in R. v. Cooper (1877), 25 W.R. 696, 2 Q.B.D. 510, the prisoner, who was a mere huckster, wrote a letter to the prosecutor ordering from him two railway-truckloads of potatoes "as samples," and expressing a hope that the quality would be good, as then a good trade would follow for both of them. The Court for Crown Cases Reserved held that this letter might reasonably be construed as containing a representation that the writer was a dealer in potatoes in a large way of business, and that it was a question for the jury whether he intended the prosecutor to put this meaning upon the letter.

In R. v. King, [1897] 1 Q.B. 214, the prisoner was convicted of having obtained certain churns by false pretences as to his position and business. He had written a letter to the prosecutor containing these words: "The two six-gallon milk churns in order do not require name on them, as they are only required for home use." This letter was produced in evidence by the prosecutor, and he was thereupon asked what opinion he had formed from the letter as to the position and occupation of the accused. The question was objected to by counsel for the defence, but was allowed, and the answer was to the effect that the prosecutor inferred from the letter that the writer was either a farmer or a dairyman. The prisoner was convicted, subject to the case stated as to the admissibility of this question and answer.

The objection was based on the ground that the witness was being asked to construe a written document, which was a question of law for the court, and not a question of fact. The court, however, held that the question was admissible, not as to whether the latter was capable of bearing the meaning put upon it, but for the purpose of shewing whether the prosecutor believed the statement made. Hawkins, J., pointed out that in a charge for obtaining goods by false pretences it must be proved (1) that a false pretence was made, (2) that the prosecutor believed the pretence, and (3) that the goods were obtained by means of the pretence; and he held that the only way to find out whether the prosecutor believed the pretence in the letter was to ask his opinion of the letter.

The doctrines of commercial agency do not apply to prevent the operation of the criminal law. So where one Clark, a policy holder of a fire insurance company, conspired with Howse, their local agent, to defraud the company and handed to Howse for transmission to the company an unfounded proof of claim for pretended losses by fire, and obtained the money through Howse from the company, it was held that the knowledge of Howse of the falsity of the pretence could not be imputed as the knowledge of the company so as to affect the criminality of Clark. R. v. Clark (1892), 2 B.C.R. 191.

Where a person tenders to another a promissory note of a third party in exchange for money or goods, although he may say nothing upon the subject, yet he should be taken by his conduct to affirm or pretend that the note has not to his knowledge been paid, either wholly or to such an extent as has almost destroyed its value, leaving only such a trifling sum due as would make the note a wholly inadequate consideration for what was obtained in exchange. And a jury may infer from the conduct of a prisoner in selling the note for $100 that he had sold it as if it was unpaid to that amount; and the selling of it for that amount when it was all paid but a small amount is a "false pretence." R. v. Davis (1859), 18 U.C.Q.B. 180.

In the Queen v. Jones, [1898] 1 Q.B. 119, the accused had gone into a restaurant with only a half-penny and ordered and consumed a four shilling meal. The court held that it was not obtaining goods by false pretences, as no representation was made by the prisoner, but that the offence was obtaining credit by fraud within the meaning of the Debtors' Act (Imp.), 1869, sec. 13. There is no similar provision to the latter section in the Code.

A representation by the person obtaining goods that he would pay for them the following week is not a representation of fact, either past or present, and any belief by the prosecutor that such a promise was a false pretence within the meaning of the Criminal Code is unreasonable. Mott v. Milne (1898), 31 N.S.R. 372.

On an indictment for the offence of having obtained money by false pretences, the defendants cannot be convicted of the full offence when it is proved by the discount of their promissory note they had only obtained a credit in account, such credit in account being a thing not capable of being stolen, but they might, if the evidence should establish an attempt to obtain the money, be convicted of such an attempt. R. v. Boyd (1896), 4 Can. Cr. Cas. 219 (Que.).

To prove that the board of a corporation had acted on the faith of the false representation made, it is not necessary to examine one or more of the directors, if the fact can be proved by other competent witnesses. R. v. Boyd (1896), 4 Can. Cr. Cas. 219 (Que.).

Evidence is admissible of facts which are subsequent to the false representation, to prove the insolvency of the defendants a very short time after the false representation had been made, as an evidence of their knowledge of its falsity when they made it. Ibid.

On an indictment for obtaining money by false pretences it appeared that the prosecutor took out a $2 bill saying he would get it changed. Prisoner offered to change it upon which the prosecutor handed it to him, and prisoner kept it without giving the change. It was held that if the prisoner replied to the prosecutor that he then had the change to give him for the bill, and if on that representation he obtained it for the alleged purpose of changing it, whether at the time he obtained it he really had the change mentioned, or whether his representation in that respect was false and was used as a pretence to get the bill; then he would be guilty; but if he did not make such representation, or if having so made it, he did not obtain the bill on such representation, and having in fact the change to give, although wrongfully withholding the change and retaining the bill, in either of these instances the prisoner would not be guilty of obtaining the money by false pretences. If the inducement to the prosecutor to part with his money was on a mere promise to get change, or to change it, the case would fail. R. v. Gemmell (1867), 26 U.C.Q.B. 312.

Prisoner having agreed to lend prosecutor $5,000, gave him certain drafts, representing that they were good and would be paid, whereas they turned out worthless and merely fictitious. On the strength of prisoner's representations prosecutor gave prisoner a note for $1,200, which note prosecutor retired before maturity. It was held that an indictment for obtaining $1,200 by false pretences was not supported by proof of the above

facts, there not having been a renewal of the false pretence when the money was paid. Though remotely the payment arose from the false pretence, yet, immediately and directly, it was made because prosecutor desired to retire the note. R. v. Brady (1866), 26 U.C.Q.B. 13.

R. v. Ollis, [1900] 2 Q.B. 758, was a prosecution for obtaining money by falsely pretending that three cheques which the accused gave to the prosecutors were good and valid orders for the payment of money. The accused had been previously acquitted on a similar charge on the prosecution of another person. It was held that the facts connected with the charge on which the accused had been acquitted could be given in evidence to shew that he had no reasonable ground for believing that there would be funds to meet the cheques on which he obtained the money from the prosecutors in the case then being tried. The fact that the accused had on another day passed a cheque which had been dishonoured was a circumstance to show a course of conduct on the part of the accused, and that the passing of the cheques in question was not a matter of forgetfulness, but that they were bad to his knowledge. R. v. Ollis, [1900] 2 Q.B. 758.

If the indictment charges a pretence which is proved to have been made, but it also appears that the defrauded party gave up the money or property wholly in consequence of another subsequent representation, a conviction cannot be sustained on the indictment so laid. R. v. Bulmer (1864), L. & C. 476.

Where on an athletic sport competition one of the competitors personates another party for the purpose of securing a good handicap and falsely declares that he had never previously won a prize race, the object of obtaining the prizes is not too remote from the false representation. R. v. Button, [1900] 2 Q.B. 597; R. v. Larner (1880), 14 Cox C.C. 497, disapproved.

A debtor who has made a judicial abandonment for the benefit of his creditors whereby his property becomes vested in another, and who, knowing that he no longer had any right to receive the rent, presents himself afterwards as landlord to a tenant of the property, and receives the rent as he had formerly been accustomed to do, is guilty of a false pretence by his acts and conduct. R. v. Létang (1899), 2 Can. Cr. Cas. 505.

In the case of R. v. Rhodes, [1899] 1 Q.B. 77, the prisoner had been indicted for obtaining from one William Bays a number of eggs by false pretences, to the effect that he was a farmer and dairyman and required them for his business. The prisoner had advertised in various newspapers, under the style of Norfolk Farm Dairy, High Street, Mitcham, for new-laid eggs, and had obtained consignments of eggs at different dates, extending over two months, from Bays and from other persons named Ellston and Chambers. He was indicted for the single transaction with Bays. It was proved on the part of the prosecution that the prisoner's business at Mitcham was an entire sham, and he was found guilty and sentenced to a term of imprisonment. It was held on a case reserved that the evidence of Ellston and Chambers of dealings with the prisoner, the one a week and the other two months after the offence charged in the indictment, was, on the whole, admissible. It was not too remote, since the transactions of these witnesses with the prisoner were the result of the same advertisement, and went to shew the prisoner's intention to carry out one entire scheme of fraud by means of a business which was a sham.

To prove a charge of obtaining goods by false pretences where there is a lapse of time between the making of the pretence and the delivery of the goods, there must be a direct connection between them constituting the former a continuing pretence up to the time of delivery. R. v. Harty (1898), 2 Can. Cr. Cas. 103.

The word "owner" following the signature of the accused in a letter written by him inviting negotiations for the charter of a vessel in his possession and managed by him, does not in itself constitute a representation by the accused that he is the "registered owner." Ibid.

The prisoner represented to the prosecutor that a lot of land on which he wished to borrow money had a brick house upon it, and thus procured a loan, when in fact the land was vacant. It was held that he was properly convicted of obtaining the money under false pretences. R. v. Huppel (1861), 21 U.C.Q.B. 281; R. v. Burgon (1856), 1 Dears. & B. C.C. 11, 7 Cox C.C. 131; R. v. Eagleton (1855), 6 Cox C.C. 559.

When the prosecutor does not intend to part with the right of property in the goods or money taken by the defendant, and in some cases does not intend to part with the possession of them until they are paid for, and the defendant fraudulently gets possession of them contrary to the intention of the owner, intending all the time not to pay for them, then the jury may find the party guilty of theft. But where the owner voluntarily parts with the possession and property in the goods, and intends to vest them in the defendant, because he relies on the defendant's promise to pay the money, or bring other property or money in place of those vested in him, then the defendant cannot be convicted of theft. Per Richards, C.J. R. v. Bertles (1863), 13 U.C.C.P. 607.

359. Punishment of false pretense.—Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud, by any false pretense, either directly or through the medium of any contract obtained by such false pretense, obtains anything capable of being stolen, or procures anything capable of being stolen to be delivered to any other person than himself. R.S.C., c. 164, s. 77.

FORM FF.—The following form of stating the offence is provided by Code form FF. (*c*):—"A obtained by false pretenses from B a horse, a cart, and the harness of a horse at —— on ——"

Procedure.]—It is not necessary that the indictment should allege an intent to defraud a particular person. Cr. Code 613 (*c*). And before the Code an indictment for obtaining money by false pretences by means of fraudulent post office orders was upheld upon a general allegation of "intent to defraud." R. v. Dessauer (1861), 21 U.C.Q.B. 231.

The intent to defraud is necessary to constitute the offence, and yet Form C contains no allegation of such intent. Mr. Justice Taschereau in his work on the Code expresses the view that a count for false pretences is perhaps the only one that can be laid without an averment of the intent, where such intent is necessary to constitute the offence, but see sec. 147 and R. v. Skelton (1898), 4 Can. Cr. Cas. 467 (N.W.T.), as to the effect of Form FF.

Section 616 (2) of the Criminal Code makes an indictment which charges any false pretence, etc., valid, although it does not set out in detail in what the false pretence consisted. This, it is submitted, does not mean that the false pretence need not be set out at all. While Meredith, C.J., in his judgment in R. v. Patterson (1895), 2 Can. Cr. Cas. 339, speaks of the "addition of the words unnecessarily setting out in what the false pretences consisted," and expresses the view that the indictment would have been

fully authorized by sec. 641 if laid "without alleging in what the false pretence consisted," it will be observed that Rose, J., limits his opinion to the case of an indictment in which the false pretence is not set out in detail.

Form FF (*c*) of the Code gives as an "example of the manner of stating" a charge of false pretences:—

"A. obtained by false pretences from B., a horse, a cart, and the harness of a horse, at —— on ——."

And by Code sec. 982 the several forms varied to suit the case, or forms to the like effect, shall be deemed "good, valid and sufficient in law."

It is submitted, however, that the form FF cannot override the express requirement of sec. 611, which demands that every count of an indictment shall be in "words sufficient to give the accused notice of the offence with which he is charged" (sub-sec. 3). Sub-sec. 4 of sec. 611 is in its terms confined to the setting forth of details of the circumstances of the alleged offence, and it is submitted that to state what the false pretence was, is a matter rather of describing the offence than of detailing the circumstances. Moreover, the false pretence, and not the mere fact of obtaining the property, would seem to be the gist of a charge of obtaining goods by a false pretence.

It seems probable also that sec. 616 (2) applies only where the false pretence, etc., is charged against the accused, and if the charge were for knowingly "receiving" goods obtained by false pretences, it would be necessary to look at the law as it was before the Code to find whether or not the false pretence should be particularized.

In the case of Taylor v. The Queen, [1895] 1 Q.B. 25, it was held that an indictment for receiving goods, knowing the same to have been unlawfully obtained by false pretences, is good without setting out the false pretences, for, the gist of the offence being the receipt of the goods with knowledge that they had been unlawfully obtained by some false pretence, it is sufficient to so allege without specifying the nature of the pretence (Mathew, J., and Charles, J.). The court there refused to treat as a binding authority the unreported case of Reg. v. Hill decided in 1851 and noted in 2 Russell on Crimes, 5th ed. 482, 6th ed. 437, in which the contrary had been held at the Gloucester Assizes. Mathew, J., said that for many years it had been the practice not to set out the particular false pretences by which the money or goods were alleged to have been obtained, in an indictment for "receiving"; and Charles, J., decided the case "on the broad ground that the indictment contains all the allegations which it is necessary to prove in order to bring home the offence charged to the defendant."

In The Queen v. Broad (1864), 14 U.C.C.P. 168, it was held by the Court of Common Pleas of Upper Canada that an indictment was valid where a prosecutor had been bound by recognizance to prosecute and give evidence upon a certain trial, notwithstanding that there was a variance between the specific perjury charged in the information and the specific charge of perjury contained in the indictment, and although the statute then in force, 24 Vict. (Can.), ch. 10, sec. 10, forbade an indictment for certain offences named, including perjury, unless a recognizance had been given "to prosecute or give evidence against the person accused of such offence," or unless the accused had been committed or bound over to "answer to an indictment to be preferred against him for such offence," etc. John Wilson, J., in delivering the judgment of the court, said: "If the indictment set forth the substantial charge contained in the information, so that the defendant had reasonable notice of what he had to answer, we should incline to think this a compliance with the statute, and would refuse to quash the indictment." (Richards, C.J., Adam Wilson, J., and John Wilson, J.)

The prisoner at Seaforth, in the County of Huron, falsely represented to the agent of a sewing machine company there that he owned a parcel of land when in fact he never owned any land. The goods were obtained at Huron though they were sent from Toronto, and the false pretence relied on was made in Huron. It was held that the offence was complete in Huron County and could not be tried in the County of York. R. v. Feithenheimer (1876), 26 U.C.C.P. 139.

On an indictment for obtaining money under false pretences, the accused may be convicted of an attempt to commit the offence. Code sec. 711; R. v. Goff (1860), 9 U.C.C.P. 438.

360. Obtaining execution of valuable security by false pretence. — Every one is guilty of an indictable offence and liable to three years' imprisonment who, with intent to defraud or injure any person by any false pretense, causes or induces any person to execute, make, accept, endorse or destroy the whole or any part of any valuable security, or to write, impress or affix any name or seal on any paper or parchment, in order that it may afterwards be made or converted into or used or dealt with as a valuable security. R.S.C., c. 164, s. 78.

In R. v. Brady, 26 U.C.Q.B. 13, and R. v. Rymal, 17 Ont. R. 227, both decided upon the authority of R. v. Danger (1857), Dears. & B. 307, 3 Jur. N.S. 1011, it was held that "valuable securities" meant valuable security to the person who parts with it on the strength of the false pretence. After the decision in R. v. Danger, and in consequence of it the statute was amended by the enactment of 24-25 Vict. (Imp.) ch. 96, sec. 90, which corresponds with Code sec. 360. Archbold's Cr. Pl. (20th ed.) 566; R. v. Gordon (1889), 23 Q.B.D. 354.

As to what is included in the term "valuable security," see the statutory definition given in sec. 3 (*cc.*).

On the charge of obtaining the giving of a note by false representations, evidence is receivable that at the same time the prisoner was engaged in practising a series of systematic frauds upon the farming community by similar representations, for the purpose of explaining motives and intention on the part of the prisoner. R. v. Hope (1889), 17 O.R. 463; R. v. Francis (1874), L.R. 2 C.C.R. 128; Blake v. Albion Ins. Co. 4 C.P.D. 94.

361. Falsely pretending to inclose money, etc., in a letter.—Every-one is guilty of an indictable offence and liable to three years' imprisonment who, wrongfully and with wilful falsehood pretends or alleges that he inclosed and sent, or caused to be inclosed and sent, in any post letter any money, valuable security or chattel, which in fact he did not so inclose and send or cause to be inclosed and sent therein. R.S.C., c. 164, s. 79.

It is not necessary to allege, in any indictment against any person for wrongfully and wilfully pretending or alleging that he inclosed and sent, or

caused to be inclosed and sent, in any post letter, any money, valuable security or chattel, or to prove on the trial, that the act was done with intent to defraud. Sec. 618.

362 Obtaining passage by false tickets.—Every one is guilty of an indictable offence and liable to six months' imprisonment who, by means of any false ticket or order, or of any other ticket or order, fraudulently and unlawfully obtains or attempts to obtain any passage on any carriage, tramway or railway, or in any steam or other vessel. R.S.C., c. 164, s. 81.

363. Criminal breach of trust.—Every one is guilty of an indictable offence and liable to seven years' imprisonment who, being a trustee of any property for the use or benefit, either in whole or in part, of some other person, or for any public or charitable purpose, with intent to defraud, and in violation of his trust, converts anything of which he is trustee to any use not authorized by the trust.

Trustee.]—The expression "trustee" means a trustee on some express trust created by some deed, will or instrument in writing, or by parol, or otherwise, and includes the heir or personal representative of any such trustee, and every other person upon or to whom the duty of such trust has devolved or come, whether by appointment of a court or otherwise, and also an executor and administrator, and an official manager, assignee, liquidator or other like officer acting under any Act relating to joint stock companies, bankruptcy or insolvency, and any person who is, by the law of the province of Quebec, an "administrateur" or "fidéicommissaire"; and the expression "trust" includes whatever is by that law an "administration" or "fidéicommission." Sec. 3 (*bb*).

By the Revised Statutes of Canada, ch. 164, sec. 58, it was enacted that:—"Every one who, being a member of any co-partnership owning any money or other property, or being one of two or more beneficial owners of any money or other property, steals, embezzles or unlawfully converts the same or any part thereof to his own use or that of any person other than the owner, is liable to be dealt with, tried, convicted and punished as if he had not been or were not a member of such co-partnership or one of such beneficial owners." This section was not re-enacted in "The Criminal Code (1892)" and the Act in which it was contained was by that legislation repealed. Major v. McCraney (1898), 2 Can. Cr. Cas. 547, 557.

Any property.]—The expression "property" as here used includes every kind of real and personal property, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods. Sec. 3 (*v*). It covers not only such property as was originally in the possession or under the control of the accused, but also any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange, whether immediately or otherwise. Sec. 3 (*v*). So where certain promissory notes were given to the accused for the specific purpose of paying certain other notes with the proceeds it was considered by Falconbridge, J., that an indictment for the misappropriation of the notes themselves would have been sufficient. R. v. Barnett (1889), 17 O.R. 649.

Consent of Attorney-General.]—No proceeding or prosecution against a trustee for a criminal breach of trust, as defined in this section, shall be commenced without the sanction of the Attorney-General. Sec. 547.

It is not necessary that the indictment should allege the consent of the Attorney General. Knowlden v. R. (1864), 5 B. & S. 532; R. v. Barnett (1889), 17 Ont. R. 649. And it seems that if the consent be stated on the record, it must be proved if traversed. Knowlden v. R. (1864), 5 B. & S. at p. 549, per Cockburn, C.J.