

crime where laws are lax, and to undermine by diffused percolation the very principles which social experience has established for the control of the vicious classes : " The State, s. 907.

II. GENERAL OBSERVATIONS.

The Criminal Code, 1892, is an adaptation of, and in many respects an improvement on the Draft Code of 1878, prepared by the Imperial commissioners, but not adopted by the Imperial Parliament.

1. *Elasticity of the common law.*

In order to preserve to some extent what is termed the "elasticity" of the common law, the absence of which is often urged as a serious objection to a code, it is provided (s. 7) that all rules and principles of the common law which render any circumstances a justification or excuse for any act, or a defence to any charge, shall remain in force and be applicable to any defence to a charge under the code except in so far as they are thereby altered or are inconsistent therewith. "This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law : " *Hurtado v. California*, 110 U.S. 516. "Whatever disadvantages," said Sir A. Cockburn, "attach to a system of unwritten law—and of these we are fully sensible—it has at least the advantage that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements of the age in which we live, so as to avoid the inconveniences and injustice which arise when the law is no longer in harmony with the wants, usages and interests of the generation to which it is immediately applied : *Mason v. Walton*, L.R. 4 Q.B. 73, and see *Usill v. Hules*, 3 C.P.D. 325.

And not only is the common law available as a *defence*, it exists also for other purposes of criminal justices. "It has never been contended that the Criminal Code of Canada contains the whole of the criminal common law of England in force in Canada. Parliament never intended to repeal the common law, except in so far as the code either expressly or by implication repeals it. So that if the facts stated in the indictment constitute an indictable offence at common law, and that offence is not dealt with in the code, then unquestionably an indictment will lie at common law; even if the offence has been dealt with in the code, but merely by way of statement of what is law, then both are in force " : *Reg. v. Union Colliery Co.*, 31 S.C.R., p. 87.