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THE CRIMINAL LAW OF CANADA.

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I. BRIEF HISTORICAL SKETCH.

"It were far better as things now stand to be charged with heresy than to fall under the suspicion of lacking historical-mindedness, or of questioning the universal validity of the historical method:" Dicey, Constitution, p. 14.

Before the conquest of Quebec in September, 1759, the criminal law of Old Canada was contained in the celebrated criminal ordonnance promulgated by Louis Quatorze in 1670; "ordonnance inhumaine et barbare, au dire de tous les historiens:" Lemieux, p. 313.

The pungent mot of the President de Harlai (sometimes attributed to Voltaire) in regard to the severity of this ordonnance is well known: "If I were accused of having stolen the towers of Notre Dame, I should begin my defence by taking to flight." This was a very reasonable precaution in days when torture was constantly made use of, and when criminal judges were eager, not so much to discover truth, as to convict the accused.

Voltaire thus describes them: "In the Dens of Chicanery the title of Grand Criminalist is given to a ruffian in a robe who knows how to catch the accused in a trap, who lies without scruple in order to find the truth, who bullies witnesses and forces them without their knowing it to testify against the accused . . . he sets aside all that can justify an unfortunate, he amplifies all that can increase his guilt; his report is not that of a judge, it is that of an enemy. He deserves to be hanged in the place of the citizen whom he causes to be hanged:" Voltaire, VII, 387, Dictionary of Philosophy.

In 1763, by the Treaty of Paris, the French King ceded and guaranteed to the King of Great Britain in full right, Canada with all its dependencies. In the same year George III. issued a royal proclamation, by which power was given to the Governors of the various colonies to enact and constitute "courts of judicature and public justice, for the hearing and determining of all causes as well criminal as civil according to law and equity, and, as near as may be, agreeable to the laws of England." This proclamation was considered by the English officials and inhabitants to have introduced the English civil and criminal law into the new province, and they acted in practice in accordance with this view.

The "new subjects," the French-Canadians, were greatly dissatisfied with the introduction of the English law relating to civil matters, claiming that they were entitled to have their old laws relating to property and civil rights continued in force. To allay their increasing dissatisfaction the "Quebec Act" (14 Geo. III. c. 83, A.D. 1774), was passed; by which it was provided "that in all matters of controversy relative to property and civil rights, resort shall be had to the laws of Canada as the rule for the decision of the same." By this the body of French laws and customs that were in use in Old Canada at the time of the conquest in respect of civil matters were reintroduced, to the great contentment of the French-Canadians.

As to criminal law, the Act provided that "whereas the certainty and lenity of the criminal law of England, and the benefits and advantages resulting from the use of it, have been sensibly felt by the inhabitants from an experience of more than nine years, the same shall continue to be administered and shall be observed as law in the Province of Quebec, as well in the description and quality of the offence as in the method of prosecution and trial, and the punishments and forfeitures thereby inflicted, to the exclusion of every other rule of criminal law or mode of proceeding thereon."

The mention of the "lenity of the criminal law of England" almost provokes a smile when it is remembered that even in Blackstone's time there were one hundred and sixty offences punishable with death. "Our criminal law," says Sir Henry Fowler, "in the year 1800 was savage in its barbarity."

"The penal code was not only atrociously sanguinary and continually aggravated by the addition of new offences; it was also executed in a manner peculiarly fitted to brutalize the people. In some respects, it is true, it may be compared favourably with the criminal procedures of the continent. English law knew nothing of torture or of arbitrary imprisonment, or of the barbarous punishment of the wheel, and no English executions were quite so horrible as those which took place in the Cevennes in the early years of the 18th century, or as the prolonged and hideous agonies which Damiens endured for several hours in 1757. But this is about all that can be said:" Lecky, The 18th Century 1, p. 505.

This provision, however, produced no dissatisfaction; in truth, even the rigour of English criminal law at that time was a welcome relief to persons accustomed to the still more cruel and uncertain laws of France where torture was frequently made use of. Mr. Lareau says in regard to this:—"Quant au droit criminel Anglais, que Murray avait illégalement mis en vigueur comme il avait agi du reste en matières civiles, nos ancêtres ne s'en plaignirent pas: ils l'acceptèrent comme une faveur. Leur substitution, dis-je, aux lois criminelles encore cruelles de la France fut dans l'ordre judiciaire un perfectionnement qui, en assurant la liberté personelle, consolida les libertés publiques:" pp. 294-295. The criminal law of England was thus retained and extended to the whole Province, including what afterwards became known as Upper Canada.

In 1791 The Constitutional Act (31 Geo. III. (1) c. 31) was passed, by which the Province of Quebec was divided into the Provinces of Upper and Lower Canada, in both of which the English criminal law prevailed. Nine years afterwards, on July 4th, 1800, the Legislature of Upper Canada passed an act now embodied in R.S.C. c. 144, declaring the criminal law of England as it stood on the 17th September, 1792, to be the criminal law of Upper Canada.

By the Treaty of Utrecht (1713) Louis the XIV. ceded to Great Britain "all Nova Scotia or Acadie with its ancient boundaries—together with the dominion and property of said lands and all right whatsoever." This cession was confirmed by the Treaty of Paris. At this time New Brunswick formed a part of Nova Scotia, but in 1784 it was formed into a separate province.

The General Assembly of Nova Scotia, in 1759, claimed that Nova Scotia "did always of right belong to the Crown of England, both by priority of discovery and ancient possession." The English law, both "the common law and all the statute law applicable to its colonial condition," was considered to have extended to that province. This was the case also in regard to Prince Edward Island, which was ceded to Great Britain by the Treaty of Paris, and was, by the proclamation of 1763, annexed to Nova Scotia, being, however, formed into a separate province in 1769.

Thus in all the provinces which were the original constituents of the Dominion at the time of Confederation, the criminal law of England was in force, modified of course in many particulars by provincial legislation.

By s. 129 of the British North America Act, the laws in force in each of the provinces at the date of Confederation were continued until repealed or altered by the proper Legislature. By s. 91 (27) the criminal law including procedure in criminal matters was placed within the exclusive jurisdiction of the Dominion Parliament.

On the 1st day of July, 1893, The Criminal Code 1892, passed by the Parliament of the Dominion, came into force, since which time there has been one uniform rule of criminal law for the whole Dominion of Canada.

The importance of uniformity in this branch of law is well described by Dr. Woodrow Wilson as follows: "In the criminal law again, variety works social damage, tending to concentrate

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, usuages 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.

2. *Imperial statutes.*

But the statute law of Great Britain cannot, in general, be invoked. Sec. 5 of the code enacts that "no person shall be proceeded against for any offence against any Act of the Parliament of England, of Great Britain, or of the United Kingdom of Great Britain and Ireland, unless such Act is, by the express terms thereof, or of some other Act of such Parliament, made applicable to Canada or some other portion thereof as part of Her Majesty's dominions or possessions."

Some general points of interest may well be noticed before examining in detail special features of contrast between the common law and the code, as it is proposed to do in a popular manner in this article, in the hopes of interesting and, perhaps, instructing those who have not given any special attention to the somewhat untrodden region of criminal law.

3. *Disused terms.*

Felony and misdemeanour.—The time honoured and perplexing distinction between "felony" and "misdemeanour" has been abolished, and all crimes are now divided into "indictable offences," if they be of a class for which an offender may be prosecuted by indictment, or "offences," if of a class punishable on summary conviction: ss. 535, 536).

Larceny and embezzlement.—The words "larceny" and "embezzlement" have also disappeared with all the minute technical distinctions that relate to them, and are replaced, as we shall see, by the word "theft."

As might have been expected difficulties have been suggested by reason of these changes of names, and in regard to the crime of larceny it was argued (*Re Gross*, 2 Can. Cr. Cas. 67) in extradition proceedings that, inasmuch as larceny no longer exists by that name as a crime under the code, the prisoner could not be extradited for larceny under the Extradition Act, which refers to larceny as an extraditable crime.

This startling contention was dealt with as follows by Osler, J.A.:—"It would be strange indeed if a change in the name of the thing, which is not even the name employed in describing it in an indictment, should produce so alarming a result. Whatever was larceny here and in Pennsylvania, whether by common law or by statute at the time of the convention in 1889, was thereby made

an extradition crime. Larceny at common law was plain theft—the wrongful taking and carrying away the property of another with the felonious intent to convert it to the taker's own use without the consent of the owner, and by our criminal law many other fraudulent dealings with the property of another were declared to be crimes, by that name. We have now abandoned that name as descriptive of these offences and embrace them all, including the common law offence of simple larceny, under the generic name of 'theft' or 'stealing': Cr. Code, sec. 305. If the evidence of criminality prescribed by the treaty sufficiently establishes the facts which constitute the offence described in the treaty, convention and Extradition Act, that must be all that is necessary whether we call such offence larceny or stealing."

Since the passing of the Code no civil remedy for any act or omission is suspended or affected by reason that such act or omission amounts to a criminal offence: s. 534.

Malice.—"A term which is truly a legal enigma": Harris, p. 13.

The terms "malice" and "malicious" are practically eliminated from the code owing to the confusion of ideas connected with them. "Malice" only appears in two places; s. 521 dealing with criminal breaches of contract where it is declared to be immaterial whether any offence defined in the section is committed from malice conceived against the person, etc., with whom the contract is made, and in s. 676 where the expression "mute of malice" is retained.

Standing mute means not answering at all to an indictment, or answering irrelevantly. In former times, in cases of felony, when this standing mute was obstinate, the prisoner was said to be "mute of malice." In such cases, in these good old days he met with but scant courtesy, and was sentenced to penance, which meant the infliction of the peine forte et dure.

"The sentence of penance which was pronounced against those who thus added contumacy to guilt, was indeed exceedingly dreadful. They were to be remanded to prison, and there placed in some low, dark room, laid on the back with scarcely any covering, and iron weights more heavy than they could bear placed upon them. In this situation they were to receive no sustenance the first day but three morsels of the worst bread, and on the second day, three draughts of standing water which should be nearest the prison door, and thus remain till they died; or, as the

ancient judgment ran, till they answered": Chitty's Crim. Law 1, p. 426.

"This practice of the 'peine forte et dure' is one of the most singular circumstances in the whole of the criminal law": Stephen's Hist. Cr. Law 1, 299. It was in force in England until the year 1772 when it was abolished by statute which made standing mute in cases of felony equivalent to a conviction; in 1827 it was enacted that in such cases a plea of not guilty should be entered for the person accused: Ib. p. 298. And this practice is to be followed under the code: s. 657.

III. PROCEDURE.

Criminal procedure had been much simplified by legislation before the code; this improvement has been continued under the code, technicalities can now seldom avail owing to the large powers of amendment given, while pleadings are short, simple and intelligible.

This removes a scandal which existed in Sir Matthew Hale's time. He writes: "That in favour of life great strictnesses have been in all times required in points of indictments, and the truth is, that it is grown to be a blemish and inconvenience in the law, and the administration thereof; more offenders escape by the over-easy ear given to exceptions in indictments, than by their own innocence, and many times gross murders, burglaries, robberies, and other heinous and crying offences, escape by these unseemly niceties to the reproach of the law, to the shame of the Government and to the encouragement of villany, and to the dishonour of God. And it were very fit, that by some law this overgrown curiosity and nicety were reformed, which is now become the disease of the law, and will, I fear, in time grow mortal without some timely remedy": Hale's P.C. II., p. 193.

And the editor of the edition published in A.D. 1800 concurs in this view, as is seen by the following significant foot note:— "This advice of our author, would, if complied with, be of excellent use, for it would not only prevent the guilty from escaping, but would likewise be a guard to innocence, for thereby would be removed the only pretence upon which counsel is denied the prisoner in cases of felony; for if no exceptions were to be allowed, but what went to the merits, there would then be no reason to deny that assistance in cases, where life is concerned, which yet is allowed in every petit trespass."

The code rule is that it shall be sufficient if the indictment contains "in substance a statement that the accused has committed some indictable offence therein specified. Such statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved": Crim Code, s. 611.

Under our system we cannot hope to rival such an indictment as was recently filed in the State of New York, where the prisoner was charged with murder by poisoning. "The indictment covers every possible point which may arise in the attempt of the prosecution to prove the murder, and charges the administration of chloretorm, mercury, chloroform and mercury combined, as well as unknown poisons. The indictment which has been filed is unique in one particular at least, as it is said to be the most voluminous indictment ever filed in a similar charge, consisting of thirteen typewritten pages."

When the complete commission of the offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of such attempt and punished accordingly : s. 711.

So, when a prisoner is charged with an attempt to commit an offence, but the evidence establishes the commission of the full offence, the prisoner may be convicted of the attempt, unless the Court shall think fit to direct him to be indicted for the complete offence : s. 711.

A prisoner charged with an offence, the commission of which is not proved, may be convicted of any other offence included in the original charge which is proved, or of an attempt to commit the offence : ss. 711-713.

Ample powers of amendment and of curing defects are given to the Court in criminal proceedings : ss. 612, 613, 629, 723.

IV. CRIMINAL APPEALS.

The general rule is laid down by Anson (Law of the Constitution II. 445) as follows : "The Queen has authority by virtue of the prerogative to review the decisions of all Colonial Courts, whether the proceedings be of a civil or criminal nature, unless Her Majesty has parted with such authority." But no appeal lies to the Privy Council in criminal cases, for sec. 751 of the Code enacts that "notwithstanding any royal prerogative, or anything

contained in the Interpretation Act or in the Supreme and Exchequer Courts Act, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any Court of Appeal or authority, by which in the United Kingdom appeals or petitions to Her Majesty in Council may be heard."

The right of appeal in criminal cases is carefully guarded so as to allow every reasonable chance to an accused person, while preventing scandals in the administration of criminal justice by repeated and hopeless appeals. An appeal may be allowed both to the accused and the Crown in certain cases upon points of law, but an appeal upon questions of fact is given only to the person convicted; none is given to the Crown in case of an acquittal of the accused.

Sec. 742 provides: An appeal lies from the verdict or judgment of any court or judge having jurisdiction in criminal cases, on the trial of any person for an indictable offence, upon the application of such person if convicted, to the Court of Appeal in the cases hereinafter provided for and in no others. Whenever the judges of the Court of Appeal are unanimous no further appeal lies; but if any of the judges dissent from the opinion of the majority, an appeal is allowed to the accused whose conviction has been affirmed by the Court of Appeal, to the Supreme Court of Canada, whose judgment shall, in all cases, be final and conclusive.

The specified cases are as follows: (1) The trial judge may, either during or after the trial, reserve any question of law, at the request of either the prosecutor or the accused for the opinion of the Court of Appeal, in which event a case must be stated for the opinion of the Court of Appeal. (2) If the trial court refuses to reserve the question, the party applying may, with the leave of the Attorney-General, apply to the Court of Appeal for permission to appeal. The Attorney-General may himself apply to the Court of Appeal for similar permission. (3) By leave of the court before which the trial takes place, a person who has been convicted may apply to the Court of Appeal for a new trial on the ground that the verdict was against the weight of evidence. A new trial may be directed by the Court of Appeal if it thinks fit. (Sec. 747.)

A very beneficial provision is contained in s. 748 by which upon an application for the mercy of the Crown on behalf of any person convicted of an indictable offence, if the Minister of Justice

entertains a doubt whether such person ought to have been convicted, he may, instead of advising that the sentence be remitted or commuted, order a new trial.

Comparisons are perhaps invidious and unprofitable, but it may be usefully pointed out that, under the above provisions, while the interests of the accused are safeguarded, no such trifling with the welfare of the public could take place as in the recent case of one Nordstrom, convicted of murder in the first degree in the State of Washington, and sentenced in 1891 to be hanged. In 1901 his case reached the Supreme Court of the United States in appeal from the State Supreme Court for the fourth time, with other points in reserve in case the decision of the Supreme Court was again adverse.

V. PARTIES TO CRIMES.

1. *Principals and accessories.*

In former times the law relating to principal and accessory was one of the most intricate branches of criminal law. It only applied to cases of felony. In treason, the object was to include as many as possible in the guilt, and all who had any connection with it were accordingly held to be principals. In misdemeanour, all were regarded as principals because it was not thought worth while to make any distinction between them : Steph. Gen. View. p. 82.

At common law there are four different positions, any one of which may be occupied by a person implicated in a felony.

(a) Principals in the first degree, being "those who have *actually and with their own hands* committed the fact:" Russ., I., 161.

(b) Principals in the second degree, being "those who were present *aiding and abetting* at the commission of the fact": Ib. Such persons "must be present aiding and abetting at the fact or ready to render assistance if necessary, but the *presence* need not be a strict, actual, immediate presence, such a presence as would make one an eye or ear witness of what passes, but may be a constructive presence:" Ib. p. 162.

(c) Accessories before the fact, "they who, being absent at the time of the offence committed, do yet procure, counsel, command, or abet another to commit a felony, which is committed in consequence of such counselling, procuring or commandment.

(d) Accessories after the fact. These are "persons who, knowing a felony to have been committed by another, receive, relieve, comfort or assist the felon:" Ib. 177.

Some act must be done to assist the felon personally, and some felony must have been actualiy committed and completed, and the party charged must have had notice direct or implied at the time of the assistance given that the person assisted had committed a felony. The code, s. 63, by defining what kind of assistance will render a person an accessory after the fact, settles a point which was a little uncertain previously; "an accessory after the fact to an offence is one who receives, comforts or assists any one who has been a party to such offence in order to enable him to escape, knowing him to have been a party thereto."

The importance of these distinctions in England has been much diminished by statutes; in Canada they have been completely abolished. There is no distinction now, even in name, between accessories before the fact and principals in the first or second degree. They may all be indicted as principal offenders, whether the actual perpetrator is indicted with them or not, and whether he has been tried or not.

Section 61 enacts: "Everyone is a party to and guilty of an offence who (*a*) actually commits it; or (*b*) does or omits an act for the purpose of aiding any person to commit the offence; (*c*) abets any person in commission of the offence; or (*d*) counsels or procures any person to commit the offence.

2. *Husband and wife.*

"The law has such regard (we are told) to the duty, love and tenderness which a wife owes to her husband, that it does not make her an accessory to felony by any receipt whatever which she may give to him; considering that she ought not to discover her husband:" Russ. 1, p. 179. But this applies to no other relation than that of a wife to her husband; the law does not, apparently, have any regard for the duty, love and tenderness of the husband to his wife. He may be an accessory (at common law) for the receipt of his wife who has committed a felony: 1 Hale 621. "A man may be accessory to his wife, but the wife cannot be accessory to her husband, though she know that he committed larceny, and relieve him, and discover it not; for by the law divine, she is not bound to discover the offence of her husband:" Coke 3rd Ins. 108. The code (s. 63 (2)) somewhat extends the privilege of a wife in such a case, and does away with the unreasonable distinction between the "duty, love and tender-

ness" to each other of husband and wife respectively, by enacting: "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."

3. *Suicide.*

By the common law suicide is murder. "No man," says Hale, "has the absolute interest of himself, but (1) God Almighty hath an interest and propriety in him, and therefore self-murder is a sin against God. (2) The King hath an interest in him, and therefore the inquisition in case of self-murder is felonice et voluntarie seipsum interfecit et murderavit contra pacem domini regis:" 1 Hale 412. If one encourages another to commit suicide, and be present abetting him while he does so, he could be convicted of murder as a principal in the second degree. A person who counselled, aided or abetted another to commit suicide but who was not present when the felo de se put an end to his life, was in the position of an accessory before the fact to murder. An accessory before the fact could not at common law be tried until the principal felon had been convicted, unless he were tried along with the principal. Hence it followed in the case of suicide that the accessory to the felony of self-murder escaped punishment, as it was not possible to try the principal before an earthly tribunal. The law in this latter respect has been altered in England by statute.

In the recent case of *Reg.* v. *Stormonth* (1897) (almost identical in its facts with *Reg.* v. *Alison*, 8 C. & P. 418) a man and a woman had agreed to die; poison was obtained, they divided it, drank it, and lay down together awaiting death; the woman alone died, whilst the man recovered and lived to be indicted for her murder. It was held that the prisoner was guilty of murder; he was accordingly convicted, and was sentenced to the penalty of death: 42 Sol. Jo. p. 3; 61 J.P. 729.

The provisions of the Code, which materially change the common law in this respect, are as follows: S. 237. "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." S. 238. "Every one who attempts to commit suicide is guilty of an indictable offence and liable to two years' imprisonment."

VI. CAPACITY TO COMMIT CRIME.

1. *Insanity.*

The onus under the Criminal Code is as at common law: "Every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved": s. 11 (3).

In the first stage of the English law relating to the insane, they were regarded as subjects of demoniacal possession. In "The Insane and the Law" (by Mr. Pitt-Lewis, K.C., and others) we get an interesting account of the development of the law of England as to the criminal responsibility of the insane; to this useful little book I am much indebted for what appears here on the subject.

Originally, the insanity of an accused afforded no defence whatever in point of law—at all events, on charges of murder. From very early times, however, it grew to be the practice that when, in such cases, a special verdict was returned, saying that the accused had committed the crime charged against him, but that he was mad at the time when he did it, he would, on this, be granted a pardon; and in time it grew to be considered that he was entitled to one (see Stephen's History of the Criminal Law II. p. 151).

In those early days, however, the only form of insanity which entitled an accused to lenity such as this appears to have been a permanent insanity: Pitt-Lewis p. 170.

Sir Matthew Hale (1 P.C. 30), tells us that, when he wrote, partial insanity (*i.e.*, intermittent) was no excuse:—"This partial insanity seems not to excuse in the committing of any offence for its matter capital."

The doctrine that, to render man irresponsible, there must exist a total and permanent, and not merely an intermittent, loss of understanding, apparently prevailed for at least half a century after Hale's time: Pitt-Lewis, p. 171.

In 1724 occurred a case of *R.* v. *Arnold*, which brought in a stage of the law which has been called the "wild beast period."

Mr. Justice Tracey in *R.* v. *Arnold*, 16 How. St. Tr. 764, charged the jury that the prisoner was not entitled to an acquittal on the ground of insanity, "unless he was *totally* deprived of his understanding and memory, and doth not know what he is doing any more than an infant, a brute, or a wild beast."

Towards the close of the 18th century a gentler feeling grew up in regard to mental disorder, largely owing to the attack of insanity with which Geo. III. was afflicted, and in 1800 occurred *Hadfield's case*, 27 How St. Tr. 1313, where Lord Kenyon directed the jury as follows:—"With regard to the law, as it is laid down there can be no doubt on earth. To be sure, if a man is in a deranged state of mind at the time, he is not criminally answerable for his acts; but the material part of the case is whether, at the very time when the act was committed, the man's mind was sane." Mr. Justice Stephen (Hist. Cr. Law II. 159), points out that Hadfield "clearly knew the nature of the act—that he also knew the quality of the act. He also knew that it was wrong (in the sense of its being forbidden by law)," yet he was acquitted under this charge.

These humane views were short-lived. The line was drawn more strictly in the next case of importance, where the test is considered to be the power of distinguishing right from wrong in the abstract. This was *Bellingham's case*. He was "a man with a grievance" who shot Mr. Spencer Percival, the Prime Minister, in the lobby of the House of Commons in 1812. The Chief Justice, Sir James Mansfield (not the celebrated Lord Mansfield), told the jury that to be a defence the insanity must so affect the mind of the prisoner "at the particular period when he commits the act, as to disable him from distinguishing between good and evil, or to judge of the consequences of his actions," and that the plea of insanity could not be "of any avail, unless it be that the prisoner, when he committed the act, was so far deranged in his mind as not to be capable of judging between right and wrong."

The manner in which the trial of Bellingham was conducted was most discreditable. With such haste were the whole proceedings forced on that, "to quote the graphic language of Lord Brougham, 'on Monday, 11th May, Bellingham committed the act; at the same hour on Monday, 18th May, his body was in the dissecting room'": Pitt-Lewis, p. 184.

In 1843 came the celebrated case of McNaughten, who killed Mr. Drummond, Sir Robert Peel's private secretary, by mistake for

the latter, and who, owing to the skill and boldness with which he was defended by Sir A. Cockburn, was acquitted on the ground of homicidal mania, or partial insanity. The jury were told by Chief Justice Tindal (and his two associate judges) that they must be satisfied that at the time the act was committed, the prisoner "knew that it was a wicked and wrong thing that he had done, or that he was not sensible at the time he committed the act that it was contrary to the laws of God and man."

The acquittal of MacNaughten aroused great public alarm and excitement. The *Times* inserted some lines by the poet Campbell, in which the writer, amongst other things, said that the people of England were "at the will of the merciless man," and

"The Insane—
They're a privileged class, whom no statute controls,
And their murderous charter exists in their souls;
Do they wish to spill blood?
They have only to play a few pranks;
* * *
For crime is no crime when the mind is unsound."

At the head of those who vigorously urged that the insane ought to be subject to punishment if they broke the law was "an Archbishop, who published a pamphlet, in which he argued that you whip a dog if he steals, though others are not deterred by his punishment, and sought literally to treat insane men in the same way as dogs in this respect": Pitt-Lewis, pp. 18, 209.

The matter was brought before the House of Lords where considerable discussion took place, and the Law Lords who took part in it differed in their opinions about the result of the case. In consequence of this the House of Lords "summoned all the judges and put to them an elaborate series of questions as to the criminal responsibility of a person who is alleged to have been insane when a criminal act with which he is charged was committed," and as a result the following canon was laid down that no act is a crime if the party committing it is at the time of its commission labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or that if he did know it, he did not know that he was doing what was wrong: Pitt-Lewis, pp. 200, 211. Mr. Justice Byles tersely put the rule in this way: "Did he know what he was doing, and, if he did, did he know that he was doing wrong?"

The scope of this paper does not permit of a discussion of that greatly debated subject as to whether in formulating this rule and in its application "law has been made to triumph over science, and the opinions of medical men, the only competent judges on such a subject, have been too autocratically disregarded.": Jurid. Rev. 1890, p. 225.

Some judges in England have held themselves at liberty to ignore the authority of these answers, and it has been said by some critics that they are entitled to no more weight "than the academic speculation of a mere debating society."

For the Canadian Courts the discussion has been definitely closed by the incorporation of the rule in McNaughten's case into the code, with one addition. The rule in McNaughten's case is defective in confining itself to cases of mental *disease*, and in not dealing with cases where there is no mental disease in the proper sense of the word, but only any absence of mental power or development, and yet there is the same inability to understand the nature and quality of an act. With the addition of the words "natural imbecility" to cover this defect, s. 11 crystalizes the rule in McNaughten's case into law: "No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility or disease of the mind to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such act or omission was wrong."

2. *Coercion by Husband.*

It was explained to Mr. Bumble that if a wife does certain acts in the presence of her husband, the law presumes she does them against her will and in obedience to him. Mr. Bumble, speaking no doubt from private knowledge of connubial life, pointedly remarked, "If the law says so, the law is a hass." And indeed many husbands would share the amazement of Mr. Bumble on learning how great was the power which the law presumed them to exert over their wives. By the law of England a woman charged with the commission of a crime less heinous than murder or treason may be acquitted if she prove that her husband was present when she committed the offence. The law presumes that she was not a free agent. In the words of Blackstone, "She is not guilty of any crime being considered, until the presumption be rebutted, as acting

by compulsion, and not of her own will, which doctrine is at least a thousand years old in this kingdom, being to be found among the laws of King Ina, the West Saxon." But wives nowadays, as Mr. Bumble well knew, are less obedient than they were in the golden age of King Ina: Marriages, Regular and Irregular, pp. 2, 3.

Blackstone says that among the northern nations of Europe the privilege extended to every woman transgressing in company with a man, the indemnity being similar to that accorded to every slave who committed a joint offence with a freeman. Its origin is thus clearly derivable from the old barbaric notions of the abject position of the wife in the matrimonial relation. See Bl. Com. ed., 1809., IV., 28, 29.

At common law, therefore, in cases of felony, if a married woman commits a crime in the presence of her husband, the law presumes that she acts under his coercion, and excuses her from punishment. This doctrine is very well illustrated by the remarkable case of *Reg.* v. *Torpey*, 12 Cox 45. The onus in such cases is on the Crown to shew that she acted independently. This presumption does not extend to crimes of the gravest kind, such as treason, murder or manslaughter, but has been applied to burglary and larceny, to forgery, to felonious assaults, and to robbery: Arch. Cr. Plg., p. 29. The presumption does not apply to misdemeanors nor to cases where from the nature of things it is reasonable to presume that the wife has a principal share and is as guilty as her husband, offences for example relating to domestic matters and the government of the house, e.g., keeping a disorderly or gaming house. See *Reg.* v. *McGregor*, 26 O.R. 115.

The presence of the husband when the offence is committed is necessary in order to raise this presumption; if in the absence of the husband the wife commit an offence, even though by his express orders, she will not be excused.

The Code (s. 13) abolishes this presumption; "no presumption shall be made that a married woman committing an offence does so under compulsion because she commits it in the presence of her husband."

This it will be noticed leaves untouched the common law doctrine that coercion by the husband is a good defence for the wife; but it puts the wife to the proof of the coercion, instead of presuming it in her favour from the fact of her husband's presence.

This defence, a relic of primitive ideas as to the subjection of the wife, is the only instance of the doctrine in private matters "for neither a son nor a servant are excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master."

VII. PARTICULAR CRIMES.

1. *Burglary.*

At common law burglary is the crime of breaking and entering the dwelling house of another in the night time with intent to commit a felony.

By the code certain changes are made in the common law, some of which are worth noting. By clause (a) of sec. 410 the old common law offence is defined and retained: "Every one is guilty of the indictable offence called burglary and liable to imprisonment for life, who (a) breaks and enters a dwelling house by night with intent to commit any indictable offence therein." But sub-sec. (b) presents two cases which were not burglary at common law. By it it is burglary (1) when a person breaks out of any dwelling house by night, either after committing an indictable offence therein, (2) after having entered such dwelling house, either by day or by night with intent to commit an indictable offence therein." In the first case there need be no criminal intent when the person enters the house. in the second, there must; but in neither case need there be any *breaking in*, which was an essential element of burglary at common law.

2. *Larceny.*

"It is stated by an able writer on the criminal law that the law of larceny is unintelligible. Many lawyers will agree with this opinion. The cases relating to larceny are conflicting. It is useless to endeavour to reconcile them": Russell (6th) II., 121. It was the difficulty of this branch of the criminal law which made an English judge say: "Our law, unfortunately, instead of being in the form of a code, is a thing of shreds and patches:" *Ex parte Belleacontre* (1891) 2 Q.B. 122, Cave J., p. 137.

And Wills, J. said: "I cannot help saying that I share a certain feeling of humiliation, which my learned brother has expressed, when one is obliged to confess formally to a neighbouring country that a great part of the atrocious things which have been done by this man are not punishable by English law": Ib.

In connection with this it is interesting to notice that Austin, in his notes on criminal law (II. 1044), has pointed out that principles are "obscured by being often couched in Latin terms not generally understood and not infrequently misapplied; i.e., larceny instead of the familiar and more precise theft. Larceny, or latrocinium, is not theft."

The endless refinements and subtleties of the law of larceny are familiar to all students of the criminal law; the distinction between things which do and do not savour of the realty by which "a heap of dung is a chattel, but if it be spread upon the land it is not" (per Rolle, J.), it being then a part of the freehold; the animus furandi; the taking invito domino; the dividing lines between larceny and embezzlement; the rules as to bailees; the strange doctrine of the common law by which there could be no larceny of a living dog, whereas there could be larceny of a dead dog's skin; in 1526 it was doubted whether a peacock could be stolen, being "rather a bird of pleasure than of profit, for it often kills all its chickens except one;" in another case Mr. Justice Hales thought it "no felony to take a diamond, rubie or other such stone (not set in gold or otherwise), because they be not of price with all men, however some do hold them precious;" these and many other instances which might be enumerated well illustrate the words of the poet who sang of

> "That lawless science of our land,
> That codeless myriad of precedents,
> That wilderness of single instances."

A remarkable illustration recently happened in London, England, where the accused is said to have entirely demolished two unoccupied houses, and carried away the whole of the materials of which they had been constructed, so that, when the owner came to inspect his property, he was surprised to find a clear site, and no vestige of his houses. Strange to say, except incidentally, the accused could not be brought within the criminal law. Trees and houses cannot be stolen, and to sever them and carry them away is merely a trespass at common law giving a civil action. The prosecutor was, therefore, driven to proceeding on a charge which was merely incidental to the principal fact of the case. By statute it is a felony, punishable as larceny, to cut or break any glass, woodwork or metal fixed to any house, with intent to steal the same. In demolishing the houses the glass and woodwork and

iron and lead piping were necessarily broken and carried off with the rest of the materials, and an information was laid under this statute. "The state of the law is somewhat ludicrous, but it seems that our forefathers failed to realize that any one could commit a crime so audacious": 43 Solicitors' Journal, p. 120. Such an offence would, in Canada, be theft under s. 303, infra.

The division of opinion in the courts as to the misappropriation of money innocently acquired, of which the cases of *Reg.* v. *Ashwell*, 16 Cox C.C. 1, and *Reg.* v. *Hehir*, (1895) 2 Ir. 709, are examples, is very notable. Such subtle questions as these are no longer possible under the code. By sec. 305 the offence of "theft" is so defined as to cover all the various shades of larceny and embezzlement. "Theft" is defined to be "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," etc. The "animus furandi" is dealt with by sub-sec. 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." The doctrine of "asportation" by which not only a taking, but also a carrying away is necessary in order to constitute larceny has given rise to much sophistical discussion. To remove a package from the head to the tail of a waggon, was a sufficient asportation but not merely to alter the position of a package where it lay. A thief grabbed at a valuable earring worn in a lady's ear; he dragged it out of the ear but it then slipped from his hand and lodged in her curls, where it was found on her arrival at her home; this was held a sufficient asportation. "If a guest take the coverlets or sheets of his bed, and rising before day, take the coverlets or sheets out of the chamber, where he lay, into the hall, to the intent to steal them, and went to the stable to fetch his horse, and the ostler apprehended him, this was adjudged larceny; and the coverlets and sheets were carried away, being removed from the chamber to the hall, albeit they were still in the house of the owner": Coke 3rd Ins. p. 108. The old nursery rhyme, it is said, precisely defines asportation, when

"The Knave of Hearts,
He stole some tarts,
And--took them quite away."

As to this, sub-s. 4, provides that "Theft is committed when the offender moves the thing or causes it to move or be moved, or begins to cause it to become movable, with intent to steal it."

"The definition (i.e. of theft) properly expounded and qualified will, we think, be found to embrace every act which in common language would be regarded as theft." Impl. Commrs'. Report, p. 28. Apply it, for the sake of illustration, to one of the recent cases above referred to, *Reg.* v. *Hehir.*

The prosecutor owed the prisoner £2 8s. 9d. for work done in his employment. Intending to discharge his debt, he handed him 9s. in silver and two notes, both of which were believed alike by prosecutor and prisoner, to be one pound notes; in fact, one was a ten pound note. There was evidence that after receiving this note the prisoner discovered its true value and fraudulently misappropriated it to his own use.

On this evidence the jury convicted him of larceny. But the court (by five judges to four) held that inasmuch as the prisoner acquired the lawful possession of the note when it was handed to him, his subsequent dishonest appropriation of it did not amount to larceny at common law. The conviction was therefore quashed.

This case very well exemplifies the truth of what has been pointed out by Sir James Stephen that one chief cause of the excessive intricacy and technicality of the subject is that the fraudulent *taking* is the essence of the offence of larceny at common law, whereas it should be the fraudulent *conversion.* Cf. 44 Sol. Jo. p. 113.

But under the code, s. 305 "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."

The prisoner was guilty of the act of "fraudulently and without colour of right converting" the note to his own use, and his act clearly came within the code definition of theft.

Settled prejudices die hard! The Ashwell case was discussed in *R.* v. *Flowers*, 16 Q.B.D. 643, and the old rule of law that, to justify a conviction for larceny, the receipt and appropriation must be contemporaneous, was said to have been "never really ques-

tioned" therein. "I am glad to think," said Manisty, J., "that the old rule of law still exists in its entirety." Section 303 provides as to what things shall be capable of being stolen that "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."

As to living creatures, clear provision is made, so that such a decision as agitated the inhabitants of Baltimore in regard to a pet Maltese cat, which was held to be of no use to man and an animal ferœ naturœ and therefore not the subject of larceny, cannot be given in Canada: Albany L.J. 1895, p. 75.

The doctrine of the common law was that "a man hath a mere property in some things that are tame by nature, and yet in respect of the baseness of their nature, a man shall not commit any larceny, great or small, though he steal them, as of mastiffs, bloodhounds, or of other kinds of dogs or of cats.": Coke, 3rd Ins., p. 109.

All tame living creatures, whether tame by nature or wild by nature and tamed, are capable of being stolen. 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; all other living creatures wild by nature (i.e. those indigenous to Canada) are capable of being stolen so long as they remain in confinement or are being actually pursued after escaping therefrom but no longer.

By s 313 a change is made in the law of theft as regards husband and wife. By the common law they cannot steal from each other, even if they are living apart, although the wife was capable of possessing separate property.

This rule is not perhaps unreasonable while cohabitation continues, but (as the Imperial Commissioners point out) when married persons are separated and have separate property, the wrongful taking of it by one from the other ought to be theft, and it is so provided by this section of the code.

"This section is also framed so as to put an end to an unmeaning distinction by which it is a criminal offence in an adulterer to receive from his paramour the goods of her husband, but no

offence in any one else to receive such goods from the wife": Imp. Commrs'. Report, p. 28.

"The general rule of law," said Lord Campbell, C.J., "is that a wife cannot be found guilty of larceny for stealing the goods of her husband, and that is upon the principle that the husband and wife are in the eye of the law, one person; but this rule is properly and reasonably qualified when she becomes an adulteress. She thereby determines her quality of wife, and her property in her husband's goods ceases": *Regina* v. *Featherstone*, Dears. C. C. 369.

Finding a lost article: The old nursery rhyme, "The loser the seeker, the finder the keeper," was at one period undoubtedly good law, but should not now be instilled, without modification, into the minds of children, inasmuch as it tends to give them wrong notions as to both law and morals.

Those "sages of the law," Coke and Hale, give no uncertain sound as to the criminal responsibility of a finder in their day. The former says: "If one lose his goods and another find them, though he convert them animo furandi to his own use, yet it is no larceny for the taking is lawful": 3rd Ins. 108.

And Sir Matthew Hale says: "If A. finds the purse of B. in the highway, and takes it and carries it away, and hath all the circumstances that may prove it to be done animo furandi, as denying it or secreting it, yet it is not felony:" 1 Hale 506.

There is, however, this much of truth in the rhyme, for if the article has been entirely abandoned by the owner, it is certain that the finder has a right to keep it, and, where the owner is unknown and cannot be found, the finder has a good title (in general) against all the world except the true owner. *Armory* v. *Delamirie*, 1 Sm. L.C. 315.

The modern rule is laid down in the case of *Regina* v. *Thurborn* (1 Den. C. C. 387), a leading authority on this point, to be "that 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 larceny. But if he takes them with the like intent, but reasonably believing that the owner can be found, it is larceny."

But, said Baron Parke: "In applying this rule questions of some nicety may arise."

Under the code it is just as much stealing for one who has lawfully received a chattel to afterwards fraudulently appropriate it as it is to take it wrongfully for the purpose of stealing it. A finder, therefore, who at the time of finding intends to honestly endeavour to return the lost article to the owner, but afterwards changes his mind, and fraudulently appropriates it to his own use is guilty of theft, and, if he retains it after discovering the true owner, would be exposed to prosecution as a thief.

3. *Embezzlement.*

This crime, "The unlawful appropriation to his own use by a servant or clerk of money or chattels received by him by or on account of his master or employer," no longer exists in Canada as a distinct offence. It is now covered, as it logically should be, by the definition of theft.

Under the code, wherever we find a case of fraudulent or dishonest conversion, there we have the offence of theft.

The foregoing examples will perhaps sufficiently illustrate the beneficial changes made by the code in this perplexing branch of the criminal law.

It is said that, in recent years, the English judges are becoming less and less willing to quash the conviction of a man morally guilty because of a mere technicality, and more and more ready to cut a way for themselves, without the help of Parliament through the legal maze—even at the expense of the English language. This seems a matter of doubtful expediency in the case of the criminal law.

The ordinary rule was well expressed by the late Lord Coleridge: "Of course, one hesitates to let a man off if he is guilty of a gross fraud, and it is matter for regret to have to let a man off who is really guilty of something. But as long as we have to administer the law we must do so according to the law as it is. We are not here to make the law:" *R.* v. *Solomons*, 17 Cox C.C. 93.

And this rule Canadian judges may now safely adhere to under the code.

4. *Libel.*

By s. 285 criminal libel is thus defined: "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."

The idea of insult, which the Roman law regarded as the chief element in libel, both in civil and criminal law, is thus retained in the criminal code.

In a civil action the idea of insult is not taken into account.

This section (285) makes a change in the law regarding libels vilifying the characters of deceased persons.

At common law where it can be shewn that the intention was "to bring contempt on the families of the deceased, or to stir up hatred against them, or to excite them to a breach of the peace," criminal proceedings would lie against the libeller.

Under the code, however, a libel to be criminal must be one designed to insult the person "*of or concerning whom* it is published," which clearly puts libels upon the dead out of the category of criminal libels.

A distinction is made between the rule of criminal law and that in a civil action as to privilege in regard to the publication of a libel by one seeking a remedy for a grievance. To support a defence of privilege in such a case in a civil action it must be shewn that the person to whom a defamatory statement is made actually had an interest or duty in the matter with which the statement deals; it will not be sufficient that the author of the statement reasonably believed in the existence of such interest or duty. Thus, a ratepayer who wrote to a Board of Guardians that A secured his election as guardian by treating or other improper means could not set up privilege because the guardians were not the persons to take action in the matter: *Hebditch* v. *MacIlwaine* (1894) 2 Q.B. 54.

But, when criminal proceedings are taken, it is a sufficient defence that the statement was made to a person who was "reasonably believed by the person publishing it 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, etc.": s. 294.

5. *Perjury.*

Perjury by a witness was, before the Reformation, usually dealt with as an ecclesiastical offence, but it has long been treated as an offence at common law: Arch. 1900, p. 992, Stephen

Hist. Cr. L. III. p. 247-8. *Rex* v. *Rowland*, Coke's 3rd Ins., p. 164, a case which Sir James Stephen refers to as, "One of the boldest, and, it must be added, one of the most reasonable acts of judicial legislation on record." An oath or affirmation, to amount to perjury at common law must be taken (1) in a judicial proceeding, and (2) before a competent jurisdiction. Shakespeare says as to this :

> "An oath is of no moment, being not took
> Before a true and lawful magistrate,
> That hath authority over him that swears."

It must also be (3) material to the question depending, and (4) false, and (5) the witness must know it to be false : Arch. (1900), p. 993.

A distinction existed, and still exists, in England, between perjury and false swearing ; the latter offence being one committed in other than judicial proceedings.

Numerous cases are to be found illustrating these distinctions, but by the code (sec. 145) changes have been made in the law, very greatly for the advancement of justice and the punishment of crime.

The distinction between perjury and false swearing has been abolished ; those false statements under oath which, at common law, only made a person guilty of false swearing are now perjury.

Neither the materiality of the statement nor its admissibility as evidence is now important, and difficulties as to jurisdiction are practically swept away. "In framing the section," (says the Imperial Commissioners' Rept., p. 21,) "we have proceeded on the principle that the guilt and danger of perjury consist in attempting by falsehood to mislead a tribunal de facto exercising judicial functions.

It seems to us not desirable that a person who has done this should escape from punishment, if he can shew some defect in the constitution of the tribunal which he sought to mislead, or some error in the proceedings themselves."

The effect of sec. 145 seems to be to make it perjury to swear or affirm in any judicial proceeding, valid or invalid.

It may be well to notice here an offence by perjury which "By the ancient common law was held to be murder, namely the bearing false witness against another with an express premeditated design to take away his life, so as the innocent person be condemned and executed. In foro conscientiæ this offence is

beyond doubt, of the deepest malignity." Deut. 19. v. 16-19. Russell III. p. 23. But Sir Edward Coke says: "It is not holden for murder at this day:" 3 Inst. 48.

Sir Michael Foster (p. 132) says of those who have advocated a different view, that they "In their loose way wrote upon the subject rather as divines and casuists than as lawyers; and seem to have considered the offence merely in the light in which it might be supposed to be considered in fori cœli. But the practice of many ages backward doth by no means countenance their opinion."

Sec. 221 of the code enacts that: "Procuring by false evidence the conviction and death of any person by the sentence of the law shall not be deemed to be homicide." But, to mark the heinous character of the crime, it is provided that: "If the crime (of perjury) is committed in order to procure the conviction of a person for any crime punishable by death, or imprisonment for seven years or more, the punishment may be imprisonment for life:" sec. 146.

6. *Homicide.*

Unintentional homicide. — Three doctrines have prevailed at different times in England as to unintentional homicide.

The earlier one, that of Coke, is as follows:

"Homicide by misadventure is when a man doeth an act that is not unlawful, which, without any evil intent, tendeth to a man's death. If the act be unlawful it is murder. As if A, meaning to steal a deer in the park of B, shooteth at the deer and by the glance of the arrow killeth a boy that is hidden in a bush, this is murder, for the act was unlawful, although A had no intent to hurt the boy and knew not of him. But if B, the owner of the park, had shot at his own deer, and without any ill intent had killed the boy by the glance of his arrow, this had been homicide by misadventure and no felony. So if one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off without any evil intent in him, this is per infortuniam, for it was not unlawful to shoot at the wild fowl; but if he had shot at a cock or hen, or any tame fowl of another man's and the arrow by mischance had killed a man, this had been murder, for the act was unlawful": 3rd Institute, p. 56.

It is satisfactory to notice, as pointed out in the latest edition of Archbold's criminal pleading (p. 765), that this "monstrous doctrine" (Stephen's Hist. Cr. Law, III. 75) was not accepted as law for any length of time without demur.

In the case of *Rex* v. *Keate* (1697) Comb. 406, Holt, C.J., says: "In the case of killing the hen, my Lord Coke is too large, there must be a design of mischief to the person, or to commit a felony or great riot."

"This astonishing doctrine" (says Sir James Stephen, Hist. Cr. L. III. 57) "has so far prevailed as to have been recognized as part of the law of England by many subsequent writers, although in a modified shape given to it long afterwards by Sir Michael Foster, who limits it to cases where the unlawful act amounts to felony. It has been repeated so often that I amongst others have not only accepted it, but have acted upon it."

That great criminal jurist, Sir Michael Foster (p. 258, 259) states the law thus: "A shooteth at the poultry of B and by accident killeth a man; if his intention was to steal the poultry, which must be collected from circumstances, it will be murder by reason of that felonious intent; but if it was done wantonly and without that intention it will be barely manslaughter. The rule I have laid down, supposeth that the act from which death ensued was malum in se; for if it was barely malum prohibitum, as shooting at game by a person not qualified by statute law to keep or use a gun for that purpose, the case of a person so offending will fall under the same rule as that of a qualified man; for the statutes prohibiting the destruction of the game, under certain penalties, will not, in a question of this kind, enhance the accident beyond its intrinsic moment."

"Cruel and, indeed, monstrous as such an illustration may appear to us" (says Sir James Stephen, in his History III., p. 74), "it is put forward by Foster as a mitigation of the views of Coke, and such no doubt it is. It certainly is less objectionable to say that unintentional homicide committed in the prosecution of a felonious design is murder, than to say that unintentional homicide committed by any unlawful act is murder. Foster's own illustration, however, shews clearly that the one rule is less bad than the other, principally because it is narrower."

The last edition of Russell on Crimes, I., p. 761 (w) states that the "law appears to be that any one who deliberately attempts to commit a felony and thereby occasions death is guilty of murder. But in this respect the law is unreasonable." In charging the jury in the case of *Queen* v. *Horsey*, 3 F. & F. 287, Baron Bramwell told them that "the law as laid down is that where a prisoner in

the course of committing a felony causes the death of a human being, that is murder, even though he did not intend it. And although that might appear unreasonable, yet as it is laid down as law, it is our duty to act upon it."

The case of *Regina* v. *Serné*, 16 Cox C.C. 311, came before Sir J. Stephen in 1887. The two prisoners were indicted for murder, it being alleged that they wilfully set on fire a house, by which act the death of a boy, the son of the prisoner Serné, had been caused.

In his charge to the jury the learned judge said: "I think that instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony, which caused death, should be murder."

On this subject the code provides (s. 227 (d)) that culpable homicide is murder "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 anyone."

This, it will be seen, combines part of the old and severe doctrine of Coke with the more lenient and reasonable ideas of Stephen. It adopts Stephen's view that there must be an act which the person either knows or ought to have known to be likely to cause death. But it adopts the view of Coke that the object with which the act is done need not be a felonious or even a criminal one.

If it is an *unlawful* one it is sufficient.

And it would seem that on this point the code may be held to go even beyond the early doctrines in this way, that no distinction is made between acts which are mala in se, and those which are mala prohibita, while by the doctrine stated by Foster the act must have been malum in se to constitute murder.

On the whole the code appears to have made the law more severe than it was under Stephen's view because some homicide which at common law is manslaughter will, under the code, be murder.

For example: An unqualified person practising medicine for profit, contrary to law, administers medicine which he ought to have known, but does not know, would be likely to cause death, and which does cause death. Before the code this would be a case

of manslaughter, but it would seem to be governed by this section, and to be murder under the code.

Provocation.—It has been laid down that no mere words or gestures, no matter how insulting they may be, will be sufficient provocation to reduce homicide from murder to manslaughter. "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:" *Reg.* v. *McDowell*, 25 U.C.Q.B. 108. But an assault too slight in itself to be sufficient provocation to reduce murder to manslaughter, may become sufficient when coupled with words of great insult. This was held in a case in which a wife not only used the most frightful language to her husband, but also spat at him. Neither the language nor the spitting would have been enough provocation by itself, but together they effected the reduction: *R.* v. *William Smith*, 4 F. & F. 1066. "If two military officers," said Byles, J., "met in the street, and one called the other a coward and a scoundrel, and spat in his face, and if the one so treated immediately drew his sword and stabbed the person assaulting him, this, I think, would be manslaughter. See Warburton's Leading Cases (2nd ed.), p. 98.

"There is no definite authoritative rule on the subject," says the Imperial Commissioners, "But the authorities for saying that words can never amount to a provocation are weighty. We are of opinion that cases may be imagined where language would give a provocation greater than any ordinary blow. The question whether any particular act falls or not within this line appears to us to be pre-eminently a matter of degree for the consideration of the jury." (Imp. Commrs'. Report, p. 24.)

But the common law doctrine that no words, however irritating or insulting, can form a provocation which will reduce homicide from murder to manslaughter, is rejected by the code: s. 229 (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."

Whether the insult amounted to provocation and whether the person provoked was actually deprived of the power of self-control by the provocation received, shall be questions of fact. Reference may be made on the subject of provocation to *Regina* v. *Brennan*, 27 O.R 659.

Suicide.—As has been already pointed out this is by the law of England regarded as a murder committed by a man on himself. Suicide is held to be murder so fully that every one who aids or abets suicide is by that law guilty of murder.

But under the definition of homicide in the code (s. 218) suicide is excluded; "homicide is the killing of a human being by another."

Improper treatment of injuries.—It is no defence to an indictment for homicide to shew that the immediate cause of death was the neglect or refusal of the injured party to submit to an operation; this is the rule both at common law and under the code: *R v. Holland*, 2 M. & R. 351.

But where the immediate cause of death is improper applications to the wound and not the wound itself, there is a marked, and perhaps not a very easily justified, difference between the code and the common law.

Under the latter, where the death is caused not directly by the wound itself, but by improper and negligent treatment by medical men or others, the original wrongdoer is not considered guilty of homicide, but the immediate agent may be.

Stephen gives an illustration of the common law rule, founded on 1 Hale 428, as follows: A gives B a wound. C, a surgeon, applies poison to the wound either from bad faith or by negligence. B dies of the poison. C, and not A, has killed B.

"If a man were wounded, and another applied to his wound sulphuric acid or something else which was of a dangerous character, and ought not to be applied, and which led to fatal results, then the person who applied this remedy would be answerable, and not the person who inflicted the wound, because a new cause had supervened:" per Willes, J., *Reg.* v. *Markuss*, 4 F. & F. 356.

Under the code, however, as long as the treatment was applied "in good faith," no matter how negligent or improper it may have been, the original wrong doer is still held responsible.

"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:" sec. 226.

7. *Bigamy.*

By the code (s. 275 (a) (b)). "Bigamy is (a) the act of a person who, being married, goes through a form of mar-

riage 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." This wide definition is restricted in its operation by sub-s. 4 as follows:

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."

These provisions raise a question of some interest, namely, as to the power of the Dominion Parliament to legislate for the punishment of extra-territorial offences.

Divergent opinions were expressed in the judgments of Provincial courts: *Reg.* v. *Brierley*, 14 O.R. 525; *Reg.* v. *Plowman*, 25 O.R. 656, and in view of the importance of the subject, questions were submitted by the Governor-General in Council to the Supreme Court of Canada as to the constitutionality of the legislation.

That eminent jurist the Chief Justice Sir Henry Strong, in a convincing judgment, expressed his opinion to be that sub-sections (a) and (b) were prima facie ultra vires of the Dominion Parliament, and that the limitation imposed by sub-section 4, requiring a leaving Canada "with intent to go through such form of marriage" has not the effect of so qualifying the preceding sub-sections as to bring the substantive enactment contained in them within the powers of Parliament.

In his view the criminal act in question under the section is "the marriage without the territorial jurisdiction of Parliament."

Such legislation dealing with an offence committed out of the Dominion could not be dealt with by Parliament, the jurisdiction of which to legislate as regards criminal law, under section 91 of the British North America Act, is, in his opinion, "confined to local offences committed within the Dominion, and does not warrant personal jurisdiction as to matters outside of it."

The other judges differed from the Chief Justice and affirmed the constitutionality of the sections in question: *Re Criminal Code* (1892), ss. 275-276, relating to bigamy, 27 S.C.R. 461.

Mens rea.—It was at one time a moot point occasioning great divergence of judicial opinion in England, as to whether a person who married again in the bona fide belief that his or her former

spouse was dead, but within seven years from the time when the latter was last seen or heard of, was guilty of bigamy.

This doubt was set at rest by *Regina* v. *Tolson*, 23 Q.B.D. 168, where the Court of Crown Cases Reserved (with five dissentients) held that such a state of facts constituted a good defence, because the guilty intention (mens rea), ordinarily necessary to make an act criminal was absent. The Imperial Commissioners, in their draft code, proposed a clause carrying out the view of the minority, thus adopting, as they said, "The construction which has been more generally put on the existing statute."

Their reason for so doing was "That care must be taken not to give encouragement to bigamous marriages by relaxing the rule that a man marrying within the prescribed seven years does so at his peril." The Canadian Parliament, however, preferred the principle of the Tolson case; the code enacts [sec. 275 (3) (a)] that no one commits bigamy by going through the form of marriage "If he or she in good faith and on reasonable grounds believes his wife or her husband to be dead."

In many of the American States statutes have been passed regulating the status of the wife and children of a second marriage where the first spouse should reappear. Why should the children in such cases have the stigma of illegitimacy imposed upon them? Perhaps the case does not very frequently happen, but, when it does, in the absence of such legislation great hardship results to the innocent children, who might well be declared legitimate by legislation.

The remarks which an eminent judge is reported to have made recently at the Criminal Assizes in regard to a prisoner indicted for bigamy should direct public attention to the injustice of our law as to divorce. If it is allowed for any cause, and certainly for the cause of adultery it should be, then there is, as the learned judge is reported to have said, an injustice in Canadian law which limits the granting of divorces to Parliament, where nine-tenths of the people could not afford to go if they wished to get rid of a marriage. The remedy, if granted at all, should surely be through the machinery of the regular courts of justice, open to all who deserve relief.

The biting witticism of Mr. Justice Maule, in 1845, when passing sentence upon a labouring man convicted of bigamy, before the Divorce Act was passed in England, by which the power to grant

a divorce a vinculo was taken away from Parliament and conferred upon a special tribunal, may well be repeated in Canada. "You should," said the learned judge, "have brought an action and obtained damages which the other side would probably not have been able to pay, and you would have had to pay your own costs—perhaps a hundred or a hundred and fifty pounds. You should then have gone to the Ecclesiastical Court and obtained a divorce a mensâ et thoro, and then to the House of Lords, where, having proved that these preliminaries had been complied with, you would have been enabled to marry again. The expense might amount to five or six hundred, or perhaps a thousand pounds. You say you are a poor man, *but I must tell you that there is not one law for the rich and another for the poor.*"

VIII. GENERAL CONCLUSION.

It will be seen that the above is not, as it does not profess to be, an exhaustive description of the present state of our criminal law.

I have selected for notice only the more important and more interesting matters in the hope that those who read this article may be tempted to study for themselves the wealth of interesting material on the subject of criminal law, its origin and development. In perusing the pages of Coke and Foster and Hale, and the records of the State Trials, together with Stephen's History of the Criminal Law, the student will find both profit and pleasure.

One matter of importance I venture to refer to. There are several Imperial statutes relating to criminal law in force in Canada, which are not collected in any one place, and therefore are practically inaccessible and unknown.

The good service done to the profession and the public by the Ontario Government in collecting and re-enacting all Imperial statutes relating to property and civil rights in force in Ontario (see R.S.O. vol. III.) will, it is to be hoped, stimulate the Dominion Government to confer without delay a similar boon by collecting and publishing as an appendix to the code all the criminal statutes of Great Britain which apply to Canada. Criminal law ought, surely, to be made accessible to everyone

I venture to close this partial sketch of changes made by the code in our criminal law by quoting from an eminent "sage of the law," thus following his "grave and prudent example":—

"I do not take upon me, or presume that the reader should thinke that all that I have said herein to be law, yet this I may safely affirme that there is nothing herein but may either open some windows of the law to let in more light to the student by diligent search to see the secrets of the law, or to move him to doubt, and withall to enable him to inquire and learne of the sages, what the law, together with the true reason thereof, in these cases is ; or lastly, upon consideration had of our old bookes, lawes and records (which are full of venerable dignitie and antiquitie) to finde out where any alteration hath beene, upon what ground the law hath beene since changed, knowing for certaine that the law is unknowen to him that knoweth not the reason thereof, and that the known certaintie of the law is the safetie of all. And for a farewell to our jurisprudent, I wish unto him the gladsome light of jurisprudence, the lovelinesse of temperance, the stabilitie of fortitude, and the soliditie of justice": Co. Litt. II. 395 A.

N. W. HOYLES.

On the 20th ult. the Hon. James Thompson Garrow, K.C., was appointed Judge of the Court of Appeal for Ontario in the room and stead of the Hon. Mr. Justice Lister, deceased. Mr. Garrow was born at Chippewa on March 11th, 1843. He commenced the study of the law in the town of Goderich, and was admitted to the Bar in 1869. In October, 1885, he was made Queen's Counsel. Since 1890 he has been prominently before the public in political matters, having for many years represented West Huron in the Local Legislature. A man of unswerving integrity and high character, not even the fire of political criticism could find any fault in his public life. Whilst it is impossible to forecast with any certainty the success or otherwise of any judicial career, the new judge commences his duties with the reputation of being a sound and able lawyer, and with the good will and friendly thoughts of all who knew him at the Bar, and in the belief that an excellent appointment has been made.

The question of an improvement in the system of drafting statutes in this country came before the House of Commons recently. It was pleasant to see that the Minister of Justice agreed with the leader of the Opposition in thinking that a better and more perfect system was desirable. The latter introduced the subject by saying :—" It is supposed by a great many people that any gentleman who is well conversant with the laws of this country, and who is engaged in practising in the Courts is, from his experience, capable of drafting a statute. We who have investigated the subject know that this is a very great fallacy indeed. A lawyer, even of great eminence is often a very poor person to whom to entrust the drafting of a statute. That work requires one who is not only familiar with the laws of the country, but who by training, experience and bent of intellect is especially fitted for work of this kind." The Minister of Justice quoted Lord Chief Justice Fitz-James Stephens, as saying :—" It is as impossible for a committee of men to draft a law as it is for a committee of artists to paint a picture," and continued, " There must be unity so far as possible ; and when our statutes go through committees it is important that they should pass into the hands of a competent draftsman so as to be put into proper shape before finally becoming law." We had occasion, (vol. 37, p. 829), to call attention to the above matter, and what was recently said by these gentlemen is almost a repetition of what we expressed at that time. It is to be hoped that the Minister of Justice will, with his usual energy, seek out and apply some remedy. Should he succeed those in charge of the legislation in the various provinces would do well to follow suit.

We notice that in England the President of the Probate Division and Mr. Justice Barnes have recently ordered the following notice to be put up in their Courts, viz.: " If any person to whom an oath is administered desires to swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland, he or she is permitted to do so. The following form of oath may be used : " I swear by Almighty God that I will speak the truth, the whole truth and nothing but the truth." This it will be seen is a shorter form than that prescribed by the new Act. A notice of a similar character might be ordered to be posted in the various Courts of this Province, and the irreverent practice of pretending to kiss the Book might in a measurable time be abolished.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

(Registered in accordance with the Copyright Act.)

HIRE—PURCHASE AGREEMENT—CONVEYANCE OF CHATTELS ABSOLUTE IN FORM, INTENDED BY WAY OF SECURITY—NON-REGISTRATION OF HIRE AND PURCHASE AGREEMENT UNDER BILLS OF SALES ACTS—BILLS OF SALES ACT 1878 (41 & 42 VICT. C. 31) S. 4—BILLS OF SALES ACT, 1882 (45 & 46 VICT., C. 43) SS. 3, 9.

In *Mellor* v. *Maas* (1902) 1 K.B. 137, one Mellor was desirous of purchasing from one Sykes an hotel and the chattels in and about the same for a lump sum of £30,000. Mellor was short of money and desired to borrow £2,000 from Maas, the defendant, on a fourth mortgage of the hotel. Maas declined to lend the money on that security. On the day fixed for the completion of Mellor's contract with Sykes, Maas called on Sykes and told him that Mellor was short of money, and offered to buy the chattels in the hotel for £2,000. Sykes accepted the offer and made a bill of sale of the chattels to Maas who thereupon purported to sell the chattels to Mellor on a hire-purchase agreement for £2,412 16s., payable in instalments, and the purchase of the hotel was completed. The hire-purchase agreement was in common form, and contained the usual license to seize. It was not registered under the Bills of Sales Acts above referred to. Mellor having become bankrupt his trustee claimed the chattels on the ground that they were merely a security to Maas for a loan, and the security was void for want of registration under the Bills of Sales Acts, and Wright, J., held that the plaintiff was entitled to the chattels as claimed by him.

LANDLORD AND TENANT—NOTICE TO QUIT—VALIDITY OF NOTICE.

Soames v. *Nicholson* (1902) 1 K.B. 157, was an action by a landlord to recover possession of the demised premises. The lease under which the defendant held provided that the tenancy should commence on May 1, 1895, and that the rent should be payable quarterly, on May 1, August 1, November 1 and February 1, "subject to three months' notice on either side at any time to terminate this agreement." The plaintiff on January 24, 1901, gave the defendant three months' notice to quit on April 25

following. The judge of the County Court held that the notice to quit was bad not being a notice to quit on any one of the quarter days named in the lease. The Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.,) held that this was not giving due effect to the terms of the lease whereby a notice to quit at "any time" might be given. The case they said was covered by *Bridges* v. *Potts*, 17 C.B. (N.S.) 314.

JUSTICES—APPREHENDED BREACH OF THE PEACE—PUBLIC MEETINGS—USE OF LANGUAGE CALCULATED TO CAUSE BREACH OF PEACE—RECOGNIZANCE TO BE OF GOOD BEHAVIOUR.

In *Wise* v. *Dunning* (1902) 1 K.B. 167, Wise, who was a Protestant lecturer who had held public meetings at which he had used both language and gestures calculated to give offence to Roman Catholics and induce them and his supporters to commit a breach of the peace, his words and conduct had in fact caused breaches of the peace by his opponents and supporters. A local Act in force in the city where the meetings were held prohibited the use of threatening abusive and insulting words in a street whereby a breach of the peace may be occasioned. Wise was summoned before justices and ordered by them to find sufficient sureties to keep the peace and be of good behaviour during the next twelve months. Wise appealed on the ground that he had committed no breach of the peace, and the justices had no jurisdiction to require him to find sureties to keep the peace and be of good behaviour. The Divisional Court (Lord Alverstone, C.J., and Darling and Channell, JJ.,) however, were of opinion that the previous conduct of the appellant had been such as to justify the justices in making the order they did, and that they had ample jurisdiction to do so. Darling, J., considered the plaintiff as one of

> ". . . . that stubborn crew
> Of errant saints, whom all men grant
> To be the true church militant.
>
> * * * *
>
> A sect whose chief devotion lies
> In odd perverse antipathies."—Hudibras, Part I.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Osler, J.A.] [Feb. 10.

WIEDMAN *v.* GUITTARD.

Leave to appeal—By endorser of note—Signatures of maker not proved and action dismissed as to them, but judgment given against the endorser—Presentment—Nonpayment—Notice.

An endorsement of a negotiated promissory note, even though the endorser really be a surety, admits prima facie, at all events, the ability and signature of all prior parties.

In an action by the holder of a promissory note and chattel mortgage against the makers of the mortgage and makers and endorser of the note the plaintiff failed to prove the signature of one of the makers of the note, and the action was dismissed as to that maker on the note, although a judgment was recovered on the chattel mortgage.

At the trial a defendant, an endorser of the note, although represented by counsel, gave no evidence, and judgment was given against her. On an appeal to a Divisional Court her appeal was dismissed, and she applied for leave to appeal to the Court of Appeal.

Held, that the evidence of the plaintiff that in payment for "the property" sold he received a mortgage and the note in question and cash for the balance, that the note was not paid at maturity and was protested after presentment and notice sent, and that notwithstanding it was contended that it was not known what notice was sent or to whom, a judge should infer from the evidence, in the absence of any weakening of it by cross-examination, that presentment was made on the day the note became due, that payment was refused, and that due notice of dishonour was given, and leave to appeal was refused.

W. M. Douglas, K.C., for defendant White. *F. A. Anglin*, for plaintiffs.

HIGH COURT OF JUSTICE.

Meredith, J.] [Nov. 13, 1901.

HISLOP *v.* JOSS.

Mortgage — Foreclosure — Tax title defence — Conveyance of equity of redemption to purchaser at tax sale—Onus of proof of taxes in arrear Improvements as under a mistake of title.

In an action for foreclosure of a mortgage of land in Toronto Junction in which a defendant set up a purchase at a tax sale and a conveyance of

the equity of redemption from the mortgagor but did not prove the regularity of the sale or that taxes were in arrear, and relied upon 58 Vict., c. 90, s. 13 (O.), and 63 Vict., c. 103, s. 11 (O.), and also claimed for improvements as made under a mistake of title.

Held, (1) following *Stevenson* v. *Traynor* (1886), 12 O.R. 804, that the onus of proof that there were taxes in arrear for which land might rightly be sold is upon the person claiming under the sale for taxes and had not been satisfied.

(2) The words "sales for taxes" in section 11 of 63 Vict., c. 103 (O.), mean sales for taxes for which the lands might rightly be sold.

(3) Under the circumstances here, that the defendant had made no improvements as under a mistake of title, there was no mistake, he had simply improved his own land which he took subject to the mortgage.

Haverson, for plaintiff. *Raney*, for defendant Lyons.

Divisional Court.] BOOTH *v.* BOOTH. [Jan. 8.

Mechanics' lien—Contract on two adjoining buildings—Lien for work done on one—Registration—Whether within time—Extent of work done.

Where a contract was made with the respective owners of adjoining lands, on which two separate buildings were erected but included under one roof, for the repair thereof, at one entire price, separate accounts being kept for the work done, and materials furnished on each building, a lien attaches and can be enforced under Mechanics' Lien Act against the lands of each of such owners for the price of the work done and the materials provided on each respective building.

The findings of the Local Master, who tried a mechanics' lien action, as to the fact of the work being done and the materials furnished within thirty days prior to the lien being registered, and as to the extent of said work and materials, was upheld for, though the evidence was contradictory, there was evidence to support such findings.

O'Rourke, for appellant. *L. H. Drayton*, for respondent.

Divisional Court.] LEWIS *v.* DALBY. [Jan. 27.

Costs—Security for—Police constable acting in discharge of duty.

Where police constables, who had a warrant for the arrest of a person charged with an offence, entered the plaintiff's house for the purpose of executing the warrant, acting, as they claimed, under a bona fide belief that he was the person designated in the warrant, and that they were discharging their duty, they come within the provisions of R.S.O. 1897, c. 89, and are entitled to security for costs. Judgment of STREET, J., affirmed.

Lobb, for motion. *Davis*, contra.

Boyd, C., Ferguson, J.] [Feb. 12.

REX *v.* COLE.

Criminal law—Attempt to incite—Perjury—Bail—Recognizance—Criminal Code, ss. 530, 601—Estreat.

A defendant charged with offering money to a person to swear that A., B. or C. gave him a certain sum of money to vote for a candidate at an election was admitted to bail and the recognizance taken by one justice of the peace.

Held, that the offence was not an attempt to commit the crime of subornation of perjury, but something less, being an incitement to give false evidence or particular evidence regardless of its truth or falsehood, and was a misdemeanor at common law, and that the recognizance was properly taken by one justice, who had power to admit the accused to bail at common law, and that section 601 of the Code did not apply.

The common law jurisdiction as to crime is still operative, notwithstanding the Code, and even in cases provided for by the Code, unless there is such repugnancy as to give prevalence to the later law.

Ritchie, K.C., for the motion. *Cartwright*, K.C., Deputy Attorney-General, contra.

Street, J.] [Feb. 24.

ARMSTRONG *v.* LANCASHIRE INS. CO.

Writ of summons—Service on insurance company—No office in Ontario—On previously appointed attorney.

An English insurance company who had carried on business in Canada and where the head office was at Toronto, by two powers of attorney had appointed its general agent at Toronto attorney to receive process under both R. S. O. 1897, c. 203, s. 66, and R. S. C. 1880, c. 124, s. 13, transferred its Canadian business to another company and closed its Canadian offices, but the deposit under the Dominion Act had not been released and neither of the powers of attorney had been cancelled. On a motion to set aside the service of a writ of summons which was accepted by solicitors as if served on the Toronto agent of the company, subject to the right to move against it, on the ground that the company was not within the jurisdiction.

Held, that a writ of summons upon a policy issued in Quebec in respect of a loss upon property in Quebec was properly served upon the agent named as attorney at Toronto under Con. Rule 159, and that the Court in Ontario therefore had jurisdiction to entertain the action.

Semble, that the power of attorney required to be filed under R.S.C. c. 124, s. 13, is to receive service of process in any suit instituted in any province of Canada in respect of any liability incurred in such province and not in respect of any liability incurred in Canada.

D. L. McCarthy, for the motion. *Middleton*, contra.

Divisional Court.] [March 3.

GILDNER *v.* BUSSE.

Defamation—Slander—Privilege—Master and servant.

A master is not necessarily liable in damages because in the presence of fellow-servants, or even of casual bystanders, he accuses his servant of theft. Such an accusation is prima facie privilege, and to destroy the qualified privilege there must be some evidence of malice, such as want of belief in the accusation, intemperate language, seeking the opportunity to make the accusation publicly, or the like. Judgment of BOYD, C., reversed.

O'Neall, for appellant. *Godfrey*, for respondent.

Master in Chambers.] [March 5.

DOMINION BURGLARY GUARANTEE CO. *v.* WOOD.

Practice—Discontinuance of action—Counterclaim—Cause of action—Jurisdiction.

Where the plaintiff discontinues his action after the defendant has delivered a counterclaim, the defendant may proceed with his counterclaim as if it were an action; the plaintiff will then be in the same position as a defendant served with a writ of summons; and if the counterclaim is one which the defendant could assert only by virtue of the plaintiff having come into the jurisdiction and sued the defendant, he should not be allowed to proceed with it as a term of permitting the plaintiff to discontinue.

C. A. Moss, for plaintiffs. *F. E. Hodgins*, for defendant.

Falconbridge, C.J.K.B., Street, J., Britton, J.] [March 15.

TAYLOR *v.* DELANEY.

Appeal from Surrogate Court—Court of Appeal—Form of notice and bond—Motion to quash.

On a motion to quash an appeal to a Divisional Court subsequent to the passing of 58 Vict., c. 13, s. 45 (O.), on the ground that the notice of appeal did not specify the court to which the appeal was taken and that the bond filed followed the Surrogate form "To the Court of Appeal."

Held, that the intention to appeal expressed in the notice was sufficient and that the words "the Court of Appeal" in the bond might be read as an equivalent of "the proper appellate tribunal," and the motion to quash was dismissed.

J. H. Moss, for the motion. *F. A. Anglin*, contra.

Trial—Britton, J.] [March 17.

TORONTO JUNCTION PUBLIC SCHOOL BOARD *v.* COUNTY OF YORK.

Public Schools—Separated town within county—County model school situated in—Liability of county.

The Town of Toronto Junction, territorially within the limits of the County of York, but a separate town within the provisions of the Municipal Act, and as a municipality not under the jurisdiction of the county council, is yet part of the county, within the meaning of ss. 83 and 94 of the Public Schools Act, 1 Edw. VII., c. 39; and the county is bound to contribute to the support of a county model school situated in the town.

W. E. Raney, for plaintiffs. *C. C. Robinson*, for defendants.

Robertson, J.] REX EX REL. ROBERTS *v.* PONSFORD. [March 19.

Municipal elections—Quo warranto—Notice of motion—Time—Wrong day of week—Mistake—Amendment.

A notice of motion in the nature of a quo warranto to contest the validity of the election of the respondents as aldermen of a city, was, by fiat of the Master in Chambers under s. 220 of the Municipal Act, R.S.O. 1897, c. 223, allowed to be served upon the respondents, and was served on the 15th February (seven clear days' notice being required by s. 221) for "Tuesday, the 24th day of February,"—the 24th February being, in fact, a Monday. Afterwards, the relator served upon the respondents a notice to the effect that the day on which the motion would be made was Tuesday, the 25th February, but this notice was not a seven clear days' notice.

Held, that the notice of motion was good and sufficient notice for Tuesday, the 25th February, and that the sureties upon the relator's recognizance, as required by s. 220, would have no ground of objection because of the proceedings not being properly prosecuted. *Eldon* v. *Haig*, 1 Chit. 11, followed.

Semble, that the practice in actions in the High Court is applicable to these quo warranto proceedings.

J. H. Moss, for relator. *Du Vernet*, for respondents.

Meredith, J.] NESBIT *v.* GALNA. [March 19.

Security for costs—Residence of plaintiff out of Ontario—Return—Ordinary residence—Rules 1198 (b), 1199.

The plaintiff was a British subject, and was always a resident of Ontario until his second marriage in 1896, since when he had been living and working part of the time in the State of Michigan and part of the time in Ontario; he had no property or means in Ontario; his wife had a home in Michigan, and, after his marriage, he made that his place of residence so far as possible, and had no other place of residence. When this action

was began in March, 1901, the plaintiff was at his wife's home in Michigan, and his solicitor endorsed that as his place of residence on the writ of summons. In January, 1902, after delivery of statements of claim and defence, the defendants obtained under Rule 1199, on pœrcipe, an order for security for costs. The plaintiff and his wife had then come to Ontario for the winter and were boarding at a hotel. The plaintiff stated on affidavit that he had come to reside permanently in Ontario.

Held, that the plaintiff actually resided out of Ontario when the prœcipe order was made; but, security not having been given, he might be relieved from that order if he was now actually, and intended to remain a resident of Ontario. Upon the evidence, however, such was not the case; the plaintiff's place of residence was in Michigan, and was likely so to remain.

Held, also, that, if the prœcipe order were set aside, an order under Rule 1198 (*b*) for security for costs, on the ground that the plaintiff's ordinary place of residence was at his wife's home in Michigan, would be properly made.

D. L. McCarthy, for plaintiff. *Falconbridge*, for defendants.

Province of Manitoba.

KING'S BENCH.

Full Court.] CODVILLE *v.* FRASER. [Feb. 15.

Fraudulent preference — Assignments Act — Motive actuating debtor in giving security to preferred creditor — Pressure.

Appeal from the decision of BAIN, J., noted 37 C.L.J. 671.

It appeared that the dominant motive of the debtor in giving the impeached security was to make an arrangement for continuing his business. The defendant induced him to give it by promises of assistance in carrying him along and in arranging with other creditors, although not in any definite way enforceable in a court of law.

Held, that, under s. 33 of the Assignments Act, R.S.M. c. 7, as amended by 63 & 64 Vict., c. 3, s. 1, there must still be the intent on the part of the debtor to prefer the particular creditor in order to set aside the impeached conveyance; and, while the effect may be to place that creditor in a more advantageous position than other creditors, and the debtor may recognize at the time that such will be the effect, yet, if he gave it for some other purpose or in the hope that he might thus be enabled to avoid insolvency, it cannot be considered that he gave it with intent to give a preference, and the security should stand.

Stephens v. *McArthur*, 19 S.C.R. 446; *New Prance and Garrards' Trustee* v. *Hunting* (1897) 2 Q.B. 19; S.C. sub. nom., *Sharp* v. *Jackson* (1899) A.C. 419; *Lawson* v. *McGeoch*, 20 A.R. 464; *Armstrong* v. *Johnson*, 32 O.R. 35, followed.

Although the amending Act declares that a prima facie presumption of an intent to prefer is to arise from the effect of such a transaction, this does not justify the Court in looking only to the effect and refusing to attach any weight to the proved facts as to the actual intent. The presumption, being only prima facie, may be rebutted by evidence.

Held, also, that the Court need not determine whether the defendant was acting bona fide or really anticipated that the other creditors could be arranged with and the business continued, it being only the debtor's mental attitude that should be considered.

RICHARDS, J., dissented on the ground that the security was obtained by deceitful representations of the defendant's agent, and should be set aside on that ground.

Appeal allowed with costs.

Howell, K.C., and *Mathers*, for plaintiff. *Ewart*, K.C., and *H. J. Macdonald*, K.C., for defendant.

Full Court.] [Feb. 15.

MUNICIPALITY OF LOUISE *v.* CANADIAN PACIFIC R.W. CO.

County Courts—Jurisdiction—Title to land brought in question—Property in sand and gravel on highways—Costs when action fails for want of jurisdiction.

This was an appeal from a judgment of a County Court awarding to the plaintiffs damages for the taking by defendants of quantities of sand and gravel from several alleged highways and allowances for roads in the municipality. The plaintiffs' claim was based on s. 615 of R.S.M. c. 100, vesting in each municipality the possession of the public roads within its boundaries, subject to any rights in the soil reserved by the individuals who laid out the same, and upon section 644, sub-section (c), empowering municipalities to pass by-laws for preserving or selling timber, trees, stone or gravel on any allowance or appropriation for a public road.

Counsel for the defendants at the trial disputed the title of the plaintiffs to the sand and gravel on the alleged highways, and claimed that the County Court had no jurisdiction to entertain the action, as a bona fide question of title to land was raised within the meaning of s. 59 of County Courts Act, R.S.M. c. 33.

As to two of the alleged highways, there was no real evidence of prior ownership or dedication by any person. The defendants' track crossed what would have been the lines of two village streets if these had been produced, but the land was in its natural state, unused and unimproved.

As to a third highway, there was evidence of long user as such. The remaining one of the alleged highways was the road allowance between two sections of land according to the Dominion Government system of surveys, and it is vested by law in the Province. The Provincial Legislature has not expressly given to the municipalities a right of action for portions of the soil of a highway wrongfully removed, and the plaintiff municipality was not in actual possession or occupation of the land so as to be entitled, on that ground alone, without proof of title, to maintain an action against wrongdoers for the removal of the soil.

Held, 1. Under the enactment substituted for section 315 of The County Courts Act by 59 Vict., c. 3, s. 2 (M. 1896), an appeal to this court lies from the decision of a County Court judge on a question of jurisdiction as from all other decisions in actions in which the amount in question is twenty dollars or more. *Fair* v. *McCrow*, 31 U.C.R. 599, and *Portman* v. *Patterson*, 21 U.C.R. 237, followed.

2. The real question in the action was one of the title to the sand and gravel removed, and these being part of the freehold it was a question of the title to a corporeal hereditament, and that the jurisdiction of the County Court was ousted.

Ordered that the judgment for plaintiffs in the County Court be set aside, that judgment be entered in that court against the plaintiffs for the defendants' costs of the action under 1 Edw. VII., c. 5, s. 1, and that the plaintiffs should pay the costs of the appeal.

Hough, K.C., for plaintiffs. *Robson*, for defendants.

Province of British Columbia.

SUPREME COURT.

McColl, C. J.] [June 21, 1901.

KING *v.* LAW SOCIETY OF BRITISH COLUMBIA.

Barrister and solicitor—University graduate—Legal Professions Act.

Order nisi calling upon the Law Society to shew cause why a writ of mandamus should not be issued directed to the Law Society commanding it to enter the name of the plaintiff on its books as an applicant entitled to be called and admitted on his paying the prescribed fee and passing the necessary examination. The plaintiff matriculated at the University of Dalhousie, Halifax, Nova Scotia, in August, 1892, and an LL.B. degree was conferred on him by the University on 23rd April, 1895; in March, 1892, he began to study law and signed articles in Nova Scotia, and on 2nd April, 895, he was called and admitted there. Subsequent to his call and

admission plaintiff was employed two years in the office of a Halifax firm of barristers and solicitors. The term of service under articles in Nova Scotia for call and admission is ordinarily four years, but in case of a college graduate it is three years. In British Columbia, a graduate, in order to have his law course shortened must be a graduate at the time he commenced to study law.

Held, that the fact that the plaintiff was gratuated after he was called in Nova Scotia precluded the circumstance of his being a graduate from having shortened his term of study. Application dismissed.

Quære whether plaintiff would have succeeded if he had graduated before 2nd April, 1895.

Stuart Livingston, for applicant. *A. D. Taylor*, for Law Society.

Full Court.] [Nov. 7, 1901.

WAKE *v.* CANADIAN PACIFIC LUMBER COMPANY.

Mechanics' lien—Woodman's lien—Action for wages—Pursuing both remedies—Estoppel.

The plaintiff, a logger, was employed by one Green who had a contract with the defendants to cut logs on their land, and brought this action in the County Court under the Mechanics' Lien Act for $74.44 for wages. Before the commencement of this action the plaintiff and sixteen others obtained a joint judgment in the same Court against Green under the Woodman's Lien for Wages Act for the gross amount of their wages. In that action Green and the Company were defendants, but the action was discontinued against the Company as they released all claim to the logs seized by the sheriff.

Held, reversing Bole, Co. J., that the plaintiff was estopped from proceeding under s. 27 of the Mechanics' Lien Act for the balance of his wages.

Harris, for appellant. *Bowser*, K.C., for respondent.

Flotsam and Jetsam.

The following is a new form of dunning letter to which no exception can reasonably be taken. The solicitor who handed it to us says that his client was so affected that he sent the money by return mail:

"Wherefore, oh man! do you resist my cry
For recognition in the way of cash?
Dost think that I can get my humble pie
Or even that more modest dish of hash,
A cabin rude, or any decent raiment,
Without at least some present payment?
Such thought were folly. Do not all men say,
'If aught you want for it you needs must pay.'
For want of cash the muse itself would rust
To keep it bright there's nothing like gold dust"