TERTULLUS THEAL.....APPELLANT;

AND

THE QUEEN.....RESPONDENT.

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*Oct. 25.

*Dec. 4.

Criminal Appeal—Indictment—Misjoinder of Counts—Evidence.

An indictment contained two counts, one charging the prisoner with murdering *M. J. T.* on the 10th November, 1881; the other with manslaughter of the said *M. J. T.* on the same day. The Grand Jury found "a true bill." A motion to quash the indictment for misjoinder was refused, the counsel for the prosecution electing to proceed on the first count only.

* PRESENT—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

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Held,—Affirming the judgment of the Court *a quo*, that the indictment was sufficient.

The prisoner was convicted of manslaughter in killing his wife, who died on the 10th November, 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, (17th October preceding) 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 the reserved questions, viz., whether the evidence of assaults and violence committed by the prisoner upon the deceased, prior to the 10th November or the 17th October, 1881, was properly received, and whether there was any evidence to leave to the jury to sustain the charge in the first count of the indictment?

Held,—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.

APPEAL from a judgment of the Supreme Court of *New Brunswick* (1) on points reserved at the trial of a criminal case.

The prisoner was tried and convicted of manslaughter at the *St. John* circuit in November, 1881. Chief Justice *Allen*, before whom the prisoner was tried, reserved the following case under the statute (2) for the consideration of the Supreme Court of *New Brunswick*:

"The prisoner was convicted of manslaughter at the *Saint John* circuit in November last, on an indictment containing two counts.

"The first count charged that he did on the 10th November, 1881, at the parish of *Lancaster*, feloniously, wilfully, and of his malice aforethought, kill and murder one *Mary Janet Theal*.

(1) 5 P. & B. 449.

(2) Cons. Stats., N. B., ch. 158, p. 1088.

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"The second count charged that he did on the 10th November, 1881, at the parish of *Lancaster*, &c., feloniously and wilfully kill and slay the said *Mary Janet Theal*.

"When the prisoner was arraigned, and before he pleaded, his counsel moved to quash the indictment on the ground of the misjoinder of the counts for murder and manslaughter, and that the finding of the grand jury 'A true bill,' was uncertain. The counsel for the prosecution having elected to proceed on the count for murder only, I refused to quash the indictment, and the prisoner pleaded 'not guilty.' In opening the case, the counsel for the prosecution stated that he would prove the ill-treatment of the deceased by the prisoner for a considerable time before her death; that his systematic abuse brought her to the condition which caused her death; that he had beaten her on the 17th October last, and that she died on the 10th November.

"The evidence shewed that the prisoner was in the habit of using violence to the deceased, by knocking her down and kicking her on different occasions, for more than a year before her death, which took place on the 10th November last.

"One witness testified that the deceased had sent for her in October last, she could not state the day; that she found the deceased ill in bed, her left eye black and bloodshot, and complaining of pain in her back and right side. That she asked deceased in presence of the prisoner what caused her black eye, to which she answered that the prisoner wanted her to get out of bed and get him a bottle of beer; that she (deceased) said she was tired and told him to get it himself; that he got out of bed and went for the beer; that she got up and followed him; that he met her in the door and hit her with a bottle; that she fell over against the door and did not know any more about it till she came

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to; that she did not know how long she lay there; that she got up and crawled into bed in the morning. That the witness asked the prisoner the cause of his doing this, to which he answered that he did not recollect doing it. This witness visited the deceased frequently between that time and her death, sometimes remaining with her during the night, and during the principal part of the time the deceased was unable to sit up, and complained of great pain. Other witnesses proved that the prisoner knocked the deceased down and kicked her at different times, one in June or July, 1880, others in September and December, 1880; another in January or February, 1881; another in March, 1881, and between April and July, 1881. Some of the witnesses swore that he kicked her in the side; and that on two occasions when he was beating her, he swore that he would take her life if he was hanged for it. It was also proved that in consequence of his violence one night she was obliged to leave the house, and remained in the barn all night. The evidence of the assaults was given after the medical testimony, and was received subject to objection by the prisoner's counsel, that no evidence could be given of assaults prior to the 10th November, when Mrs. *Theal* died; or, at all events, prior to the 17th October, as stated by the counsel for the prosecution in opening the case.

"Dr. *White*, who visited the deceased at the request of her brother on the 26th of October, prior to her death, stated that he found her in bed, that she complained of severe pain and soreness in her right side and tenderness on pressure directly in the region of the liver. That he visited her again on the 7th November and found all her symptoms considerably aggravated, the pain in her side greater than before, more fulness, and extending more over the liver, and her pulse much more rapid than on the 26th

October. That she was very weak and complained of pain in the region of the liver, extending from the region of the right to the left lobe, and at that time he considered her condition very critical. This witness made a *post mortem* examination the day after Mrs. *Theal's* death, with the assistance of Dr. *McFarlane*. He stated that there was a great deal of fulness on the side of the deceased, extending from the right side over to the left in the region where she complained of the pain, that the condition of the liver was unusually large, about twice its natural size; that they examined the liver very carefully and found it much darker than its natural color, very soft and breaking down with the slightest pressure of the finger, particularly the right lobe, indicating that it was very much disorganized and had undergone a high degree of inflammation, and that, as it broke down, a peculiar fluid issued from it, which, though not pure pus, they concluded contained pus matter; that their opinion was, that the disease of the liver was the immediate cause of death, and that they believed the disease of the liver to be acute, and thought the disease was of three or four weeks duration; that they did not notice any indications of chronic disease in any of the vital organs; that a blow or a fall on a hard substance might cause the acute inflammation of the liver; that inflammation would cause the appearance of the liver which they found. That in his experience, cases of acute inflammation of the liver were not common in this climate.

"On cross-examination he stated that he could not say positively what caused the inflammation of the liver of the deceased; that a change of temperature might cause it, by a person being overheated and then exposed to a lower degree of temperature; that extreme heat might cause it, and it was very common in tropical climates. That they found no mark on the right side

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of the abdomen over the region of the liver That a blow might be received in the abdomen which would cause death without producing any local manifestation, and he believed a blow could be given which would cause inflammation of the liver without producing any external mark.

"Dr. *McFarlane*, the other medical witness who assisted at the *post mortem*, stated that they found the liver much larger than in a normal state—that it was very much softened and broke easily on pressure, and when separated, a large quantity of brownish fluid flowed out, in which, in his opinion, there was pus; that it had undergone a process of disintegration, shewing that serious structural changes had taken place, exhibiting that the liver was in an advanced stage of inflammation; that he considered the immediate cause of death was acute inflammation of the liver: it had probably lasted for two or three weeks; that acute inflammation was caused in tropical climates by using alcoholic stimulants; that it was not a common disease in the temperate zone; that he thought it might be caused by a kick or a blow, or external violence, without leaving any external mark.

"On cross-examination, he said that he did not know how the inflammation of the liver was caused; that it would not be remarkable in this case that there were no external marks of violence; that he had known cases of persons receiving injuries in the abdomen without any external marks; that the injury which would cause the state of the liver they found, might have remained eight or nine weeks; that in ordinary cases pus begins to form in two or three weeks after the inflammation commences; that a patient would feel pain very soon after acute inflammation commenced; that acute inflammation would be likely to run its course in from eight to ten days; that in his opinion

inflammation of the liver as they found it, would be more apt to be caused by external violence than by other causes; that the effects of food, a heavy meal, might cause inflammation; that pus begins to form between two and three weeks after acute inflammation.

"I directed the jury to consider: 1st. Whether inflammation of the liver was the immediate cause of Mrs. *Theal's* death; and 2nd, If it was, was such inflammation produced by natural causes, or by injuries and violence inflicted by the prisoner. If the cause of death was inflammation of the liver, and that was produced by a series of acts of violence committed by the prisoner, at least, if they were committed within a year of the death, the crime would be murder or manslaughter according to circumstances, though no one act of violence by itself would have produced that result. I directed them to exclude from their consideration, evidence of assaults committed more than a year before the death. I explained to the jury the principles which would distinguish murder from manslaughter. The questions which I reserved for the opinion of the court are—

"1st. Whether the indictment should have been quashed for the reasons before stated.

"2nd. Whether the evidence of assaults and violence committed by the prisoner upon the deceased, prior to the 10th November or the 17th October, 1881, was properly received.

"3rd. Whether there was any evidence to leave to the jury to sustain the charge in the first count of the indictment.

"(On this point it was understood that all the evidence might be referred to.)"

The Supreme Court of *New Brunswick* held that the conviction should be affirmed, Mr. Justice *Palmer* dissenting. The prisoner thereupon appealed to the Su-

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preme Court of *Canada*, under section 49 of the Supreme and Exchequer Court Act.

Mr. *Lash*, Q. C. for appellant: On the first question I rely upon Mr. Justice *Palmer's* judgment (1). The counts being joined are repugnant and contradictory, and therefore bad. The motion to quash was made before the crown officer elected to proceed on the first count only, and in a criminal case the power of amendment is not given to the court on a matter of substance without the consent of the Grand Jury.

Then as to the second question, the evidence of assaults a year and a-half previous to her death was clearly inadmissible. The prisoner was the husband of the deceased and in the habit of quarrelling, and assaulting his wife, but as it was proved that prior to the 17th of October, 1881, she was in her usual good health, evidence of assaults prior to that date was improperly received. It was proved that the death was caused by acute inflammation of the liver, and if that was caused by violence it could only be by recent violence. *Roscoe's* Criminal Evidence (2).

The case of *The Queen* v. *Lute* (3), though not in favor of the prisoner, is important as it is the converse of this case. In that case had the indictment been for manslaughter, the evidence would have been improper.

Then was there evidence to leave to the jury on the count of murder, of assault to causing death? [The learned counsel then reviewed and commented on the evidence, and contended that the death had not been the result of violence.]

Mr. *E. McLeod*, Q.C., for the Crown.

[On the first point he relied on *Reg.* v. *Young*, (4); *Reg.*

(1) 5 B. P. & B. p. 454.
(2) Ed. 1875, 655.
(3) 46 U. C. Q. B. 555.
(4) 3 T. R. 106.

v. *Strange*, (1); *Reg.* v. *Downing*, (2); *Reg.* v. *Trueman*, (3); *Reg.* v. *Davis*, (4); and *Reg.* v. *Craddock*, (5); and contended that the evidence of ill treatment prior to the 17th October was properly received to shew the prisoner's intention, (*Archbold* Crim. Ev. 226,) and that there was sufficient evidence to justify the learned Chief Justice in leaving the question to the jury, whether the death was caused by the prisoner's violence.]

RITCHIE, C J.:—After reading the reserved case proceeded as follows:—

As to the first point, it is too clear for argument, that there are cases where a greater offence includes the less, that upon an indictment for the greater the prisoner may be found guilty of the less. Of this, the case of murder and manslaughter is an example, for upon an indictment for murder, the prisoner may be found guilty of manslaughter. It is, therefore, unnecessary and useless to add a second count, but if a second count is added for manslaughter, how can this make the indictment bad? It cannot be doubted that offences of the same character, though differing in degree, may be united in the same indictment, and the prisoner tried on both at the same time, and, on the trial, he may be convicted on the one and not upon the other.

It is true that, if different felonies be stated in several counts of an indictment, while no objection can be made to the indictment on that account, in point of law, the judge, in his discretion, may quash the indictment, or require the counsel for the prosecution to select one of the felonies and confine himself to that. This is technically termed putting the prosecutor to his election, and is done when the prisoner, by reason of two charges

(1) 8 C. & P. 172.
(2) 2 C. & K. 382.
(3) 8 C. & P. 727.
(4) 3 F. & F. 19.
(5) 14 Jur. 1031.

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being inquired into at the same time, would be embarrassed in his defence, or, as it has been said, lest it should "confound" him in his defence, a matter, however, only of prudence and discretion, to be exercised by the judge. In this case, the prosecutor elected to proceed on the count for murder, and the prisoner was tried on that count alone. There was no necessity for this election, for the prisoner was in precisely the same position on the trial upon the count for murder that he would have been on the two counts for murder and manslaughter. Upon the count for murder, the prisoner was not found guilty of the murder, but was found guilty of manslaughter. The result would have been precisely the same, had he been tried on both counts; he would not have been found guilty on the count charging murder, he would have been found guilty on the count charging manslaughter. I am wholly at a loss to conceive upon what principle or technical rule of law any objection to the course pursued can be sustained, or how the prisoner was in any way embarrassed or confounded in his defence, or otherwise aggrieved.

As to the second point, 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, when they tend to prove the intent of the party and the prisoner's malice against the deceased.

It was quite proper on the count for murder to give evidence of the prisoner's assaults and threats to shew the animus of the prisoner.

On the third question, I think there was evidence the learned Chief Justice could not withdraw from the jury, and quite sufficient to justify them in arriving

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at the conclusion they did, that the deceased came to her death, not from natural causes, but by reason of the violent and unprovoked assaults committed on her by the prisoner. The evidence shows that the deceased was in good health on the night when defendant assaulted her, and though no person witnessed the assault, it is very apparent from the evidence that it was of the most violent character; and this evidence the judge was, in my opinion, bound to submit to the jury, and from which, I think, they could form a very accurate estimate of the extent of the violence—and which, in connection with the medical testimony, justified the jury in concluding that from the effects of such violence the deceased gradually languished until she died.

STRONG, FOURNIER and HENRY, JJ., concurred.

GWYNNE, J.;—

The questions reserved in this case do not present to my mind any point of any difficulty. The judgment of the court below must be affirmed upon all points, and the appeal be dismissed. No doubt, it is quite unnecessary to insert in an indictment a count charging a homicide, amounting to manslaughter only, in addition to a count charging the homicide to have taken place under circumstances amounting to murder; for the prisoner, being put on his trial for the murder, although acquitted of that crime, may upon the same count be convicted of manslaughter. That the joinder of two such counts is unnecessary, is all that can be said about it. The homicide charged in such case is but one, and it is the presence or absence of malice aforethought in the committal of that offence which gives to it the character of murder or of manslaughter. The manslaughter charged in the count for manslaughter being

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comprehended in the count for murder, a prisoner, when he has pleaded to, and is given in charge to the jury upon this latter count only, is, in truth and substance, given in charge upon every thing included in that count, and therefore upon the charge of manslaughter, just as much as if he had pleaded to, and had been given in charge to the jury, upon the two counts; the insertion therefore of these two counts, although quite unnecessary, does not lay the indictment open to the exception that it contains two separate counts for distinct felonies, within the meaning of the rule, that a prisoner ought not to be charged with several felonies in the same indictment; even where that rule does apply, it is a matter left to the prudence and discretion of the judge, whether he will or not quash the indictment,—a discretion which he usually exercises by quashing, if there appears to him to be any danger that, by pleading to the whole indictment, the prisoner might be confounded in his defence or prejudiced in his challenge of the jury. See *Young* v. *Rex* in error (1). But where the crime charged in the second count, as here, is involved in the crime charged in the first count, it is plain that the prisoner could not possibly be prejudiced. It was contended, however, that the indictment by reason of its containing the two counts was incurably defective as containing two inconsistent charges, namely, a charge in the second count that a man already killed with malice aforethought was afterwards killed again without such malice, a point which, if there were anything in it, is disposed of in *Regina* v. *Downing* (2). Here the counsel for the crown only called upon the prisoner to plead to, and he was only given in charge to the jury upon, the count for murder, and the trial which took place was quite regular.

Upon the objection as to there not having been any

(1) 3 T. R. 106. (2) 2 C. & K. 382.

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evidence proper to be left to the jury, I cannot see how any doubt can be entertained upon the point of the sufficiency of the evidence to convict the prisoner; the jury was the tribunal to be satisfied; but that there was evidence, and that of considerable weight, to be submitted to them, does not, in my judgment, admit of a doubt.

The appeal must be dismissed and the conviction affirmed.

Appeal dismissed.

Solicitor for appellant: *John Kerr.*

Solicitor for respondent: *E. McLeod.*

ELIZABETH J. MONAGHAN. .....APPELLANT; 1881

AND *Dec. 10.

SARAH HORN.....RESPONDENT. 1882

*June 22.

IN RE "THE GARLAND."

ON APPEAL FROM THE MARITIME COURT OF ONTARIO.

Maritime Court of Ontario, jurisdiction of—Rev. Stats. Ont. ch. 128.—Collision.—Negligence, causing death.—Action in rem by mother of deceased child.—Master and servant.

The appellant's child, a minor, was killed in a collision between two vessels by the negligence of the officers in charge of one of them—"The Garland."

Petition against "The Garland"—libelled under the Maritime Court Act at the port of *Windsor*—on behalf of the appellant claiming $2,000 damages suffered by her, owing to the death of her son and servant, caused by the negligence of the officers in charge of said "Garland." The respondent intervened, and

*PRESENT—Sir Wm. J. Ritchie, C. J., and Fournier, Henry, Taschereau and Gwynne, JJ.