

Many subsequent attempts were made to codify the criminal law, and various amendments were, from time to time, made therein; but the above suggestions were not given effect to.

In the year 1878 a Commission was appointed to inquire into and consider the provisions of a Draft Code relating to indictable offences, and a Draft Code was subsequently prepared by the Commissioners and presented in their report. This code, which was not adopted by the Imperial Parliament, is the basis of the Criminal Code of Canada. The provisions contained therein on the point under discussion are substantially the same as are to be found in the Canadian Code. The Commissioners do not seem to have approved of the change recommended by the Fourth Commission above referred to; they do not, at any rate, embody them in their Draft Code, or suggest their adoption.

Sir James Stephen, who was a member of this last Commission, says:—

“As to the degree of force which may be used in order to arrest a criminal, many questions might be suggested which could be answered only by way of conjecture. Two leading principles, however, may be laid down with some confidence, which are also to be collected from Hale. The first is that if a felon flies or resists those who try to apprehend him, and cannot otherwise be taken, he may lawfully be killed.” (History of the Criminal Law (1883), I p. 193). In a note to this page, Stephen says: “This rule seems to overlook the distinction between taking a man a prisoner and taking possession of his dead body, for it is difficult to see in what sense a pick-pocket can be said to be taken if he is shot dead on the spot. The rule would be more accurately expressed by saying that a man is justified in using any violence to arrest a felon which may be necessary for that purpose, even if it puts, and is known and meant to put, his life in the greatest possible danger, and is inflicted by a deadly weapon, and does in fact kill him.” (Ib.)

In the latest edition of Russell on Crimes, the common law rule is stated in substantially the same terms as by Sir James