The Legal News.

VOL. II. JANUARY 11, 1879. No. 2.

DALLAIRE AND GRAVEL.

The question decided by the Court of Appeal in this case (p. 15) is one of considerable importance in the law of real estate. The facts were very simple. Dallaire acquired a certain immoveable during his marriage, and the property became a *conquêt* of the community which existed between him and his wife. The latter died in 1870, leaving six children of the marriage. Five years after the death of his wife, Dallaire hypothecated the immoveable in question as security for a loan of $600 which he effected at the time. The hypothec was given on the whole property and was duly registered. The hypothecary creditor being about to bring the property to sale, under a judgment which he had obtained against Dallaire, Emélie Dallaire, one of the six children, came in by opposition, and claimed a sixth of one half of the immoveable, as heir-at-law of her deceased mother. The creditor contested the opposition, alleging that the father had remained the apparent proprietor of the immoveable, and that the opposant, not having caused the transmission by succession to be registered, as required by Art. 2098, had lost her right as against the holder of a duly registered hypothec.

The terms of Art. 2098 are as follows:—"The transmission of immoveables by succession must be registered by means of a declaration, setting forth the name of the heir, his degree of relationship to the deceased, the name of the latter, the date of his death, and, lastly, the designation of the immoveable." And the clause which follows says:—"So long as the right of the purchaser has not been registered, all conveyances, transfers, hypothecs, or real rights granted by him in respect of such immoveable are without effect."

The question, then, was whether the heir, who, it must be remarked, did not derive her title from the same person as the hypothecary creditor, was deprived of her right by the failure to register. If she was not, then the registrar's certificate, showing the property to be free from all claims, was calculated to mislead. And on the other hand, if the heir was cut out from her right, then it would follow that the act of the father in hypothecating property which did not belong to him, might deprive his children of the inheritance coming to them from their mother. The Court of Appeal decided that the heirs were not deprived of their share in the immoveable, and that the penalty of failing to register the transmission by succession is not the loss of their right, but merely that conveyances, transfers, hypothecs, or real rights granted by them in respect of the immoveable are without effect.

THE ENGLISH CRIMINAL CODE.

The draft of the new criminal code has been under the consideration of commissioners, appointed at the end of last session, and the amended draft will probably be laid before the House of Commons at an early date. The steps taken in England towards codification have been watched with considerable interest in the United States and Canada, and we give our readers elsewhere an article written by an experienced lawyer of the former country, in which several features of the proposed code are discussed and criticized.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, December 20, 1878.

MACKAY, J.

BETHUNE et al. v. CHARLEBOIS.

Rentes Constituées—Prescription—Parole Testimony.

Held, that arrears of *rentes constituées* are prescribed by five years.

2. That renunciation to such prescription cannot be proved by parole testimony, when the amount demanded is over $50.

MACKAY, J. This is a suit by the owners of the seigniory of Rigaud against a tenant of land there for $126.24 due up to 29th September, 1877, inclusively, of *rentes constituées*, representing the abolished *cens*, sixteen years

being claimed. The defendant by plea tenders the sum of $39.45 for the last five years' *rentes*, but says that the rest of the claim is prescribed. One question is: Are such *rentes* prescriptible by five years? Another is, whether in the present case the prescription acquired has not been renounced by acts and acknowledgments of the defendant? Upon the former point I am with the defendant. Our Consolidated Statutes, cap. 41, support the defendant, and so, I would say, does our old law. On the second point, the parties have been at enquête, and to prove renunciation to the prescription a witness has been examined, to whom questions have been put (under reservé of objections by defendant), the answers to which prove renunciation and promises by the defendant to pay, request for delay, &c. It is to be observed that this is parole proof to support a demand persisted in of far more than fifty dollars. The proof has been objected to as illegal, and upon the objections reserved I am with the defendant; the evidence going to prove a renunciation to prescription is declared of no effect. The demand in controversy being over fifty dollars, must control, and it cannot be admitted that the evidence referred to ought to make gain to plaintiff for a sum not exceeding fifty dollars, comprised in the larger sum of the demand. See Merlin, Rep., vo. "Preuve," also Danty, p. 416, edition of 1769.

Bethune, for plaintiffs.

Geoffrion, Rinfret, Archambault & Dorion, for defendant.

CORPORATION OF ST. MARTIN v. CANTIN.

Public Road, What is Necessary to show the Existence of.

A village corporation seeking to have a lane declared a public road, must establish by positive evidence the existence of the right alleged. It is not sufficient to show that inhabitants of the village passed by the lane in question,—more especially where the facts appear to indicate that the lane was opened originally for the private convenience of adjoining proprietors.

MACKAY, J. The plaintiffs sue to have a lane in the Village of St. Martin declared a public road under the plaintiffs' control, and to have defendant ordered to discontinue encroachments and barriers upon it, and condemned to pay $500 damages for having disturbed plaintiffs and the public in their rights to the lane. The declaration alleges immemorial use of that lane by the general public, and that the plaintiffs had notified defendant to discontinue his trespasses. The plea denies that the lane alluded to is a public road, and sets up that it is a piece of private property, which the defendant, whose land adjoins, has had right to use in common with all the proprietors whose lands adjoin. The lane in question is a *cul de sac* fifteen feet wide; entry to it is from the Main street of the village, and it runs till it strikes the lands of two men, Gauthier and Charette. It makes a sortie, extra, for these men's lands, which have other outlet, but the villagers who might be disposed to walk about upon the lane would have to confine themselves to it, for they would be trespassers, if going beyond, they were to pass over Gauthier's and Charette's lands. The history of the first opening of the lane is dark; the plaintiffs show no ancient plan, nor deeds, dedicating, even impliedly, this lane space to the public. The plaintiffs have never spent a cent upon the lane. Curasson says that *communes* often pretend claim to *chemins privés* as *chemins communaux*, sometimes under pretext that the inhabitants pass there daily. (P. 239, Edition of 1842. Actions Poss.) The facts articulated by the *communes*, he says, must be *bien appréciés*. The passage of the people may have been by leave and license, or tolerance. "Ces faits de passage seuls, quelque nombreux et multipliés qu'ils fussent, seraient équivoques." But, he adds, if "*actes de voirie*," "*réparations faites*," &c., &c., have been, also, and if there are old plans, giving these lanes or passages the name of road, there would be more to support the *communes*. Further on, he says, "Le passage des habitans *ut singuli* n'est pas à considérer, si surtout le chemin, bordant ou traversant des héritages particuliers, parait destiné à leur service, et qu'il existe à proximité de véritables chemins de communication."

Applying these principles and considering what is proved in the present case, I consider it impossible to maintain the plaintiffs' action. The plaintiffs had burden of proof, and have failed to prove their allegations. The lane in question, from all that I can see, is a mere *chemin d'exploitation* which we may presume the adjoining proprietors or some of their *auteurs*, probably the owners of a potashery that formerly

existed, established for the « desserte de leur fonds respectifs, qui peuvent avoir, jadis, appartenu à un seul propriétaire."—(p. 246 Curasson.) The plaintiffs seem to me to be fighting, by the action, in the interest of Charette or private person who wants to get issue by this lane from land at the end of it to the village main street. The value of the subject in litigation looks to be very small to plaintiffs, in any aspect. But the costs of this case will be large. Twenty-two witnesses have been examined, and at the end of the enquête, the plaintiffs' case is seen to be totally weak. The action is dismissed with costs.

Ouimet & Co., for plaintiffs.

Loranger & Co., for defendant.

COURT OF QUEEN'S BENCH.

Montreal, December 21, 1878.

Present:—DORION, C. J., MONK, RAMSAY, TESSIER and CROSS, JJ.

FAUTEUX, Appellant, and THE MONTREAL LOAN & MORTGAGE CO., Respondent.

Sheriff's Sale—Nullity—Procedure.

Held, that the sale by the Sheriff of land situated within the Parish of l'Enfant Jésus, a duly erected parish for all civil purposes, could legally take place at the Church door of said parish only, and the sale at the Sheriff's office was a nullity.

2. Such nullity may be invoked by a hypothecary creditor by petition, duly served on the parties interested; or by opposition filed after the sale, containing all the essential allegations of a petition *en nullité de décret.*

The appellants, hypothecary creditors, by opposition asked to have the Sheriff's sale set aside, the ground being that whereas the property was situated at Coteau St Louis, in the Parish of l'Enfant Jésus, (formerly part of the Parish of Montreal), and the sale could only take place at the Church door of the former parish, the Sheriff had conducted the sale at his office in Montreal.

The judgment of the Court below, which dismissed the opposition, was reversed in appeal, the reasons assigned being that at the time of the sale the Parish of l'Enfant Jésus was duly erected for all civil purposes, and under 671 C. P., the property could only be sold at the Church door of such parish. The sale at the office of the Sheriff of Montreal was a nullity, and the opposition of the appellants, hypothecary creditors, which contained all the essential allegations of a petition *en nullité de décret*, and under 715 C. P. was sufficient, must be maintained.

Judgment reversed.

Doutre & Co. for appellant.

Cramp for respondent.

DALLAIRE, Appellant; and GRAVEL, Respondent.

Community—Registration — Heir-at-law — Article 2,098, C. C.

Held, that the husband cannot hypothecate more than his own half of an immoveable of the community which existed between him and his deceased wife; and the heirs at law of the wife, though they have failed to register their title as required by C. C. 2,098, may claim the wife's share, in preference to the mortgagee whose hypothec is duly registered.

A husband, after his wife's death, hypothecated the whole of an immoveable, *conquet* of the community which had existed between him and his wife. The property being about to be sold at the instance of the hypothecary creditor, the appellant as heir-at-law of the wife, filed an opposition *afin de distraire*, claiming her share of the wife's half. The opposition was contested by the creditor, on the ground that the title of the opposant had not been registered as required by Art. 2,098. The contestation was maintained by the Court below.

In appeal, this judgment was reversed. The Court remarked that no delay was fixed by Art. 2,098 for the registration of title by heirs, and the omission to register did not involve forfeiture of their rights with regard to third parties who had registered.

Judgment reversed.

Longpré & Dugas for appellant.

M. E. Charpentier for respondent.

SOME CRIMINAL CASES.

In some of the recent southern and western reports, we have found a number of noteworthy and rather curious criminal cases;

In *Cole* v. *People*, 84 Ill. 216, the defendants were indicted under a statute for a fraudulent conspiracy to « injure the administration of

public justice," by unlawfully and fraudulently attempting to obtain a decree of divorce. This statute would seem to be very vague in its provisions, and there is not much satisfaction in the prevailing opinion of the court which affirmed a conviction. Two judges dissented on the ground that the indictment did not sufficiently specify the offence. The indictment simply charged a fraudulent attempt to obtain a decree of divorce, without specifying the means used. Of this, one judge dissenting remarked:

The obtaining of a divorce, is not in itself an unlawful act. On the contrary, it is authorized by statute, and can only become unlawful when the means by which it is sought to be obtained is unauthorized by law; and under the rule laid down by the foregoing authorities, those means must be particularly stated in the indictment."

The other dissenter remarked:

"This charge, thus stated, does not give the accused, as the Constitution requires, 'the nature and cause of the accusation;' nor is the offence stated 'so plainly that the nature of the offence may be easily understood by the jury,' as required by the statute. What do we learn from this indictment as to 'the nature of the offence,' or 'the nature and cause of the accusation?' Did they conspire to bribe the judge in order to procure the decree,—or to bribe a sheriff to pack a jury in the case,—or to corrupt a jury already selected,—or to bribe the opposing attorney to betray his client,—or to impose upon the court with a forged deposition? What was the nature of the offence which the grand jury passed upon in finding this indictment? No man can tell from reading this indictment. The record shows that the evidence on the trial tended to establish two offences: First, the procuring of a strange woman to falsely personate Mrs. Cole and receive service of the summons; and second, an attempt to induce Major to give false testimony at the hearing of the cause. No such offence, however, is pointed out in the indictment. The accused are presumed innocent, until proven guilty. These defendants, if really innocent, could have had no idea, before the trial, of the nature of this accusation."

Sullins v. *State*, 53 Ala. 477, was an indictment, under a statute, for stealing part of an "outstanding crop of corn." The prisoner had pulled eight or ten roasting ears from the standing stalks. His counsel asked the court to charge: "1st. That an outstanding crop of corn is a cereal matured, and in a condition to be gathered into a house. 2nd. That corn is grain unreaped and unthreshed. 3d. That outstanding corn is that which remains beyond the proper time of housing, or matured corn in a condition to be housed." This was refused, the prisoner was convicted and the judgment was affirmed. The court observed:

"There is no room for doubt that the statute under which the indictment was found intended to change the common-law principle, that the severance and asportation of corn or cotton, whether in an immature or mature state, from the freehold, was a mere trespass, and convert it into the offence of grand larceny. The word 'corn' and the words 'outstanding crop' are not technical, and have a popular signification which cannot be misunderstood. 'Corn,' here, whatever it may elsewhere signify, or whatever it may have signified elsewhere, does not mean a cereal, or wheat, or barley, or oats, or mere grain. It means that which is termed Indian maize, and is and has been the principal breadstuff here. 'An outstanding crop' we all understand to mean, a crop in the field—not gathered thence and housed, without regard to its state. It is an outstanding crop from the day it commences to grow until it is finally gathered from the ground on which it is planted and taken away. There are doubtless intervening periods when its severance and asportation would be a mere trespass, and not larceny under the statute. When, however, corn has reached that state that it may be an article of food for man or beast, and of consequence vendible as such, its severance and asportation is within the mischief against which the statute was designed to protect, and within its words."

In *Beery* v. *United States*, 2 Col. 186, the prisoner was indicted for *stealing*, from a post-office, a packet containing $40 in currency and $1,000 in gold dust, which was intended to be conveyed by post. The language of the statute under which he was indicted was, "*taking* a letter or packet which contains an article of value," etc. The indictment was adjudged

good, and it was also held that whether the currency or gold dust was mailable matter was not material. In the same case the prisoner had been induced by promises of favor and by threats to produce the dust and make some confessions. The evidence was that the witness advised the prisoner to make full restitution, and said if he did so it would go easy with him; that it would be better for him to confess; that the door of mercy was open, and that of justice closed; that he threatened to arrest him, and expose his family, if he did not confess, and the like. The court granted a new trial on account of the admission of the confession in evidence, but ruled that the fact of the production of the gold dust was admissible. One judge dissented, averring that the exclusion of confessions induced by promises or threats "is one of those venerable errors abounding in the law, which rest altogether upon authority, and are respectable only for their antiquity." He bases this upon the ground that the law admits the fact of the production, by the prisoner, of the article stolen, because so much is a fact; and claims that consequently the confession ought to be received because this fact stamps it as true. He concludes thus:

"In other words, the received doctrine involves this absurdity, that while, in passing upon the primary question whether the evidence shall be received, the court, notwithstanding the corroborating circumstances, shall find the confession probably untrue, and therefore exclude it, the jury, considering the same evidence, may find the very fact confessed to be absolutely true."

Another case of enforced confessions, and one illustrative of some phases of western justice, is *Montana* v. *McClin*, 1 Mon. 394. The reporter skillfully omits to inform us what the prisoner's offence was, but at all events he was found guilty on his confessions alone. Part of the confessions were made to the sheriff at the time of the arrest, and after the sheriff had told him it would be better for him to confess. The bill of exceptions also showed the following:

"In addition to the above, further evidence being adduced that a mob of one hundred men were around and about the jail where defendant was confined at intervals of nearly all one day; that threats were frequently made against defendant that if he did not confess he would have one hundred lashes, would be hung, etc.; that word was brought to defendant that one person confined with him and recently taken out by the mob had been hung; that the names of defendant and others confined in jail and addresses of their parents and friends had been taken down by John Guy, deputy sheriff, in writing, with their knowledge; that in consequence of these threats and demonstrations, defendant was greatly excited and alarmed so that he shed tears; and further, no evidence being produced that the inducements held out by the said deputy sheriff, John Guy, were at any time withdrawn, or that the mind of the defendant was at any time freed from the apprehensions occasioned by said violent threats and demonstrations; the court admitted as evidence confessions of guilt made by defendant to said Guy at intervals for several days afterward."

The appellate court thought this a little irregular, and gave Mr. McClin another chance for his life or liberty, whichever it may have been.

Gerrish v. *State*, 53 Ala. 476, is a very interesting case, and well considered. The prisoner was indicted by the name of F. A. Gerrish, for taking pictures without a license. He pleaded that his name was not F. A. Gerrish, but Frank Augustus Gerrish, and that he was generally known as Frank A. Gerrish, and that this was known to the grand jury that indicted him. The plea was held good, being supported by proof. The court observed:

"We agree with the Supreme Court of Connecticut in *Tweedy* v. *Jarvis*, 22 Conn. 42, that letters of the alphabet, consonants as well as vowels, may be used as the names of persons, if given to them as such. The same was held in *Regina* v. *Dale*, 5 Eng. L. & Eq. Rep. 360. A declaration to a *sci. fa.* upon a recognizance described the justices before whom it was entered as Lee B. Townshend, Esq., and J. H. Harper, Esq., to which objection was taken by *demurrer*, that their full names should be set out. Lord Campbell, C. J., said: 'But I do not know that these are initials. I do not know that they were not baptized by these names. And I must say that I cannot acquiesce in the distinction made in the cases referred to, that a vowel may be a name, and a consonant cannot. . . . . Why may not parents, for a reason

good or bad, say that their children should be baptized by the name of B, C, D, F or H?'"

"However proper it may be, in the hurry of daily life, and on unimportant occasions, to write one's own name, or the names of others, in the shortest intelligible manner, it is not allowable to do so in so grave and solemn an instrument as an indictment by a grand jury under oath, which denounces the person denominated in it as a violator of the law, with intent to have him sought out from the rest of the community, and arrested and brought to punishment. And solicitors and grand jurors ought to be diligent to find out and insert in their indictments the true names of those whom they thereby accuse. Of course, every one who can spell correctly, and knows a person's name, knows also the initial letters of it, and can testify that he is well known by those initials. But they do not thereby become his name. F is not Frank; H is not Henry; and the names of persons are not changed in the understanding of anybody because they are denoted by the initial letters used in spelling them. And if any man who is known by the initial letters of his name may be designated by them in an indictment, when the true name is also known, then everybody may be indicted by initials merely; for, of course, every one who knows the name of another knows also the initials of it."

Another case, involving confessions, is *Sampson* v. *State*, 54 Ala. 241. The reporter's statement is as follows:

"The appellant was tried and convicted for horse-stealing. The only evidence criminating him was a confession made to the owner of the mare, and the fact that the horse was found where he said she was in his confession. The confession was made under the following circumstances: The owner of the mare met him, and said to him, 'Sam, you have taken my mare, and I want to know what you have done with her.' Defendant denied any knowledge of the whereabouts of the horse, and the owner then said: 'Now, Sam, if you don't tell me where my mare is, I will arrest you, and it will be too late to confess it then.' He again denied having stolen the mare, and was then arrested and carried before a justice of the peace. After arriving at the house of the justice of the peace, the defendant said: 'Mass John, I will tell you where your mare is.' Witness told him it was too late. Defendant said he 'would tell any way,' and said: 'I stole the mare and she is at the Pott's place, over the river, tied out in the cane,' and stated his uncle would show him where she was. Witness sent one Beck, a colored man, for the mare, and he got her."

These confessions were admitted under the prisoner's objection. The court sustained the conviction, holding that the confessions were voluntary, the influence of the threats having passed away. This is a pretty close ruling, but it is perhaps good enough for "darkies," who steal white folks' horses.

In the same State the courts do not allow themselves to be imposed on by the ingenuity of counsel. Thus, in *Holly* v. *State*, 54 Ala. 238, an indictment for taking and carrying away a *portion* of an outstanding crop of corn was held good, although the statute employs the word *part* instead of *portion*. Again, in *Washington* v. *State*, 53 Ala. 29, it is held that an indictment concluding, 'against the peace and dignity of the State of Alabama," instead of "against the peace and dignity of the same," is not demurrable.

Robinson v. *State*, 54 Ala. 86, is a singular case. Mr. Robinson was on a railroad freight train, and having no ticket, was ordered by the brakeman to get off, and did so, without waiting for it to stop; and when the caboose passed him, the conductor threw "some small article" at him, and thereupon Mr. Robinson drew a pistol and fired three times, not at the conductor, but at the brakeman, on the top of the cars. The court affirmed a conviction of assault with intent to murder, seeming to lay some stress on the circumstance that the prisoner had fired at the wrong man. They say:

"No matter what the rudeness of the conductor toward defendant may have been, if the evidence showed that the latter was actuated by malice or revenge for being put off a train, where he had no right to be, in shooting at another person, a brakeman, and not by the conductor's supposed maltreatment of him after he was put off, the provocation would not reduce the offence to one of less criminality."

The attempts of the courts in the south and west to preserve the order of religious assem-

blies are commendable. *State* v. *Hinson*, 31 Ark. 638, holds that an indictment, charging a disturbance of a religious congregation "by acting and talking in a manner that was calculated to disturb, insult, and interrupt said congregation," was good under a statute providing a punishment for disturbing such a congregation, "by using any language or acting in any manner that is calculated to disquiet, insult or interrupt said congregation;" that the character of the language, or the particular words, need not be given; and if the disturbance is by acting, the better practice would be to indicate in general terms, without alleging the details, the general character of the disturbing acts. The court remark:

"The argument of counsel for appellee, that he may have been talking under the influence of the spirit, may be more appropriately addressed to a jury after they shall have heard all the evidence in the cause. A sensible jury will, no doubt, be able to determine whether he was talking under the impulse of a good or bad spirit—whether he was expressing religious emotions, as some enthusiastic people do, or ill-manneredly talking, with a contemptuous disregard for the quiet of the congregation. The motive of the accused may be well left to the jury, under the advice of the court."

In *Holt* v. *State*, 57 Tenn. 192, the defendant was indicted for disturbing religious worship. The evidence showed that "Holt was outside the house, near the door; that it was dark, and defendant came around, some six or eight feet from the door, and seemed to be shuffling his feet on the ground, or something like he was dancing, and appeared like he had been drinking; but they did not know that he had drank anything. He used no loud talk, or anything of the sort. Witness did not know that any one was disturbed in the house or out of the house; that witnesses were not disturbed, but that their attention was attracted by what was done. The dancing of defendant attracted their attention." For this Terpsichorean intrusion Mr. Holt was held amenable.

In *Stuart* v. *State*, 57 Tenn. 178, the court held, where a plea of temporary insanity or *delirium tremens* was set up to excuse the murder of the prisoner's wife, that if the prisoner knew the difference between right and wrong, at the time in question, he was responsible for his act. From the fact that the court in its opinion uniformly writes "*delerium*," we infer that the honorable court is not familiar with the disorder in question. So much cannot be said for the reporter, however, for he spells the word right in the syllabus. The court affirmed a conviction, saying, however, "several years have elapsed since the fatal tragedy, and the prisoner has doubtless suffered much, and may be entitled to sympathy." But as the court elsewhere says, "It appears the prisoner was intoxicated the night previous to the killing, but at the moment of the killing was not," we are curious to learn the application of the "sympathy," unless a man is to be pitied because he has the misfortune to kill his wife in a moment of irritability after a carouse.—*Albany Law Journal.*

THE PROPOSED CRIMINAL CODE OF ENGLAND.

It seems probable that a long-delayed reform is at last to be accomplished. The laws of England for the punishment of crime, and also for the enforcement of civil rights, are in a condition of ever-increasing complexity. They are scattered through fifty volumes of statutes, and may be found declared and elucidated by a search through twelve hundred volumes of reports. Eighteen thousand acts of Parliament and one hundred thousand cases, besides unwritten rules and principles, briefly comprise the law of England. Statutes have been repealed, decisions overruled, but no mark distinguishes the living from the dead. The rights of husband and wife, of landlord and tenant, are established by various enactments of law-makers, from the Saxon dominion to the reign of Victoria. They are settled by authorities ranging from the treatise of Glanvil to the decisions of Cairns. The duties of a coroner, and the power of the crowner's quest, are contained in acts of Parliament extending from the time of Edward I. to 1875. A study of the statutes from the last of Victoria to the first of Henry III. might be necessary to decide upon the limits of a crime and the extent of its punishment.

In a case of high treason, the counsel, on beginning his examination, would find that, in

the reign of Edward II., a man who unlawfully took the king's venison, or stole his fish, was guilty of this grave offence, and liable to its terrible punishment. From thence he would go to the 25th of Edward III., where treason is defined and limited, in a statute which has few superiors for brevity and clearness of expression, as compassing or imagining the king's death, levying war against him, or giving his enemies aid or comfort. This, however, would be but an imperfect guide; for, after examining the 5th and 6th of Edward VI., he would find that a long series of decisions by subservient judges under the Tudors and Stuarts had greatly extended the statute, and declared acts, seemingly very remote from high treason, to be in the eye of the law compassing the king's death or levying war against him. Coming later, he would find the dangerous extension of the crime sought to be established in the prosecutions brought in the alarm of the French Revolution and the act of 1795, which swept most of the former decisions into the statute-book. This again, in 1848, was amended by a provision that such offences might be prosecuted either as high treason or as felony; while other statutes of William, George III., and Victoria would throw additional light or obscurity on his client's rights and liabilities.

In many less important crimes successive statutes have been passed in disregard of each other, and the endeavor to ascertain the actual condition of the law would be almost hopeless. In some branches of criminal law, as in the case of murder, the definition has been broadened by successive decisions. Theft, on the contrary, has been narrowed, until there are not merely loop-holes for escape, but gates as wide and numerous as those of Babylon, through which the criminal may walk in safety.

The need of codification in English law has long been apparent. Even Edward VI. said, "I could wish that, when time shall serve, the superfluous and tedious statutes were brought into one sum together, and made plain and short, to the intent that men should better understand them." The time that should serve for the fulfilment of the royal wish has been tardy in coming, and the statutes have grown ever more superfluous and tedious.

The poet of the present day has accurately described its law:

> "The lawless science of our law,
> That codeless myriad of precedent,
> That wilderness of single instances."

But the habitual disinclination of the English, and especially of their lawyers, towards change has stayed the reform. In 1816, a conference of both Houses of Parliament solemnly decided that any codification of the English statutes was impracticable. Reformers, like Bentham and Austin, protested against the confusion of laws which then existed; but, though their influence was in many ways beneficial, it did not effect any reform in this respect. In 1854, all the law judges protested against a code which should substitute written rules for the unwritten and elastic doctrines of the common law.

The idea of a scientific code was first carried out in reference to India. Macaulay's great genius was employed in preparing a code which, in apt, accurate, and happy phraseology and definition, far surpasses the efforts of most lawyers who have made their own science their exclusive study. Not, however, until 1860 did any portion of Macaulay's work become law. At that time the penal code of India was adopted,—a work which had been carried on and completed by others, but to which his labors had largely contributed. A civil code for India has since been in part adopted.

Sir James Stephen has long borne a conspicuous part in such labors. He was engaged in the preparation of parts of the Indian code. In 1863, in his "General View of Criminal Law," he sketched many of the reforms which finally seem about to pass into the statute-book. Later, in his "Digest of Criminal Law," he condensed with extraordinary brevity and clearness the existing principles of criminal jurisprudence.

The English have of late shown an unusual readiness for legal change. The long-established and vigilantly guarded bounds of common law and equity have been obliterated. Courts which can be traced back almost to the Conqueror have been swept away. The House of Lords has narrowly escaped extinction as a court. A radical modification of the criminal law is therefore an easier task than at any previous period, and the bill introduced at the last session of Parliament, with some modifications, will probably, during the coming year

become the law of England. Sir James Stephen is, as it is understood, the author of the entire bill, though the judgment of the constituency which regarded the author of "Ginx's Baby" as a fitter representative in Parliament prevents him from advocating his measure there in person.

The list of the acts repealed by this bill shows the extent of the field over which it was necessary to travel. Ninety-seven acts of Parliament are repealed, in whole or in part, beginning with the 23d of Edward I., and ending with the 39th of Victoria. The first statute is one as to breaking prisons. The last is the Merchant Shipping Act, passed to prevent sending ships to sea in an unsafe condition. The earliest act guards against an offence which might occur in a comparatively simple state of society. Sending ships to sea, so cheaply built, so heavily loaded, and so amply insured that the certainty of profit compensates for the peril of sailors, shows the full, ripe development of the commercial spirit of the age.

The code first specifies the punishments to which criminals are subject. Among these are flogging and whipping. Flogging is the infliction of not over fifty strokes on a person over sixteen; whipping, the infliction of not over twenty-five strokes with a rod on a boy under sixteen. These punishments are used in England at present, and over the lowest and most brutal classes of the community they exert a preventative influence much stronger than any fear of imprisonment. The latter is no great hardship to many, and is considered among their comrades no special disgrace. The fear of pain is strongest among the most brutal, and flogging exposes them to derision and ignominy among their most depraved associates. Imprisonment is not, as philanthropists would dream, for most criminals, a place where their time is devoted to regret for past crime, and a pious resolve of a better life in the future. The retirement of the hero of some assault with intent to kill is by no means that of Saint Francis of Assisi or of Thomas a Kempis. They must be frightened from evil-doing; and the prospect of a comfortable prison does not have that effect. Punishment should be made disagreeable for the class who undergo it. A happy prison is not a social desideratum.

The number of strokes and the instrument are specified by the court, and any abuse is thus guarded against. Solitary confinement is entirely done away with, which is a judicious change. Another provision seems foolish; and, as the codifier has formerly expressed his disapproval of it, his usual boldness in amending the law seems here to have failed him. Imprisonment is divided into imprisonment with and without hard labor, and simple imprisonment. Simple imprisonment is confinement for crime, but in a class of offences where the statute has said the person imprisoned is not to be regarded as a criminal prisoner. As Sir James has remarked, it is difficult to see why it should be in a judge's or any other person's power to declare that a man convicted deserves punishment indeed, but punishment expressly intended to inflict only inconvenience as distinguished from disgrace. The popular mind will not grasp this refinement, but will see in the imprisoned culprit a man disgraced for crime, be his imprisonment "simple," or without modifying adjective.

The portion of the code which treats of matters of excuse is one of its most unsatisfactory parts. It is lacking in clearness and precision, in which qualities the most of the act especially excels. No act, it is provided, shall be an offence, when the person doing it is prevented by "defective mental power or disease of mind from knowing the nature of his act; or knowing that it was forbidden by law, or morally wrong; or, if the person at the time was in such a state that he would not have been prevented from doing it by knowing that, if he did, the greatest punishment permitted by law for such an offence would be instantly inflicted upon him: but this shall not apply to a person in whom such a state of mind has been produced by his own default." These provisions are apparently intended to contain the substance of the decisions of the English courts on the subject of insanity as a defence for crime. They embody many incoherent and irrational decisions in a whole, which seems the legitimate result of the components. They go too far, and not far enough. The fortunate criminal whose intellect is so little developed that the boundaries of right and wrong are beyond his grasp, may sin in peace, and rely upon uniform acquittals. The question of the comprehension of what is morally wrong, which has perplexed

the philosophers of all ages, is still to be disposed of by a British jury.

On the other hand, the act induced by a diseased and irresistible impulse, but accompanied by knowledge of the act and of its criminality, remains without excuse, except so far as it may be contemplated in the last provision. Here, however, we find new difficulties. Under its wording, a person who was so resolved to commit a crime that the fear of punishment had no effect upon him would seem void of offence. None but the brave deserve acquittal. This provision is, indeed, modified by the statement that it shall not apply to one in whom such a state of mind has been produced by his own default. Courts may elucidate the meaning of this provision, but it would perplex anything less than judicial wisdom. Recklessness produced by drink might be said to be produced by one's own default. But a frame of mind which was insensible or indifferent to the danger could not be said to be produced by default, or produced at all, except by nature. The man who combines to the willingness to commit a crime, the fear to meet its results, whose villainy is tempered by cowardice, is the only one who can have no hope of escape under this elastic provision of the code.

Nor is the code much happier in dealing with drunkenness. Voluntary drunkenness, it is enacted, is not a disease affecting the mind, under the above provisions, but involuntary drunkenness is. What is voluntary drunkenness, and where is the line between that and involuntary drunkenness, is a question that had best be left to the casuists. All would rather drink than be drunk; and so all drunkenness is involuntary. A man may be led to the bar, but he cannot be made to drink, unless he wishes; and so all drunkenness is voluntary.

One relic of the absurdities of the common law is swept away. The presumption that a married woman committing a crime in presence of her husband does it under compulsion from him is abolished. One by one the remains of that most irrational of all systems of jurisprudence pass away. The time will soon come when lawyers will have little more to do with the common law than to sing its praises. As we leave it behind, we approach constantly nearer an effective administration of a rational system of law.

The effect of ignorance of fact has lately been discussed in England. A statute made the abduction of a girl under sixteen an offence. One Prince abducted a girl under sixteen; but he in good faith believed her eighteen. It was, however, held that he could be punished, because, the act being in itself immoral, the person committing it took the chances of the facts being such as should make it criminal. The code follows this rule, but provides "an alleged offender shall, *in general*, be in the same position as if the facts were as he in good faith supposed them, except where the act is itself immoral; and then mistake as to the facts making the act a crime shall not excuse." The use of the term "in general," which several times defaces this proposed statute, is a piece of slovenliness of which there is otherwise but little cause to complain.

A judicious section provides that if the court deems the act complained of to be of too little importance to be treated as an offence, it shall have the power to disregard it. This authority has been exercised by English judges; but giving the practice legislative foundation is a judicious step, and might be of much value in putting a summary end to trifling and vexatious prosecutions.

The code next treats of the parties to an offence, and here, by a few simple rules, does away with one of the myriad opportunities for the escape of criminals afforded by the present artificial system of criminal law. The distinction between principals in the first and second degree, and accessories before the fact, is done away with. All are parties who do or order the criminal act, or aid or incite the offender in or to its commission. With equal simplicity, it is provided that a conspiracy is committed where any overt act is done, or where the unlawful agreement is made; an offence causing bodily injury to the person is committed where the act was done or where the injured person received the harm, or, in murder, where the death took place. The wrongful taking of property or receiving stolen goods is committed as long as, and at every place where, the offender has the property so unlawfully obtained in his possession or under his control. Without taking away any privilege to which an alleged criminal is entitled to secure a fair trial, these provisions sweep away

much of the useless complication which defrauds justice, and they should be made the law of every State.

From the passage of the code, no person committing any indictable offence against any provision of it shall be proceeded against at common law.

Having thus prepared the way, the code proceeds to define the various crimes and their punishment. Without including all the myriad offences against the State, it defines the most important.

In the first place, the distinction between a felony and a misdemeanor, which has furnished the occasion of so much useless learning, and been productive of so much confusion, is abolished. All offences against the act are styled indictable offences, and proceeded against in the same manner. The disqualifications resulting from conviction for felony are attached to the offences for which the offender might be punished by death, transportation, or penal servitude.

Indictable offences are divided into those against public order, in which are included treason, riots, piracy; those against and by public officers, among which come bribery, extortion, perjury, and escapes; those injurious to the public, among which are found disturbing religious bodies, indecencies, and nuisances; those against the person, the conjugal and parental rights and reputation, among which are murder, assaults, rape, bigamy, and libels; and, lastly, those against property, which are far the most numerous, and include theft, fraud, forgery, fraudulent bankruptcy, and many miscellaneous offences.

The definition of these various crimes does not, of course, for the most part, differ very largely from those which are in force in all civilized nations. But many changes have been made of value and importance.

Riot is briefly described as a breach of the peace committed by three or more persons, to the terror of Her Majesty's subjects. The codifier has before illustrated his felicity in brief and comprehensive definition in his Digest, where, stating the existing differences between a riot, a rout, and an unlawful assembly, he thus illustrates: "A., B., and C. meet at A.'s house, for the purpose of beating D., who lives a mile off. They then go together to D., and beat him. At A.'s house the meeting was an unlawful assembly, on the road it is a rout, and when the attack is made it is a riot."

The faithful performance of duty by public officers, especially those of the peace, is sought to be enforced by rendering a failure to prevent peace from being broken, or property or persons endangered, an indictable offence, unless the danger be greater than a man of ordinary firmness may reasonably be expected to encounter.

The bribery of officers and of voters is strictly prohibited. This law is less of a dead letter there than here. At least, bribery or undue influence which forfeits a seat in Parliament is watched with a strictness which seems almost undue. The question has been wisely taken from Parliament and given to the courts.

They have held that permission given by a landlord to his tenants, just before election, to shoot rabbits on his grounds was bribery which must cost a seat. Another candidate, whose offence was of the mildest nature, consisting in furnishing a breakfast in the meeting-house to electors on the way to the poll,—a tea-and-toast affair, free from any suspicion of beer,—was held to have gone too far, and was unseated; while one who set up beer, cakes, and cheese was convicted of illegal treating, without hesitation.

The term "perjury" is done away with. In its place we find the offence of false evidence, which includes any assertion by a witness, on oath or otherwise, given as evidence in a judicial proceeding, and not believed by him to be true. The requirement of a formal and duly administered oath, which has saved so many would-be perjurers is omitted.

The penalty of false evidence is increased. The Tichborne case showed how grievous such an offence might be; and, though the punishment there inflicted was for fourteen years,—the extreme limit,—yet a life sentence would not be deemed too severe for one who had shown such a prodigious faculty for causing enormous harm.

It is also illogical that the same punishment should be inflicted on perjury, though the evils intended to be accomplished may be very great or comparatively small. Morally, all false evidence may be of equally black hue, but practically its evil is of variable import-

ance. The code provides that where the false evidence was given to obtain a conviction, where the person accused would be liable on conviction to death or penal servitude, or to enable the offender to retain or keep anything of the value of one hundred pounds, he shall be liable to penal servitude for life; in other cases, for fourteen years.

The punishments prescribed by this statute are generally severe. It fixes, however, only the maximum penalty, and a wise discretion is left to the judges; the minimum penalty for all cases where the offender can be sentenced to penal servitude for life or a term of years being five years' penal servitude, or two years' imprisonment.

A relic of a different state of society, when the unjust influence of powerful persons was more feared by the courts, is found in the ancient offences of champerty and maintenance. This act enacts that in future there shall be no prosecution for champerty or maintenance, or for being a common barrator. For a long time there has been nothing left of these offences but ugly names.

[To be continued.]

CURRENT EVENTS.

QUEBEC.

Mr. Holt, Q.C., of Quebec, has been appointed Judge of Sessions, in the place of the late Mr. Doucet.

Mr. Gonzalve Doutre, D.C.L., has been appointed a Q.C.

ENGLAND.

CONTEMPT OF COURT.—In a lucid judgment Sir R. Harrington, at Coventry County Court, in Martid *v.* Bannister discussed the very important question whether County Court judges can enforce obedience to their orders by commitment for contempt. It has been decided in Reg. *v.* Lefroy, *exparte* Jolliffe (28 L. T. Rep. N. S. 132; L. Rep. 8 Q. B. 134) that inferior courts have power only to commit for contempt *in facie curiæ*, and although Sir R. Harrington is of opinion that a much larger power is vested in those courts, he declined to exercise it. And he declared that he will not exercise it until a Superior Court has decided that he may lawfully do so. This course was undoubtedly discreet, for, as Sir George Jessel remarked in *Re Clements* (36 L. T. Rep. N. S. 332), "This jurisdiction of committing for contempt, being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest anxiety on the part of the judge to see that there is no other mode which is not open to the objection of arbitrariness, and, to a certain extent, unlimited power, which can be brought to bear upon the subject." But it would be very satisfactory if a decision could be obtained upon facts properly raising the question, which Reg. *v.* Lefroy did not; for although the power to commit is arbitrary, it is one which is necessarily incident to a court of justice.—*The London Law Times.*

JAPAN.

THE JAPANESE PENAL CODES.—According to a summary of the Japanese Penal Codes, which was recently contributed to the Asiatic Society by a member of the English embassy in Japan, it appears that those Codes, though embodying the most advanced ideas of the civilized world upon the subject of criminal procedure, still do not dispense with torture in the investigation of offences. Torture, it is asserted, is not actually practiced, and a notification was issued by the Prime Minister of the Empire two years ago which conveyed the impression that it would not be, but the Codes being silent on the subject it is asserted that the courts have power to resort to it when such a course shall be deemed expedient. The old laws which govern the question are very explicit in their directions as to when and upon whom torture may be inflicted. It is allowed in a mild degree, in all preliminary examinations, in which case only a whip, which inflicts pain, but cannot result in permanent injury, is used. The severer forms are to be resorted to only in the cases of persons held for trial for murder, incendiarism, robbery and other serious and capital crimes, and who are already morally proved guilty of the offence of which they are charged. Before torture is resorted to the accused is notified of the intention to use it, and he can avoid its infliction by making a full confession admitting that he is guilty of the offence charged. In case of the infliction of torture in cases where it is not allowed, the officer ordering the infliction is responsible personally. The tortures are numerous and consist of the infliction of pain by mechanical devices and fire and of deprivation of sleep and drink, and of exposure to venomous reptiles.