

Access to Information Request Form

TBC 350-57 (Rev. 1990/11)

Info Source

Access to Information Act



Step 1

Determine which federal government institution is most likely to have the information you are seeking. Decide whether you wish to submit an informal request for the information or a formal request under the *Access to Information Act*. If you wish to make an informal request, contact the appropriate institution. The address can likely be found in *Info Source* publications which are available across Canada, generally in major public and academic libraries, federal government offices, such as Canada Employment and Immigration Centres, and constituency offices of federal Members of Parliament.

Step 2

To apply for information under the *Access to Information Act*, complete this form or a written request mentioning the Act. Describe the information being sought and provide any relevant details necessary to help the institution find it. If you require assistance, refer to *Info Source (Sources of Federal Government Information)* for a description of program records held by the institution or contact its Access to Information Coordinator.

Step 3

Forward the access request to the Coordinator of the institution holding the information. The address is listed in the "Introduction" to *Info Source*. Enclose a \$5.00 money-order or cheque payable to the Receiver General of Canada. Depending upon the type or amount of information being sought, you may be asked to authorize further charges.

Step 4

When you receive an answer to your request, review the information to determine whether you wish to make a further request under the Act. You also have the right to complain to the Access to Information Commissioner should you believe that you have been denied any of your rights under the Act.

Federal Government Institution

National Archives of Canada

Provide details regarding the information being sought

s letter

Copy of Henri Elzéar Taschereau (one of the judges of the Supreme Court of Canada), dated 20 January 1893 to the Attorney General of Canada with Comments and Suggestions, 6 p., and annexed memorandum of 23 p. (Public Archives of Canada, Records of the Department of Justice, Record Group 13, Acquisition 86-87/1084, file 63/1984, part 2, item 107).

The letter, Comments and Suggestions, and annexed memorandum concern the proposed Criminal Code, 1892 (which came into force on 1 July 1893).

Method of access preferred

☒ Receive copies
of originals

☐ Examine originals in
government offices

Name of applicant

Mr. François Lareau

Street, address, apartment

55-890 Cahill Dr. W.

City or town

Province

Ottawa, Ontario

Postal Code

K1V 9A4

Telephone number

(613) 521-3689

This request for access to information under the
Access to Information Act is being made by

☒ a Canadian citizen, permanent resident or
another individual present in Canada, or

☐ a corporation present in Canada

Signature

Date

1 September 1993.



Government
of Canada

Gouvernement
du Canada

Français au verso

Canada



National Archives
of Canada

Archives nationales
du Canada

Office of the
National Archivist

Cabinet de
l'Archiviste national

395 Wellington Street
Ottawa, Ontario
K1A 0N3

395, rue Wellington
Ottawa (Ontario)
K1A 0N3

22 September 1993

93-A-00111

François Lareau
55-890 Cahill Dr. W.
Ottawa, Ontario
K1V 9A4

Dear Mr. Lareau:

This is in response to your request under the Access to Information Act, which was received at the National Archives of Canada on 7 September, 1993 concerning Henri Elzéar Taschereau.

Enclosed, please find copies of the documents you requested from RG 13, Accession 86-87/1084, file 63/1894, part 2, item 107. Please note that this accession has been retained permanently by the National Archives, with the result that file 63/1894, part 2 is now part of RG 13, Volume 2274. Note further that the materials requested by you - Taschereau's letter of January 20, 1893 and attached memorandum - are identified in the file as part of item 107A, rather than 107.

If you are not satisfied with the outcome of your request, you have the right to complain to the Information Commissioner within one year from the time your request was received by our institution. Notice of complaint should be addressed to:

Information Commissioner
Tower B, Place de Ville
112 Kent St., 3rd Floor
Ottawa, Ontario
K1A 1H3

. . . 2/

Canada

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For your future reference, you may wish to note that the National Archives has developed an informal access procedure which is consistent with the provisions of the Access to Information Act. Under the informal procedure, there is no application fee. In the future, therefore, you may wish to make your requests informally. Should you be dissatisfied with the results of an informal review, you may still request a formal review of the records.

Yours sincerely, ..

M. D. Swift
Access to Information
and Privacy Coordinator

Enclosures

National Archives Canada / Archives Nationales Canada

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RG 13 VOLUME 2274
MG VOLUME
FILE / DOSSIER 63 / 1894, part 2, item 107A
REEL / BOBINE
DATE

CRIMINAL CODE OF 1892

LETTER BY

Judge Taschereau

TO THE

Attorney General of Canada

WITH

COMMENTS AND SUGGESTIONS

DEAR SIR,—

Having been informed, on reliable authority, that amendments to the criminal code passed at the last session of Parliament are to be introduced at the next session, I take the liberty to send you a memorandum of the changes which should, in my humble opinion, be made thereto, before it is allowed to come into force.

It was a self evident proposition, one which no one will controvert, that the Chief Justice of England laid down, in reference to an akin measure presented to the Imperial House of Commons in 1875, when he said: "I think that any attempt at codification which is either partial or incomplete can only be productive of confusion and mischief" or, as he put it, in other words, in 1879, in reference to another one of the same import: "It is of the very essence of a perfect code, that it shall contain and provide for whatever is intended shall be the law at the date of its formation, so that both those who have to administer the law, whether in its preliminary or after stages, and those who have to obey it should have it before them as a whole, without having to search for it in Acts of Parliament scattered over the statute book, and which most persons, at least so far as the laity are concerned, are ignorant of and know not where to find. The main purpose of the codification of the law is utterly defeated by leaving the code to be supplemented by reference to statutes, and what is still worse, to parts of statutes which are still to remain in force, but are not embodied in it."

Now, sir, as you are aware of, the draft code, upon which the Lord Chief Justice made these observations, was found to be so defective, as well for incompleteness, as for other reasons, that it had to be dropped in 1880 by the Attorney-General, and has never been adopted into law by the Imperial Parliament.

That our code of 1892 is deficient, in respect of completeness, to a still greater degree than that one in reference to which the Lord Chief Justice so expressed his views on the essential requisites of a codification, must, it seems to me, be conceded, when it is taken into consideration that, whilst the latter superseded all the common law, the former leaves all of it in force, with, besides, a number of important enactments, scattered all over the statute book. So that, in future, any one desirous of ascertaining what is, on a given point, the criminal law of the country will have to refer first, to the common law, secondly, to our unrepealed statutory law, thirdly, to the case law, fourthly, to the Imperial special statutory enactments on the subject in force in Canada, not even alluded to in the code, and fifthly, to the code. I shall not attempt to here enter into details on what, to anyone at all conversant with the subject, appears *on the face of the record*. I have, however, called more particularly your attention in the annexed memorandum to a few of these *lacunæ*, which, in my opinion, must prove hereafter to detract so much from the usefulness of this legislation. They are those which more particularly struck my mind in a preliminary survey I have made of its contents, in view of a third edition of my book on criminal law adapted to it, which, under pressing solicitations from Bench and Bar, from all parts of the Dominion, I have undertaken to prepare.

To cite here a few instances, under this head of omissions, I may more particularly allude to the following offences, which I have not been able to find treated of anywhere; negligent escape, compounding felonies, or offences generally, abortive inciting to commit any of the offences provided for by the code, one maiming himself, either to increase his chances at begging, or to avoid military service, champerty, malfeasance, or culpable nonfeasance of a public officer in relation to his office; extortion, and bribery, generally; various statutory indictable crimes, the number of which I have not ascertained; conspiracy to commit an unlawful, not indictable, act.

Then, as to accessories before the fact, I find that though sec. 63 defines what is an accessory after the fact, what is an accessory before the fact is nowhere to be found. The very name has disappeared from the law, even in the index.

Those who know the law on the subject can see that sec. 61 is given as a re-enactment of it in a different shape, but for those who, in their studies, finding the expression as one known at common law, in every book, desire to ascertain what it is in the code, it is putting obvious difficulties in their way, not to, at least, keep the name in the marginal note, or sub-title; the same may be said as to aiders and abettors. Then, not a word is to be found of the rule "*actus non facit reum nisi mens sit rea*," nor of the cognate rule, as to intent, that the law of England judges not of the fact by the intent, but of the intent by the fact; nor of the law, in criminal cases, of principal and agent, or master and servant, nor of the rules on consent, waiver, or estoppel in such cases; neither of the law as to contributory negligence in manslaughter.

Another class of omissions is such as follows, and, there are many of them. A man steals ten sheep at the same time. Can he be indicted ten times, one accusation for each? "Yes," says Lord Hale, "for thus it hath happened that a man acquitted for stealing the horse hath yet been arraigned and convicted for stealing the saddle, though both were done at the same time."—But then, if a man steals, say ten sovereigns, can he be indicted ten times? or twice, if five of the sovereigns belong to A., and five to B?—A. kills B. and C. by one shot. Has he committed two murders, or one murder of two men? Why not provide for such cases and say that one act constitutes only one crime, the quantity, etc., being only a matter of aggravation, or settle it, in some way or other? Persecution, in the guise of prosecution in the public interest, should not be tolerated. Such questions, it must be assumed, have been discussed by the special committee, but there is not a word of them in the code.

A third class of omissions to which I may here more especially allude is that of the Imperial Statutory enactments in force in Canada. I beg leave to refer you, for a few instances thereon, to my note under section 640 as to such of those that have come to my mind. Allow me, also, to call your attention to the fact that section 542 bears the construction that our Parliament has assumed jurisdiction on offences committed by a *foreigner* on the high seas, on board a *foreign* ship. That cannot have been intended and should be set right.

A few observations, now, on some of the amendments made to the existing law. I have not had time, as yet, to ascertain, to my own satisfaction, which of its 983 sections are new law, and which are old law, not a simple thing to do, by any means, you will admit, sir; but I have, however, seen enough of it to be in a position to assert that the changes and innovations are numerous and of a sweeping character, both in the substantive and in the adjective law.

A large, I may say, a very large number of these changes and innovations, including those in the law of murder, rape, perjury, bigamy, etc., etc., as well as those in the rules of procedure, were undoubtedly taken from the abortive bill or draft code presented to the Imperial House of Commons in 1880, that I have already alluded to. And it may be, if I am allowed to say so, that sufficient attention was not paid to the fact that these innovations, though suggested, had never been adopted in England, and that, consequently, some of them have passed into this code without having been defined before Parliament in such a clear way that their consequences can have been foreseen. And, on this, rather than to speak for myself, I take the liberty to make the following quotation from the report of the committee of the Imperial House of Commons, to which had been referred, in 1875, a cognate measure, a bill on homicide drafted by Sir James Fitzjames Stephens: "Nothing could be more likely to impede, or, indeed, utterly to frustrate the work of codification, than the suspicion or certainty that, under the pretext of simplification and re-arrangement, *great and important* changes were effected *which had never been brought out in a clear and simple way* to the attention of the Houses of Parliament. For these reasons, your committee are of opin-

"ion that it is not desirable to proceed with the present bill, notwithstanding that this "experience in codification has been presented to them with every advantage that "learning and skill could give it."

Without wishing here to enter into details, I call your attention to the following alterations and changes that I have noticed in the course of my cursory examination of the act.

The atrocious crime of infanticide by starvation, or neglect of natural duties, (so frequent in cases of illegitimacy) which has always here, as in England, and, in all the civilized world, been either murder or manslaughter, is to be nothing more in the future but a simple offence of the class now known as misdemeanours, and punishable with a mere fine, at the discretion of the Judge, or with imprisonment for not more than three years. If a husband, under a legal duty to provide necessaries for his wife, omits, without lawful excuse, to do so, and thereby causes her death, he has always been, up to the present, deemed guilty of murder or manslaughter. But that is, also, to be, in the future, but a simple offence punishable by a fine, or at the most, by an imprisonment for three years. Heretofore, a gaoler who caused the death of his prisoner, by not supplying him with the necessaries of life was guilty of manslaughter, but Parliament has decreed that that shall not be so in the future. I may be mistaken, but I am strongly inclined to think that such alterations in the law have not deliberately been made by Parliament. Yet, there they stand on the statute book, to be our law after the 1st of July. These last three changes, I need hardly say, were not proposed in the English bill of 1880.

Another instance :—It is decreed, by sec. 64, that the question, whether an act is too remote or not to constitute an attempt, shall be a question of law, and not one for the jury. Has this important innovation been designedly made? See, in memo. what Chief Justice Cockburn says of a similar one, when proposed in England.

Another one again, (not proposed in the English bill) :—In future, perjury, forgery, and manslaughter even, are to be triable at Quarter Sessions; counterfeiting Her Majesty's coin, treason at common law, is also to be triable in the inferior Courts. Offences now falling under secs. 247 and 248, for injuries by explosives, heretofore not triable at Quarter Sessions, are also now to be so. I refer you for other instances of changes in the law to my memorandum.

I pass now to the intrinsic defects of the measure: they are numerous. It is replete of contradictory clauses, of redundant enactments, of clumsy, needlessly minute and irrational, or repugnant provisions, obviously leading, in many instances, to incongruities and anomalies, *rudis et indigesta moles*, cumbrous, yet not complete: the classification is unsystematic, and the whole without attempt at symmetry.

Why, for one or two instances, as to defective classification, put the offence of unlawfully digging up a dead body, under the title of nuisances? Or, why separate by eighty sections the offence of defiling a girl under 14 with the offence of defiling a girl above 14? As to repugnancy, redundancy, irrational legislation, let me refer to a few enactments as illustrations.

It is an indictable offence to conspire to induce a woman to commit adultery, but to commit adultery itself, is not, except in New Brunswick. Now, a conspiracy to commit or procure the commission of an unlawful act is, at common law, indictable, even where that unlawful act itself is not. But there is no reason, that I can see, for a special enactment as to this one, when the unlawful act itself is not made indictable. It has the effect to reduce the punishment, and that cannot have been the reason why it was enacted. Such an enactment was proposed in the English draft. It was a necessary one there, because all the common law was superseded. It has been lost sight of, in this special provision on conspiracy to cause adultery to be committed, that the common law of conspiracy remains untouched by this code.

Any one who offers for sale a putrid carcass of mutton, or an obscene photograph, or a car conductor's fault of being drunk on duty, must be prosecuted by

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indictment, whilst any one who entices one of Her Majesty's soldiers to desert from the service, or any one who personates a candidate at an examination in a college or university may be punished on summary conviction. *Adultery* is to be an indictable offence in New Brunswick, *but is not to be so in the other Provinces*. A number of offences are purged by lapse of time, whilst there is no limitation for the prosecution of the attempt or conspiracy to commit the same offences: treason, and the offences under the trade marks act are put alone on the three year's limitation list. Why? The seducer of a girl under sixteen is protected by one year's limitation, whilst one who once offers for sale one obscene photograph, or a pound of tainted meat, has no such protection, and can be prosecuted at any time. One year relieves from all liability to punishment the nefarious crime of a *mother*, who, for a few dollars, is a party to *the ruin of her 14 year old daughter*; but the prosecution for the same offence when committed *by any other person*, on that girl, is barred by no limitation whatever. There are to be found five sections on injuries by explosives; three different enactments to say that a peace officer may arrest without warrant a person committing certain offences; two to say that a false oath, not in a judicial proceeding, amounts to perjury; two or three to provide for offences against railways; two sections to decree, in different terms, that if any one leaves a hole made by him through the ice, unguarded, he will be guilty of manslaughter, if any person loses his life by falling therein. One section enacting that an attempt to commit sodomy will be punishable by ten years, and another one, that an assault, with attempt to commit sodomy, will be punishable by seven years. Could even a Philadelphia lawyer tell the difference between the two, between an attempt to commit sodomy and an assault with attempt to commit sodomy? With, to make confusion worse confounded, a different punishment attached to each. It is decreed that a nuisance which occasions injury to one individual is indictable. Is that a *common* nuisance?

On many of these subjects, the law, it is true, was not previously in a better state; and the errors and anomalies that I have called attention to, often are mere reproductions from the statute book. But you will bear me out, sir, when I say that this is obviously an aggravation, not an excuse of the fault committed of not taking advantage of the codification to remedy the law. The pruning knife was evidently wanting in the hands of the drafter: the "lopping off the dead branches without hurting the root," if you allow me, sir, to use the felicitous expression, was not performed, the weeding has been left undone.

A most favorable occasion has been lost to improve, to ameliorate, to make needed reforms, to reduce the bulk of the law and simplify its mechanism. I have given you illustrations of it; allow me to add a few others. A complete revision of the punishments is clearly wanted—that is admitted on all hands in England, and our statutes on the subject do not stand on a better footing. A reference to the compilation, under the heading "Punishments" that I have attached to my memorandum, so as to afford an easy though incomplete comparison thereon, will amply demonstrate it, were demonstration necessary. But to particularize here for one moment, should not a codification have purged our statute book from the following anomalies instead of re-enacting them?—An accessory before the fact to the offence of carnally knowing a girl under fourteen, *when a perfect stranger to her*, is punishable with *imprisonment for life*. But, *if he is a guardian who is such accessory to the like offence on his ward*, he is punishable *by fourteen years only*. That extraordinary legislation is a reproduction from the statute of 1890. But that is not all; if it is himself, *the guardian*, who seduces his ward, he is liable only to a fine, or at the most, *to two years imprisonment*! And another one almost as startling: a train conductor, for merely being *drunk* on duty, is liable to *seven years' penitentiary*. And, for another one again, any one who, *unsuccessfully* incites another to commit an indecent assault is liable to *seven years' penitentiary*, but, if the other does, in fact, *commit* the assault, then the inciter escapes with two years' prison.

Again, to simply *obstruct* a "public" officer in the execution of his duty, is punishable by *ten years' penitentiary*, but to *assault* a public officer whilst performing his duty, only by *two years' prison*; and to *obstruct* a "peace" officer in the execution of his duty, *two years*.

Then, in many instances, it has evidently been forgotten that a codifier must not rashly cast down without also building up; that, to quote Austin's words (*principles of jurisprudence*)—"he should have constantly before his mind, a map of the law as a whole, enabling him to subordinate the less general under the more general, to perceive the relations of the parts to one another and thus to travel from general to particular, and from particular to general, and from a part to its relations to other parts, with readiness and ease, to subsume the particulars under the general, and to analyze and translate the general into the particulars that it contains."

Some of the instances where most beneficial enactments have been repealed and not re-enacted have been referred to in my memorandum.

As to the enactments relating to the code itself, I call your attention specially to section 981, which enacts that, after July 1st, next, two sets of rules of procedure will be in force, one, for the offences committed before that date, and one for the offences committed after that date. That seems to me very objectionable for obvious reasons. Please refer to my note under that article for my suggestions on the subject.

Another class of errors may be mentioned. Here again, I shall not enter into details. They are of a less important nature, and, evidently, the result of inadvertence. Some of the class of those I here allude to are the errors made in the repeal of the statutes. One, for instance, is in the repeal of a section that had already been repealed. Another one, in the unrepeal of an enactment which clashes with an enactment on the same subject. One, *and a singular one it is*, is in enacting that the code itself shall come into force on the *1st of July*, whilst the repeal of the previous Statutes takes effect only *on the 2nd*. So that on the 1st of July itself, for twenty-four hours, the two *sets of laws will be in force*. Another one, a clear oversight also, has for serious consequence to strike out of the law the provision for punishing a *master, foreman or superintendent* of a factory, mill, workshop, *for the seduction of any girl under twenty-one years of age who is under his control and in his employment*. All of these, and there are not a few of them, are palpable errors: I leave it to you, sir, to say whether they do not disfigure the measure, to make use, for once, of an euphemism.

I REST HERE.—My object is simply to bring to your attention what I consider to be serious defects in this legislation, without entering into more details than necessary to *prima facie* support my remarks. In fact, the short time at my disposal, at this season of the year, would not have allowed me to do more. I have not been able to go over the whole of these 983 sections more than once, and in such a cursory way, that it is possible that some of them, not many, are not open to the objections I have taken.

There is an observation that I think proper to make, sir, before closing, one hardly necessary, yet, which it is, perhaps, better for me not to omit, so that no room be left anywhere for misrepresentation or misinterpretation. Whilst addressing this letter to you as head of the administration of justice in the Dominion, in your capacity of Attorney-General, I wish it to be clearly understood that I have not committed the mistake to think that you are the author of this code of 1892. It cannot be expected, in any quarter, that an Attorney-General's duties, here not more than in England, and, perhaps here still less than in England, would at all permit him to undertake such a task. And when Lord Chief Justice Cockburn, in 1879, addressed his criticisms on a similar measure that I have alluded to to the Attorney-General of England, he was, likewise, perfectly aware that though he had introduced it in the House of Commons, the Attorney-General had not drafted it.

Moreover, let me assure you, that, had it at all been possible for me to think, for one moment, that you were the author of this one, I would certainly not have taken the liberty to address you these comments. The mistakes have been made

somewhere, and there lie, perhaps, the principal causes of the ill-success, first, to place too much reliance on Sir James Stephen's draft; and secondly, to form too light an estimate of the difficulties that lie in the drafting of a code, a mistake that has, in England, put such powerful arms in the hands of the opponents of codification, as to enable them, by itself almost alone, to resist successfully, so far, all endeavours in that direction. I, myself, though, at one time, of opinion that a code of criminal law would be of great advantage to Canada, and might be prepared without very serious difficulties, am free to admit that I, now, have, to say the least, grave doubts on the subject. A revision and consolidation, not a mere compilation, of the statutory law, would, perhaps, be all that is necessary in that direction to supply the present needs of the administration of justice in Canada.

Should Parliament, however, not determine to withdraw the present one, temporarily at least, I suggest that the ends of justice might perhaps require that the date of its coming into force should be postponed.

I have the honour to be,

Sir,

With highest consideration,

Your obedient servant.

(Sgd.) H. E. TASCHEREAU,

Judge, Supreme Court.

THE HONOURABLE SIR JOHN THOMPSON, K. C. M. G.

Minister of Justice and Attorney General.

P.S.—Following the course adopted by Lord Chief Justice Cockburn, in England, when addressing the Attorney General on an analogous subject, I give to this communication the form of an open letter. I trust, sir, that you will see no impropriety in my doing so.

SECTION 3.

Interpretation of Words.

The words, *carnally know* should be defined in this section. Why not also define the words "dealt with, inquired of, tried, determined and punished." See *per Lord Wensleydale, in R. v. Ruch, Note Y. 1 Russ. 757.*

The expression *loaded arms* taken from an old English act might be improved upon, in view of a recent decision, and of the improvements in fire arms.

SECTION 5.

This applies to Imperial Statutes only, not to the Common Law.

Not a word of Champerty, nor of the offence of any one who maims himself deliberately, so common when a war is threatened, nor of compounding felonies or offences, nor of a negligent escape.

These offences will continue to exist, but to be found elsewhere than in the Code.—See remarks under sec. 933 *post*—And, on procedure, the number of *lacunæ* is still larger perhaps. Yet, is it not true that "Dans un système qui admet la maxime humaine que : il vaut mieux que cent coupables échappent que si un innocent était puni," il est du plus impérieux devoir de dissiper tous les doutes qui font de l'administration de la Justice criminelle une loterie, avec tant de chances en faveur des coupables." *Livingstone, Preface, Code Louisiana.*

SECTION 7.

Justification or excuse. General rules at Common law.

Sec. 7 enacts that all such common law rules shall remain in force. Why not put them in the Code? Here is what Chief Justice Cockburn said of a similar enactment proposed in the English Code :

"Such a provision appears to me altogether inconsistent with every idea of codification of the law. If it is worth while to codify at all, whatever forms a material part of the law should find its place in the Code. The circumstances under which acts, which would otherwise be criminal, will be excused or justified, forms an essential part of the law, whether written or unwritten. If the unwritten law is, as part of the law, to be embodied in a Code, so material a part of it as that with which we are dealing ought certainly to be carried into the Code, and should not be left at large, to be sought for in the unwritten and traditional law, which the Code once established, it will be worth no one's while to study and which will speedily become obsolete."

SECTION 11.

On Insanity as an excuse for Crime.

Not a word about drunkenness, and the rule that, though it is not an excuse for a crime, yet where the intention of the party guilty of an offence is an element of the offence itself, the fact that the accused was intoxicated at the time may be taken into consideration by the jury in considering whether he had the intention necessary to constitute the offence charged. *R. v. Doherty, 16 Cox, 306; R. v. Cruse, 8 Cox 541,—* There is no room for doubting that such is the law. Then, why not insert it?

SECTION 60.

What does this strange enactment mean? says, Lord Cockburn, on a similar one, in the English bill.

SECTION 61.

Accessories.

(See *Hume, Commentaries*, and, *Alison, principles of the Criminal Law*: for Scotland.)

There is no change with the previous statutory law, intended by this article, I assume. It is taken verbatim from the English Code, Sec 71, which the Commissioners gave as existing law. It is, however, couched in terms calculated to mislead, in view of Sec. 983, which enacts that where one is punishable under two sections, he may be indicted under either. A proviso should be added, to the effect that, notwithstanding sec. 983, where accessories before the fact, and aiders and abettors, (principals in the second degree) are liable to prosecution and punishment by a special enactment, creating a substantive separate offence, they shall be prosecuted under that special enactment only, as in art. 15, *7th Rep. Imp. Comm.* There are, through the Code, a number of enactments of that kind: aiding suicide for instance, a new provision.—Sections 185, 186, 166, 160, are other instances where the offenders, in many cases, would be, at common law, accessories, or aiders and abettors.

A. and B. go out together with a gun with intent to kill D. A fires the shot, but his gun bursts and kills himself, A. A has committed self-murder, suicide, and B. is, as aider and abettor, under this Section 61, and at common law, guilty of the same crime, and as such to be hanged, whilst, under sec. 237, he is only punishable with imprisonment.—So that he is indictable first, at common law, 2nd, under section 61, and 3rd, under section 237. And there are cases where an aider and abettor cannot commit the crime himself. In rape, for instance, a husband cannot be guilty of rape on his wife, but he may be an aider and abettor to it. In such a case a special indictment would be necessary. One charging the husband as a principal would be unintelligible to a jury.

Section 61 same as 71 of the Imperial Code. But by Section 496, the Imperial Code enacted specially that "Every one who is a party to any offence within the meaning of Section 71 may be convicted either upon a count charging him with having committed that offence, or upon a count showing how he became a party to it within the meaning of that Section." Such a Section is not in our Code. It is submitted that it would be prudent to enact it—in fact it seems almost necessary.

SECTION 64.

Attempts to Commit Crimes, New Provisions.

A, with the intention to kill B., takes up a revolver which he thinks to be loaded and shoots at B. but the revolver was not loaded in any of its chambers. Is it the intention of Parliament to make this constituting an attempt by A to murder B punishable as such by the criminal law, *R. v. Lovel*, 2 M. & R. 34.

Then, if so, suppose A, wanting to kill B, goes out in the dark and fires at a post, thinking it is B, would A be indictable for attempt to murder B? If so, I take that to be new law, Did Parliament foresee these consequences of Section 64?

On sub-section 2 which declares that the question whether an act done with intent is or is not too remote to be indictable, Ch. Justice Cockburn says:

"To this, I most strenuously object, the question is essentially one of fact and ought not, because it may be one which it may be better to leave to the judge to decide than to submit it to a jury, to be, by a fiction, converted into a question of law.

"The same thing is done in other instances, and is in all of them open to objection. The right mode of dealing with a question of fact, which it is thought desirable to withdraw from the jury, is to say that it shall, though a question of fact, be determined by the judge."

Then, how is this going to be worked? Will the judge dismiss the jury and discharge the prisoner, if he finds that the act is too remote?

SECTION 68.

Sections 6 and 7 of ch. 146 R. S. C., concerning treason, have been left unrepealed.—Yet, section 68 of the Code provides for the same offence.—Punishment is not the same in one as in the other.

SECTION 70.

Section 70.—Conspiracy to intimidate a legislature or legislative Council.—Why not extend it to Senate and House of Commons?—Probably, an oversight.

SECTIONS 99, 100, 247, 248, 488.

These five sections relate to the causing or attempting to cause bodily injuries or injuries to property by explosives :

Why five sections for what could so easily be cast into one ?

99. Explosion, no injury, Life.

100. Attempt with, or without explosion, 14 years.

247. Explosion causing injury, Life.

248a Attempt same, with intent to do grievous bodily harm, Life.

248b. Attempt same, with intent to do bodily injury by explosives, 14 years.

488. Attempt to destroy building by explosives, 14 years.

And, in sections 100 and 248, the words " whether any injury or bodily harm or bodily injury is effected " are absurdities. If such an injury is effected, the offence is no more a mere attempt but is the full offence itself and falls either under 247 or 488.

SECTION 104.

Any one found with smuggled goods is punishable, *but only, if, when so found, he is carrying offensive weapons*, as in repealed clause.—Is that condition intentional ?

SECTION 133.

Frauds upon the government (Abbot's act.) Is this an indictable offence ? Probably so, by general rules. But why, by exception, not say it as in other cases ? Submitted that it is an oversight. It was provided for in the original act.

SECTIONS 144-263.

Sections 144 and 263 ought to form only one.—144 sub. sec. 1, is for resisting, or obstructing a *public* officer in the execution of his duty. Punishment, ten years.—263 is for assaulting a *public* or *peace* officer in the execution of his duty. Punishment, two years.—Then sub. sec. 2, sec. 144, again provides for the offence of resisting or wilfully obstructing any *peace* officer in the execution of his duty. Punishment, two years. Ten years for resisting a *public* officer, and, by the same clause, two years for resisting a *peace* officer. By the interpretation clause, Sec. 3, the expression " peace officer " includes a " Mayor, Warden, Reeve, Sheriff, Deputy Sheriff, Sheriff's officer and Justice of the peace, and also the Warden, Keeper or guard of a penitentiary, or of any prison, and any police officer, police constable, bailiff, constable or other person employed for the preservation and maintenance of the public peace, or for the service or execution of civil process "

So that, by 263, an *assault* on a Mayor, Reeve or Warden, in the execution of his duty, is punishable by *two* years, and by 144, *obstructing* him in the execution of his duty is punishable by *ten* years.

SECTION 147.

Is that enactment not previously covered for by sub-section 3 of section 145 ?

SECTION 155.

Sec. 155 makes the compounding of a (*qui tam action*) *penal action*, an indictable offence—but what about compounding felonies or any indictable offence ? not a word of it. Why not provide for it in the Code ? Sections 156 and 157 apply exclusively to what is known at common law as *theft bote*, compounding certain offences : Submitted—that a Code of this nature should, as much as possible, cover all offences known to the law.

SECTION 158.

Section 158 is out of place—it ought to be after Section 942, as it was before.

SECTION 159.

Escapes and Rescues.

A gaoler who, by negligence, allows a prisoner to escape, is, at common law, guilty of the offence known as a negligent escape, and indictable and punishable as such. Section 7 of Chap. 155 R. S. C. had made it a statutory offence without altering the punishment. Now, this last act is repealed, and not a word of a negligent escape is to be found in the Code. (part XI.) Sections 165 and 166 apply exclusively to voluntary escapes, that is, where the gaoler voluntarily and intentionally permits the escape. It follows that a negligent escape remains indictable at common law. Another offence not provided for by the Code.

SECTION 175.

Section 175 decrees 10 years imprisonment for the attempt to commit sodomy.

Section 260 decrees 7 years and whipping for the assault with attempt to commit sodomy—what is the difference between the two?—See John v. R. 15 Supr. C., from British Columbia.

Why two sections and two different punishments for the same offence? An attempt to commit crimes of that nature, where personal violence is a necessary ingredient, is an assault with intent to commit that crime. In such a case, an attempt is an assault, and an assault is an attempt.

SECTION 176.

Incest is now, by that section, a crime, and is so since 53 Vic. Chap. 37:—punishable by 14 years imprisonment. But, in Prince Edward Island, by the 24 Vic. Chap. 27, left unrepealed, incest is punishable by 21 years—and, in New Brunswick, by chap. 145, Rev. Stat, also left unrepealed, the same crime is punishable by 14 years. Adultery is also made an indictable offence by the last Act. These two Acts should be repealed.

Mr. Justice Burbidge, in his valuable Digest, [mentions also a Nova Scotia act on incest. It ought also to be repealed.

SECTION 181.

Are the words "*seduce a girl of previously chaste character*" correct? Is the connection with a dissolute known character called seduction? Then it reads "*seduces and has illicit connection*"? So does section 182. But section 183 reads "*seduces or has illicit connection*." Is that difference intentional?

SECTION 183.

Through a slip in the draft, probably, *it is not now a punishable offence for an employer to seduce a chaste woman under 21 years of age who is employed in his factory, mill or workshop.*

SECTION 187.

As to householders permitting defilement of young girls on their premises—It makes the owner *and* occupier punishable. The English Statute 48-49 Vic. 69, s. 6., says, the owner *or* occupier. The alteration makes a vast difference, and one favouring such an immoral traffic.

SECTION 192.

Nuisance.

Section 192 makes punishable a *common* nuisance which occasions injury to the person of any individual.—Now, this is unmitigated heresy. It was in the English bill, but it is none the less an error, an absurdity on its face. If it occasions injury only to the person of an individual, it is not a *common* nuisance. And how such an error can have crept in, is hardly conceivable, as the very preceding art., 191, gives an accurate definition of a common nuisance.

SECTION 193.

Section 193 is an enactment about convictions for nuisances *not criminal*. Section 429 of the Imperial Code, which provided for the pleading and procedure, in such cases, has been omitted.—Section 641, sub-section 4, which limits the mode of proceeding by indictment does not affect informations:—see note to Section 641.

SECTION 194.

Provides for the offence of one exposing for sale, for human food, articles which he knows to be unfit for human food, and makes it indictable. Should that not be punishable by summary conviction? Then, is not Ch. 107, R. S. C. sufficient to cover that offence? The expression *food*, it says, includes every article used for food or drink by man or cattle, and food shall be deemed to be adulterated, if it consists wholly or in part of a diseased, or decomposed, or putrid, or rotten animal, etc., and it provides against bad milk, or butter, and all other articles of food possible.

SECTIONS 198–207.

The offence in Section 198 is for keeping a disorderly house or bawdy-house.—Indictable, punishment one year.

By sec., 207, every keeper of a disorderly house or bawdy-house is liable on summary conviction to a fine not exceeding \$50 or to six months imprisonment. Is there a difference in the two offences?

SECTIONS 210, 211, 215.

Injuries by not providing necessities.

These sections are simply re-enactments of the provisions regarding the neglect or refusal of parents, husbands, or masters to provide the necessities of life for their children, wives and apprentices or servants, with an addition, however, which is a palpable error, the words “if the death of a child, or a wife, or a servant, is caused by such neglect.” That never was in the Statute, and could not be. That is culpable homicide at common law, and, by the Code itself, Section 220, murder or manslaughter. The consequence is that murder or manslaughter by neglecting to provide is now triable at quarter sessions and punishable only by three years imprisonment, section 215: Is that right?

SECTIONS 220-228.

Murder by fright.

Why limit to children and sick persons the rule that a murder may be committed by fright or influence on the mind.—On a grown up person, it may produce the same result. It is matter of evidence only.—The Code makes the following case not to be murder. It is a mistake, I submit.

Suppose it to be proved to the entire conviction of the Court that B., the deceased, was in a very critical state of health, that A, the heir to B's property, had been informed by B's physicians that B's recovery absolutely depended on his being kept quiet in mind, and that the smallest mental excitement would endanger his life; that A immediately broke into B's sick room, and told him a dreadful piece of intelligence which was a pure invention; that B went into fits, and died on the spot; that A had afterwards boasted of having cleared the way for himself to a good property by this artifice. These things fully proved, no judge could doubt, it seems, that A had voluntarily caused the death of B, nor is there any reason for not punishing A, in the same manner in which he would have been punished if he had mixed arsenic in B's medicine.

SECTION 239, *new*.*Death before Birth.*

Provides for the case where a child dies *before* his birth by the mother's neglect to provide reasonable assistance in her delivery. That is *new* by all means and in *all* respects. Who ever heard of one dying before he is born, *death before birth*? Sec. 219, in this very code, says that a child is not a human being in law till he has completely proceeded in a living state from the body of its mother. Submitted that, on the face of the code itself, this section 239 is contradictory in its own terms. It is true that sec. 240, as to concealment of birth, has also, as the English Statute had, the words "whether the child died before its birth" But that section related to the concealment of a *dead* body: then, it is not a happy expression, even there.

And this section 239 is clumsily drawn. The child must have died, or have been permanently injured *thereby*, that is to say, by the neglect of the mother. The indictment must charge the offence in those terms, and the prosecutor must, of course, prove accordingly. Why then add "unless the mother proves that such death or permanent injury was not caused *thereby*"? (by such neglect.) What does all this mean? Either the prosecutor has proved his case or not. Why put that *onus probandi* on the poor mother? But the section seems unnecessary altogether. Are not the provisions against abortion or attempts to procure abortion coupled with the law of infanticide sufficient?

SECTION 242.

"Unlawfully" is the term used in sections 242, 245, 246, 248, 250, 486.

"Wilfully" in sections 243, 439, 488.—Quotations, to demonstrate the want of harmony or the want of uniformity, might be multiplied.—They appear everywhere on a simple inspection.

SECTIONS 250-489.

Is not sub-section 2 of 489 provided for, previously, by section 250, S. S. A. & B. The first one decrees imprisonment for life for obstruction upon a railway, or displacing a rail, or interfering with signals, or any other unlawful act, *with intent to cause danger to life or person*. The second, imprisonment for life, for obstruction upon a railway, or displacing a rail, or interfering with signals, or unlawfully to do any other thing, *with intent to injure, or to endanger, the safety of any person travelling or being upon a railway*. What is the difference? Would it not be better to make only one of these two enactments?

SECTIONS 256, 257, 546.

256 is for sending an unseaworthy ship to sea.

257 is for taking an unseaworthy ship to sea.

Now, by 546, no prosecution under 256 is allowed without the consent of the Minister of Marine and Fisheries—Why for one, and not for the other? The two clauses should form only one, or 546 should apply to both.

SECTION 258.

Assault.

An assault is defined as being the act of intentionally applying force to the person of another, directly or indirectly. Now, that is not a mere assault, it is an assault and battery. Every battery includes an assault, but every assault does not include a battery. Why not keep a so well established distinction?

DEFINITIONS IN REPORT OF 1889—*Imp.**Article 108.*

A battery consists in the *actual* infliction of any the least unlawful violence to the person of another, in an angry, or revengeful, or rude, or insolent manner.

Article 105.

An assault consists in any attempt or offer with force and violence to do bodily harm to another whether it be for malice or wantonness.

SECTION 263, 528, 529.

By Section 263a, it is made an indictable offence to assault any person with intent to commit an indictable offence. Punishment, two years. Now, the words *in any case where no express provision is made herein for the punishment of such assault* ought to be added, as assaults with intent to commit special indictable offences are provided for in various sections for instance, section 400—assault with intent to rob; 268—assault with intent to commit rape—which are the words always used in indictments to attempt to commit rape and held good by Supreme Court in *John v. R.*, a criminal case from British Columbia; 282, sub-sections C. D. H., assault with intent to commit murder.

Then, sections 528 and 529 ought, like the corresponding sections of the Imperial Code, 419-420, to be made applicable to conspiring to commit offences. They, at all events, should be altered, or Section 263a should. They clash, as to all the cases where an attempt to commit a crime is an assault with intent to commit that crime. Perhaps better to strike out 263a altogether. 528 and 529 would cover the offence completely, specially with section 64 as it stands.

The point is important; as for the trial, and specially for the challenges of jurors, the accused and the Court must know under what section the charge is laid—for, if under 263, four peremptory challenges only are allowed—if under 528, twelve are.

528. The words at the end, *or for any term longer than 14 years*, should be stricken out. There is not a single instance in the whole Code, that I have found, where the punishment is for a specific term of over 14 years.

Section 263e, 2 years for an assault on the day of a *parliamentary*, or *Municipal* election.—Why not extent it to a Provincial Election?

SECTION 266.

Section 266. "Carnally know" is complete upon proof of penetration, but that applies only to that section. What about sodomy, sec. 174?—the Imperial Code, under the corresponding section—sec. 144, repeats that the offence is complete upon penetration.

Then, there are sections 189, carnally knowing idiots; 269, carnally knowing children under 14, and others.

Heretofore, the words "carnally know" were defined in the Procedure Act so as to apply generally to all offences of that nature. Would it not be better to do the same? Not doing so might lead to serious consequences? For offences of such gravity, the statute law should speak in clear terms.

SECTIONS 372, 373, 374.

Fraudulent Sales.

These three sections, on fraudulent sales, hypothecation, or seizure by authority of Justice of real property, by ch. 164, R. S. C., secs. 93, 94 and 95, now apply only to the province of Quebec. The Code extends the two first, 92 and 93, to the whole Dominion, but not 95, on fraudulent seizure. Why that distinction? It must be an oversight.

SECTION 450.

Upon conviction for an offence against the Trade-Marks Act, the punishment is 2 years with or without hard labour, "or to fine, or to both imprisonment or fine." These last words from "or to fine" are unnecessary. For every offence under this Act, by sec. 958, a fine may always be imposed in addition to, or in lieu of the punishment when it is not for more than 5 years. Such redundancies disfigure a Code.

SECTION 534.

Section 534. Is not that civil law, to be applied by the civil courts, in civil actions: as in *Wells & Abraham, L. R. 7 Q. B. 554*, *Osborne & Gillet, L. R. 8 Ex 88*; *S. & S., 16 Cox., 566*? If so, is it *intra vires*?

SECTION 540.

A defamatory or seditious libel is not triable at quarter sessions, but a blasphemous libel, by the code, is. That is *new*. Submitted that this must be an oversight.

Is it intentionally that perjury, forgery and counterfeiting coin, have been made triable at quarter sessions? That was never so before, here or in England, and was not to be so under the Imperial Code:—The same, as to manslaughter. It is now to be triable at quarter sessions. That should not be.

SECTION 542.

Offences within the Admiralty Jurisdiction.

This section has to be carefully considered. It seems to me to assume that the Courts of Canada would be competent to try any crime committed within the jurisdiction of the Admiralty by a *foreigner* on board *any* ship. Now, that is not so. A crime by a *foreigner*, committed on board a *foreign ship*, on the high seas, within the jurisdiction of the Admiralty, is not cognizable by the laws of Canada. That is uncontrovertible law. *R. v. Lewis, Dears & D. 182*. In the famous case of the "*Franconia*" *R. v. Keyn*, in 1876, it was held by a much divided Court, seven against six (Cockburn, Kelly, Bramwell, Lush, Pollocks, Field and Phillimore, against Coleridge, Brett, Amphlett, Grove, Denman and Lindley,) that such was the law, even if the crime by a *foreigner* on board a *foreign ship*, had been committed, on a British subject, within three miles of the British Coast. This decision caused intense surprise, in England, where it had been assumed, for centuries, that the three mile zone around the coast was to be considered as territorially within the realm; and the Imperial Parliament lost no time in passing a Statute to declare it to be so, the 41-42, V. c. 73, the *territorial waters jurisdiction Act*, 1878, which applies to Canada. And, now, *R. v. Keyn* is not to be followed; but it leaves the law untouched, that if the crime by a *foreigner* on board a *foreign ship* be committed on the high seas, that is outside of the three mile zone, the Courts of the country are incompetent to try it. Now, by that Act, 41-42 Vic. c. 73, it is enacted that, in Canada, (in any of Her Majesty's dominions) proceedings for the trial of a foreigner for a crime committed on board a foreign ship, within one Marine league of the coast shall not be instituted except with the leave of the Governor General (or officer for the time being administering the government, 52-53 Vic. 63 Imp.) in which such proceedings are to be instituted, and on his certificate that it is expedient that such proceedings should be instituted, and that, on the trial, it shall not be necessary to aver, in any indictment or information, that such consent or certificate of the Governor General has been given, and the fact of the same having been given shall be presumed unless disputed by the defendant at the trial, and the certificate of the Governor shall be sufficient evidence of such consent, as required by the said Act. Now, that is the law of Canada, and will be, after the Code is in force. Why not insert it in the Code? Are not such omissions fatal to the completeness of a Code.

SECTIONS 543 to 548.

These sections contain provisions that the prosecution of certain offences shall not take place without the leave of the Attorney General, or, in one case, of the Minister of Marine and Fisheries. They are all re-enactments, I believe, except section 544.

Now, in such cases, an indictment is defective, if it does not aver that such consent has been obtained, and the magistrate before whom the information is laid cannot proceed without evidence that it has been given.—Now, why not provide for the case, and enact, (what is the law for Canada as well as for England, for offences committed on a foreign vessel by a foreigner within one league of our sea coasts, *by the Territorial Waters Act of 1878 Imp.*, as to the previous consent of the Governor General required for such prosecution, as noted under previous section,) that it will not, now, be necessary to aver such consent in the indictment, and that its existence shall be presumed, if not specially denied.

Such an enactment exists partially in section 641 as to the consent of the Attorney General for the preferring of an indictment without a previous investigation. If a good provision for one, why not for the other? Submitted, that such a general provision has been inadvertently omitted,

SECTION 540.

Manslaughter will now be triable at quarter sessions.—Surely, this is not intentional?

SECTION 551.

Limitation of Prosecutions.

By section 551, the offence of having illicit connection with a girl under 16 must be prosecuted within one year.—But, for the attempt to commit the offence, there is no limitation of time whatever.—Same, for a guardian having illicit connection with his ward, and in, perhaps, many other cases. This must be an oversight.

It is impossible to guess upon what basis the distinctions in this article, between the offences which are purged by efflux of time, and those which are not, rest. See *post*.

It is, in a large measure, nothing but a collection of previous enactments found scattered all over the statutes of the Dominion. It was certainly proper to reproduce the law on the subject in the Code, but a general review of it, on some previously understood basis, should have been made. The omission to do so has been intentional, it would seem; as some alterations have been made, though to what extent I have not the time just now to ascertain. That is one of the great objections to the Code, generally. What is new law? What are the changes in the law? Where did Parliament intend to enact new law, or simply declare the law?

That is left to be ascertained by those who have to deal with the law, including magistrates, justices of the peace, &c., who cannot be expected to be in a position to very well be able to do what will prove to be a serious difficulty in the higher courts.

Then, the rule is, that it is not necessary, in a criminal case, for a defendant relying on a statutory limitation to plead it in bar. It devolves upon the prosecuting power to show an offence within the statutory period. Why not a word on this rule, one way or other, in the Code?

The section says "no prosecution shall be commenced." What constitutes the *commencement* of a prosecution? Is it the plaint or information, or the warrant, or the arrest? That is a mooted point, why not settle it?

LIMITATION IS 3 YEARS,

For treason, and offences against the Trade Marks' Act.

2 YEARS,

For frauds upon the Government, for corrupt practices in municipal affairs, and for solemnizing a marriage without lawful authority.

1 YEAR,

For resisting the reading of the Riot Act,
 Carrying arms at, or near, public meeting,
 Seduction of girls under sixteen, but above fourteen,
 Seduction under promise of marriage,
 Seduction of a ward by her guardian,
 Procuring a woman to be a prostitute, or overpowering any woman
 by drug, or liquor, so as to enable any person to have unlawful connection
 with her,
 Parent or guardian procuring defilement of his daughter or ward,
 Householders permitting defilement of girls on their premises.

6 MONTHS,

For unlawful drilling,
 Possession of weapons dangerous to the public peace,
 To print or publish reward for return of stolen property.

3 MONTHS,

For cruelty to animals,

1 MONTH,

For carrying firearms, bowie knives, daggers, &c.

NO LIMITATION,

In all the others, including for instances :
 Exposing for sale articles unfit for human food,
 Gambling in public conveyances,
 Grave-digging,
 Attempts to injure cattle,..... etc., etc.
 Injuries to poll books.

Then, I have not found anywhere that the prosecution, for attempt or conspiracy to commit the offences which have to be brought within a limited time are, at all themselves, limited as to time.

Why decree that an offence must be prosecuted within say, a year, and leave the accidentally abortive attempt to commit that same offence liable to be prosecuted for during two, five, ten, an unlimited number of years?

Where the gist of the offence is the conspiracy, or an attempt, a statutory limitation touching only the commission of the offence does not apply.

Why not put all these limitations in a list as a schedule to the Code? Also, the list as to arrests without warrant. —Punishments, also, perhaps.

SECTION 552.

Any one can arrest, without warrant, any one found committing sodomy,—but, not any one attempting to commit sodomy.—So that if any one, not a peace officer, sees any one attempting to commit that crime he must wait till the crime is committed before arresting him.—also no arrest without warrant, by any person, for an indecent assault.

Is that right?

By sub-section 3, of section 552, a peace officer may arrest without warrant any one whom he finds committing any offence against this Act.

By sub-section 2 thereof, a peace officer may arrest without warrant any one found committing any of certain specified offences against the Act. What is the use of the last one, sub-section 2? Does not sub-section 3 cover it?

But both are useless, for section 27 enacts that every peace officer is justified in arresting without warrant, any person whom he finds committing any offence. Or, it is this last one, perhaps, that ought to disappear. Sections 24 to 30, also, seem unnecessary, in view of section 552. By authorizing the arrest without warrant, in the cases mentioned in 552, it is justifying such arrests, it would seem.

Here we have three different enactments to say the same thing, as to the offences specified in sub-section 2 of section 552.

SECTION 558.

The words "with respect to the jurisdiction of justices" in the second line, should be stricken out; as well as the word "magisterial" in the other parts of the section.

It ought to read in the second line "with respect to the territorial jurisdiction of the justices *and of the Courts of Criminal jurisdiction.*"

We find, here, from section 558 to section 608, intercalated between enactments affecting exclusively the Superior Courts, the law regulating the preliminary procedure before magistrates, justices of the peace &c., &c. Then, at section 762, down to section 882, are intercalated the rules of procedure on summary trials for indictable offences, speedy trials, and juvenile offenders. And, at section 882, are resumed the enactments affecting the Superior Courts, but only for six or seven provisions. And, at section 839, down to section 909, are the summary convictions procedure rules. Then sections 910 to 983 again take up enactments affecting the Superior Courts.

Is not this mixing up wrong? If the procedure before the magistrates is to form part of a Code of this nature, (a question determined negatively by the English Commissioners, they should be put together, and form a distinct and separate chapter at the end of the Code.

SECTION 560.

Section 560, strike out "beyond the seas" and replace by "out of Canada" "Beyond the seas" are the words in the Imperial Act, 11-12 Vic. cap. 42, and they are correct for England, but not for Canada.

SECTION 590.

The use of stenographers in all the criminal courts for taking down the evidence should be authorized, as it is in section 590, sub-section 7, for the preliminary investigations by the magistrates. It has been doubted by eminent judges if it was legal to have evidence taken by stenographers at the trial, though section 632 would seem now to infer that it would be so.—However, better to make point clear. The ruling, in *Riel's* case, by the Privy Council applies only to the North West territories.

SECTION 595.

The marginal note "copy of depositions" is a manifest error. The clause is a reproduction of section 458 of the Imperial Code, entitled "person preferring charge may have himself bound over to prosecute."—Then sub-section 4, thereof, it is submitted, ought to be stricken out—it is not practicable.

SECTION 614.

It is clearly by error that section 614 has been made applicable to all the sections from 65 to 78 inclusive. The Imperial Code, 489, extended it only to section 65, treason, and, 69, treasonable offences.

SECTION 626.

As to joinder of offences

There will be some difficulty to work this clause. It makes the law the same in all cases, per Lord Ellenborough, *R. v. Jones*, 2 *Campbell*, 131. Per Buller, J. in *Young's case*, 1 *Leach* 511; *R. v. Heywood*, L. & C. 451; *B. v. Bradlaugh*, 15 *Cox*, 217. At common law, a count for a felony could not be joined with a count for a misdemeanour, 1 *Starkie, Cr. plead.* 43. The reason was that the challenges and mode of trial generally, were not the same in both cases. Now, the same reason will continue to exist under the Code, as to challenges. For offences punishable by death, twenty challenges are allowed. For offences punishable by more than five years, twelve challenges are allowed. For all other offences, four are allowed, 668. How will it work to have an offence where twelve challenges are allowed in the same indictment where four challenges are allowed? However, those in charge of prosecutions should obviate all trouble by an unnecessary joinder of offences, but the Statute should not authorize what cannot be done. Of course, charging one and the same act as a different offence, in various counts, is a different thing. The section, it is submitted, should say instead of "for any offences whatever" (or, be re-enacted so as to say) that any number of counts for any offences punishable by five years or less may be joined in the same indictment and, any number of counts for offences punishable by more than five years may be joined together.

What about joinder of defendants, and whether, and when, they are entitled to separate trials? Not a word of it.

It was no objection, in point of law, that different felonies were charged in different counts in the same indictment. The Court used at the trial the powers that sub-section 3 of this section 626 give.

SECTIONS 631-632.

Autrefois acquit and autrefois convict; how is the issue to be tried? By the Court, without a jury? Ought to be made clearer; and submitted, that trial ought to be by the Court.

SECTION 633.

A second Accusation.

Section 633 decrees that, when an indictment charges *substantially* the same offence as that charged in the indictment on which the accused was given in charge on a former trial, but adds a statement of intention or circumstances of aggravation tending, if proved, to increase the punishment, a previous conviction or acquittal shall be a bar to such subsequent indictment. This either means nothing, or means what I conceive not to have been intended. That "no man is to be twice put into jeopardy" or, as said in the civil law, *nemo bis vexari debet pro eadem causa*, is a sacred rule of law in every civilized country. And, under the English law, that rule covers, not only the offence directly charged in the previous indictment, but also, any lesser offence of which the accused might have been found guilty thereon, at common law, or, which, by special statutory enactment, the accused could have been found guilty of. At common law, for instance, an acquittal on a charge of murder bars a charge of manslaughter for the same homicide; and why? because, on a charge of murder, a verdict of manslaughter can be returned. And now, an acquittal on a charge of child murder is a bar to a charge for conceal-

ment of birth, because by statute, a verdict for the latter may be given on the former. Section 631 re-enacts that law in clear terms, but the question that section 632 raises is one not so clear. Is, for instance, at common law an acquittal upon a charge of manslaughter a bar to an indictment for murder for the same homicide? In an old case, it was held that it was, because the two offences differed only in degree. That is founded on reason. If the party charged on the first indictment was not guilty even of manslaughter it would obviously be absurd to charge him with murder on the same facts. *R. v. Holcroft*, cited in 2 *Hale*, 246. Denman J., however in *R. v. Tancock*, 13 *Cox*, seems to have had doubts on the question. Under those circumstances it was expedient to settle the point for the future by the Code, as it does, though to enact the conversed proposition was unnecessary, and already covered by the provision of Art. 631, repeated in another form in section 713. In *R. v. Gilmore*, 15 *Cox*, 85, Baron Huddleston held, on these principles, that, on an indictment for a felony, the acquittal is no bar to an indictment for misdemeanour on the same facts, though the misdemeanour was included in the felony, because the jury could not on the trial for the felony have convicted of the misdemeanour. See 1 *Chitt Cr. L. R. v. O'Brien*, 15 *Cox*, 29; 1 *Bish. Cr. L.* 804, 1059. Under the Code, in Canada, now, sec. 713 will cover that point. A late case on the subject may be referred to, *R. v. Miles*, 1890, 17 *Cox*, 9, with the remark, however, that all of Hawkins J., *dicta* therein were not concurred in by the other judges. A case of *Ryley v. Brown*, also in 1890, 17 *Cox*, 79, is on the same question. I refer also to a case in Mauritius, 2 *Mauritious decisions*, 85, *R. v. Rozan*, 17. If a man charged with the murder of a girl whose mis-carriage he had sought to procure, and who after the operation died, is acquitted of murder, he may still be tried and convicted of an attempt to procure abortion. And, in Ontario, it was said by Draper J. that, if A commits a burglary, and, at the same time steals goods, out of the house, if he be indicted for the larceny only and be acquitted, yet he may be indicted for the burglary afterwards, and *a converso*, if indicted for the burglary, with intent to commit larceny, and he be acquitted, yet he may be indicted for the larceny, for they are several offences, though committed at the same time; *R. v. Magrath*, 26 *U. C. Q. B.* 388. And in *R. v. Salvi*, 10 *Cox*, 481, in 1857, it was held that an acquittal on a charge of cutting and wounding with intent to murder was not a bar to a charge on the same act for murder, the death having occurred since. So, in *R. v. Morris*, in 1867, 10 *Cox* 480, it was held, Kelly C. B. diss., that a previous conviction for an assault is not a bar to an indictment for manslaughter of the party assaulted dying afterwards. If, in *Morris*' case, the defendant had been acquitted on the charge of assault, the second would have been barred, *R. v. Elrington*, 9 *Cox*, and cases cited in *R. v. Miles ubi supra*. By this section, 633, it is not intended, I take it, to make the law otherwise than it was held to be in these last two cited cases. I would submit, that it is unnecessary, I mean the first part, and that section 631 is quite sufficient. But, if allowed to remain, the wording should be altered. I take the law on the subject to be, from a review of the cases and text-writers, that *where the second offence grounded on the same facts is, as charged in the second indictment, "greater" than the offence that was charged in the first*, an acquittal on the first bars the second, if it results from it that the defendant could not have been guilty of the offence charged in the other: *Chitty Cr. L.* 455; or, if such acquittal is inconsistent with his having been *then* guilty of the offence charged in the second: and, that a second indictment, upon the same fact or facts, charging an offence greater than the first, lies only where, since the conviction on the first, a supervening fact has happened which changes the nature of the offence. If that is the law, (I am not sure that it is) submitted, that Art. 633 might be made to say it in clear terms. When an offence is *substantially* the same as another one—is far from being clear. Say, when anyone is arraigned upon a second indictment based on the same fact or facts but charging a *greater* offence than the first indictment did, an acquittal on the first shall be a bar to such subsequent indictment, if it results from it that the defendant could not *then* have been guilty of the second, but a conviction on the first shall not be a bar to the second, if the offence so charged in the second has become such only through facts subsequent to the conviction on the first. (I give the sense I mean, only; the proper shape would have to be given to it.)

MEMORANDUM RELATING TO THE

CLAUSE 289.

Jurisdiction of Quarter Sessions.

This clause was intended to represent 5 & 6 Vict. c. 38, but was inaccurate in several particulars. The Attorney General proposes to substitute for the clause, as it stands, the following, which, in the main, represents the existing law, but enlarges the jurisdiction of the courts of quarter session by enabling them to try burglaries and robberies with violence, restricting them, however, in such cases to sentences of 14 years' penal servitude. It also prevents their jurisdiction from being narrowed by the new definition of fraudulent misappropriation. The net result of the proposed clause thus is to give the courts of quarter sessions jurisdiction in cases of criminal breach of trust, and to a certain extent in cases of burglary and robbery.

The courts of quarter session shall have jurisdiction to try all offences against this Act, with the following exceptions (that is to say):—

(a.) Offences against any of the provisions of Part II. of this Act other than the provisions of sect. 45 and sect. 46;

(b.) Offences against any of the provisions of Part III. of this Act;

(c.) Offences against any provision contained in any of the following chapters of this Act (that is to say): chapter 24, chapter 26, chapter 32, chapter 33, chapter 34;

(d.) Offences against any of the following sections of this Act (that is to say): sect. 98, sect. 104, sect. 142, sect. 146, sect. 219.

(e.) Any offence upon conviction of which a person not previously convicted, may be sentenced to death or penal servitude for life: Provided, That courts of quarter session shall have jurisdiction to try any person on a charge of fraudulently misappropriating property of the value of 500 l. or upwards, or on a charge of robbery, or on a charge of breaking into a dwelling house by night, with intent to commit an indictable offence therein; but no such court shall have power to pass a sentence of more than 14 years' penal servitude for any such offence upon any person who has not been previously convicted, nor in any case to sentence any such person to be flogged or whipped;

(f.) Any conspiracy to commit any of the offences aforesaid.

CHAPTER 40.

Venue.

The law of venue is abolished by Clause 290. This makes new provisions necessary as to the local jurisdiction of criminal courts. They are contained in chapter 40, which, however, contains nothing substantially new except Clause 304, which gives power to the High Court to change the place and mode of trial. This extends the principle of Palmer's Act, and replaces the existing law as to *certiorari*. The Attorney General proposes to make a slight amendment in the clause as drawn, confining the exercise of these powers to the High Court in London. Clause 291 authorises the execution of a warrant within seven miles of the place where it is issued, although the Justice issuing it may not have jurisdiction there. The present law is subject to the qualification that the place where the warrant is executed must be in the next adjoining district, so that a warrant issued in Middlesex cannot be executed in a part of Kent within seven miles of the place of issue, because London intervenes.

The Attorney General proposes to amend Section 306, so as to make it correspond with 38 Geo. 3, c. 52, s. 3, from which it is taken. As the Bill stands, it confers a power upon the courts of quarter session, which ought to have been confined to courts of assize. A similar amendment is proposed in Clause 292.

CLAUSE 311.

Refusal to Grant Process.

Clause 311, last paragraph, is new. It enables a prosecutor to appeal to a Judge-at Chambers if a Justice refuses to grant a summons or warrant.

But why are the Imperial statutory enactments as to offences committed abroad, or within the jurisdiction of the Admiralty, applying to Canada not to be found in the Code? If *ultra vires* of the Canadian Parliament, should they not have been inserted somewhere, either as declaratory, or referred to in some way or other? Those gaps should be filled up. If they are not, a student, for instance, preparing for his examination would make a great mistake if he simply relied on this Code. The following Imperial Statutes, for instance, all apply to Canada, and, I believe, that not even a reference to them is to be found in the Code.

The 12-18 V., c. 96, s. 1, Imp., enacts that all offences committed upon the sea, or within the jurisdiction of the Admiralty shall, in any colony where the prisoner is charged with the offence or brought there for trial, be dealt with as if the offence had been committed upon any water situate within the limits of the colony and within the limits of the local jurisdiction of the courts of criminal jurisdiction of such colony.

And s. 2 of the same act enacts that: When any person, shall die in any colony of any stroke, poisoning or hurt, such person having been feloniously stricken, poisoned or hurt upon the sea or within the limits of the admiralty, or at any place out of the colony, every offence committed in respect of any such case may be dealt with, inquired of, tried, determined and punished in such colony in the same manner in all respects as if such offence had been wholly committed in that colony, and if any person in any colony, shall be charged with any such offence as aforesaid in respect of the death of any person who having been feloniously stricken, poisoned or hurt, shall have died of such stroke, poisoning or hurt upon the sea, or any where within the limits of the Admiralty, such offence shall be held for the purposes of the act to have been wholly committed upon the sea.

The 17-18 V. c., 102, s. 467, Imp., enacts that all offences against property or person committed in, or at any place, either ashore or afloat, out of Her Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is or within three months previously has been, employed in any British ship are deemed to be offences of the same nature respectively, and are liable to the same punishments respectively, and may be inquired of, heard, tried, and determined and adjudged in the same manner, and by the same courts in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England.

The 18-19 V. c. 91, s. 21, Imp., enacts that if any person, being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbor, or, if any person, not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is found within the jurisdiction of any court of justice in Her Majesty's dominions which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits. Then, it is enacted that nothing contained in that section shall affect the 12-18 V., c. 96, (*ubi supra*).

By the Imperial Merchant Shipping Amendment Act, 30-31 V., c. 124, sect. 11, it is enacted that:

"If any British subject commits any crime or offence on board any British ship, or on board any foreign ship to which he does not belong, any court of justice in Her Majesty's Dominions, which would have had cognizance of such crime or offence if committed on board a British ship within the limits of the ordinary jurisdiction of such court shall have jurisdiction to hear and determine the case as if the said crime or offence had been committed as last aforesaid."

See *R. v. Armstrong*, 13 Cox, 184.

R. v. Lewis, D. & B.

By 23-24 V., c. 122, Imp., legislatures in Her Majesty's possessions abroad are empowered to pass an enactment as the one contained in sect. 9 of the Procedure Act.

By 28-29 V., c. 68, Imp., any colonial law repugnant to an Act of the Imperial Parliament is, to the extent of such repugnancy, void.

And by the *Courts (Colonial) Jurisdiction Act*, 1874,—37 V., c. 27, Imp.—it is enacted that:

"Whereas by certain Acts of Parliament jurisdiction is conferred on courts in Her Majesty's colonies to try persons charged with certain crimes or offences, and doubts have arisen as to the proper sentence to be imposed

upon conviction of such persons..... When, by virtue of any act of Parliament now or hereafter to be passed, a person is tried in a court of any colony for any crime or offence committed upon the high seas, or elsewhere out of the territorial limits of such colony and of the local jurisdiction of such court, or, if committed within such local jurisdiction, made punishable by that act, such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such colony and of the local jurisdiction of the court, and to no other, anything in any act to the contrary notwithstanding : Provided always that if the crime or offence is a crime or offence not punishable by the laws of the colony in which the trial takes place, the person shall, on conviction, be liable to such punishment (other than capital punishment) as shall seem to the court most nearly to correspond to the punishment to which such person would have been liable in case such crime or offence had been tried in England."

I refer also to secs. 5, 9 and 10, 24-25 V., c. 100. Another act, is the territorial waters limits Act of 1878, applying to offences committed within one league of our sea coasts.

SECTION 641.

Proceedings by information are not provided for as they were by sec. 674 of the Imperial Code. The law would seem then to remain as heretofore, but in what cases will an information be authorized, now that the distinction between felony and misdemeanour is abolished? The word "information" appears twice in the interpretation clause.—Sec. 3, *i. e.* Then section 198, seems to keep the remedy in force for nuisances not criminal: also sect 833 for libel.—This Code itself therefor recognizes that the remedy will still subsist.—Why not then regulate it?

SECTION 660.

Judge may permit prisoners to be absent.

Why give that discretion to the Judge in cases where he did not before have it. The less discretion, the judge has, says Montesquieu, the better the laws and the less arbitrary excess of power there will be.

Submitted, to leave the law as it was, or modify the rule, so to, at least, oblige the accused to appear and plead in person,—116 5th Rep. 1845.

SECTIONS 660-754.

Section 660 allows the absence out of Court, during trial, of a prisoner for any offence whatever, even capital cases (if accused is on bail) What about strictly followed practice heretofore of having accused in the dock in all trials for felonies. See *R. v St. George* 9 C. & D. 485. *R. v Douglas*, C. & M. 193, and other authorities cited in Taschereau's Criminal Law, 2nd edition, page 839. To cover this and other similar points of practice, why not by a general enactment, decree that, in all cases not specially mentioned or provided for by the Code, the practice and procedure as to all offences for which the punishment imposed thereby is death or five years imprisonment or more, shall be the same as it has been heretofore in felonies, and as to all other offences, the same as it has been heretofore in misdemeanours. Something like what section 754 enacts for Ontario only; what is a proper rule for Ontario, ought to be a proper rule for all the Dominion.

And, in sub-section 2 of that section 660, insert after "The Court" the words "in all cases punishable by less than five years imprisonment" so as to make it imperative on the accused to be present in court in all offences of a grave nature, as it has been heretofore in felonies. Otherwise an accused may be tempted, when he sees the evidence going against him and his chances of escaping a conviction lessening, to jump his bail and laugh at the administration of justice in his country.—With the United States so near us, such a thing has to be guarded against a great deal more cautiously than in England. And the fact that the Imperial Commissioners recommended the rule now inserted in our Code in this respect should not have any weight on such a point; what may produce no inconvenience in England may prove here very hurtful to the interests of society. Then, on this as on all the rest of it, it must not be lost sight of that the English bill is yet, after 15 years, nothing but a bill, and that the suggestions of its framers have not been adopted.

SECTION 661.

It is a controverted question whether a prisoner has the right to make a statement to the jury before, or after, the address of his counsel. In *R. v. Weston*, 14 Cox, 846, the prisoner's counsel was allowed to make a statement on behalf of his client. In *R. v. Masters*, 50, J. P. 104, Stephen, J., said that the prisoner may make a statement to the jury, provided he does so before his counsel's address. In *R. v. Shimmin*, 15 Cox, 122, it was held that such a statement is allowed only after the counsel's address. So in *R. v. Taylor*, 15 Cox, 265, and, in *R. v. Millhouse*, 15 Cox, 622, the Court held that a statement by the prisoner could be allowed only when he called no witness. In *R. v. Doherty*, 16 Cox, 306, Stephen, J. said that such a statement must be made before the counsel's address. In *R. v. Borrowes*, noted in *Shirley's Leading cases*, 140, the Judge ruled that any prisoner defended by counsel had no right to make a statement to the jury. "Whatever may be the correct practice says the annotator in *Shirley*, *ubi supra*, it is obviously a reproach to the administration of justice in a civilized country that there should be any uncertainty about so simple a matter." Submitted, that the enactment of a new Code presents an opportunity to remedy such defects in the practice which should not be lost.

SECTION 645.

It would be expedient to declare whether this enactment is merely directory or imperative. It might be enacted that any contravention of the directions contained in this section will not invalidate the finding of the Grand Jury; but that the Court may therefor, upon proper application, before plea, quash the indictment if the accused has, in the opinion of the Court, suffered from such contravention to the requirements of this section.

Difficulties have arisen under a similar clause in the United States. In *Andrew's, V. the People*, 117 Illinois, 195, it was held that a similar enactment was mandatory. *Thompson, on juries*, 724.

SECTIONS 684c and 171.

Section 684c says: offences under part XII, sections 181 to 190, cannot be proved by one not corroborated witness.—Now sections 181 to 190 are not, under part XII, but under part XIII.—This is unimportant—but it is an imperfection.—So, in section 171, the word "used" is missing in *used for divine worship*.

SECTIONS 705-289.

705 provides for any criminal proceeding taken under section 289. And section 289 does not provide for any criminal proceeding, but for the case where no criminal proceedings can be taken.

SECTION 711.

Sec 711 decrees that, if full offence charged, but attempt only proved, the conviction may be for such attempt, and the punishment shall be accordingly.—What is the punishment to be, where an assault with intent to commit has been proven as constituting the attempt? Will it be under sec. 263a? Or under 528 or 529? Or, if for attempt to commit rape for instance, or to rob, under, sec. 268, or 400, or, if to commit murder, under sec. 232? All these are attempts to commit crimes. Or will it be under sec. 951, which provides for the case where no punishment is specially provided for. In a case from British Columbia, in the Supreme Court of Canada, of *John v. R.*, 15 Supr. C. 384, such a question arose, under a verdict of assault with intent to commit rape upon a charge of rape.—Submitted, that punishment should be provided for as it is in sec. 188 of the Procedure Act.

SECTION 712.

Attempt charged, full offence proved.

This is a re-enactment, and a good one. But there are divers enactments in the Criminal procedure Act of 1886, that authorized a verdict for another offence than the one charged, for instance, section 194 allowed a verdict for the offence charged, though strictly speaking, another was proved. Section 196 enacted that if upon a charge for obtaining under false pretences, a larceny was proved, yet the defendant might be convicted of the offence charged: section 197, was of the same nature: Sec. 198, enabled the converse of section 196, a verdict for falsely obtaining under a charge of larceny; *R. v Adams*, 1 Den. 38. See *R. v Solomon*, 17 Cox, 198. Sections 184, 193, 194 are of the same nature. All these are left out.

SECTION 713.

Sec. 713 is a good one. It makes the law the same as to felonies as it has always been understood to be in misdemeanours. In fact, the abolition by itself of the distinction between the two would produce the same result. It is enacted to replace sec 189, 190, 191, 192 and 198 of the Procedure Act. But it ought to be made clearer. The words "as described in the enactment creating the offence, or as charged in the count" ought to be stricken out; they are not necessary, they might perhaps prove embarrassing. Then, the words *as described in the enactment creating the offence* could not apply to an offence at common law, which, it must not be forgotten, has not been by the Code completely abolished, and, after the words "although the whole offence charged is not proved," ought to be added "and although the offence so included is not charged in terms," as it was in sec. 191 of the Procedure Act. So that a person accused—for instance—of rape may be convicted, first, of rape, second, of an attempt to commit rape, (711-713), third, of an indecent assault, (260), fourth, of a common assault, (265)—so for an offence under sec. 269 for carnally knowing a girl under 14—or a charge of robbery.

Then the clause ought to say clearly that the offence that can be so found, though not charged in terms, must be a lesser offence than the one directly charged, and one punishable by a lower degree of punishment. It cannot be that on a trial for an offence—for instance—where the accused had only four challenges, he might be found guilty of an offence on the trial of which he would have been entitled to twelve challenges.—There may be cases where it is difficult to say what offence is included or not in another.

And the clause ought to provide for the punishment by adding "upon such conviction, the punishment shall be as if the indictment had charged in express terms the offence so found by the jury."

SECTIONS 713-714.

* Section 713 enacts in express unrestricted terms that the jury shall not be at liberty, on an indictment for murder, to find the accused guilty of, besides the offence charged, any other offence but manslaughter. Immediately after however, by the very next section, without reference at all to that so very positive enactment of the previous one, it is enacted that, on the trial for the murder of a child the jury may find the accused guilty of concealment of birth.

That is one of the numerous instances where the Code bears intrinsic evidence of being hardly anything else but a collection of statutory enactments put up together without any attempt at harmony.

A new offence, that of a mother causing the death of her child by wilful neglect at her delivery is created by section 239.—Why not on an indictment under this new enactment, allow to find concealment of birth.

SECTION 726.

The Imperial Code abolished the formality of a formal record, as now known. The Commissioners call it, "an extremely formal and prolix document, though the materials from which it is compiled are simply short notes in a rough minute book kept by the officer of the Court," and pages 39 and 40 say: "With respect to the materials to be laid before the Court of Appeal, we propose to abolish the present record. It is extremely technical and gives little real information." The report then suggests what should replace the record.—Section 726 has been in force in Canada for a long time, and, under it, the formal record in the old form, less the caption, has always, in practice, been drawn up, when necessary. Would it not be expedient to adopt the Imperial Commissioners' suggestion in the matter? A record may yet be necessary in cases of a plea of *autrefois acquit* or *autrefois convict*.

SECTIONS 738-744, sub. sec. 5.

By 738, if the Court allows the motion for arrest of judgment, the prisoner is discharged. By sec. 744, sub. sec. 5., the prosecutor may move the Court of Appeal to pass a sentence. But if the prisoner has been discharged, how can a sentence be passed by the Court of Appeal? How is he to be arrested again? And again, if the prisoner has been acquitted and discharged, what becomes of the right given the prosecutor to ask for a reserved case, and to appeal, if refused. If the prisoner is convicted the prosecutor will, of course, rest satisfied, and will not appeal, of a refusal, during the trial, to reserve a case at his request.

Submitted, that a reserved case at the *instance of the prosecutor*, and the appeal by him ought to be stricken out.

SECTION 735.

Strike out the words "writ of error." This proceeding is abolished by sec. 743.

SECTION 747.

New trials (Innovation as to what was felony.)

Introduces new trials in all cases, greatly to be regretted, I believe: A blot on the United States law in criminal cases. One which, it is there often conceded, has, in numerous instances, be taken advantage of by criminals to delay unduly and defeat the ends of justice.

Not a word of *venire de novo*, a well known proceeding.

SECTION 753.

This section applied, heretofore, only to Ontario. It is now extended to the Dominion. Why not do the same thing for the next one, 754, which has been left applicable only to Ontario?

SECTIONS 882-886.

Section 882 decrees that Courts may, upon conviction, condemn to costs. Will costs be payable to the Crown? It is not clear. Then, the payment of costs may be enforced at the instance of any person liable to pay, or who has paid, the same in such and the same manner subject to the provisions of this Act) as the payment of any costs ordered to be paid by the judgment or order of any Court of competent jurisdiction in any civil action or proceeding, may, for the time being, be enforced.

That is far from being clear. What do the words "subject to the provisions of this Act" mean? what will be a Court of competent jurisdiction? How is the payment to be enforced? By a fi-fa? Then will Criminal Court issue a fi-fa? It is submitted that this clause ought to be repealed. Or, if not, provide for imprisonment and warrant of distress, for costs, as in section 884.

886. Then, the same difficulty under section 886 (*new*) as to how the compensation awarded under that clause is to be levied. Is it by fi-fa? and, if so, from what Court is the fi-fa to issue? But there are still greater difficulties arising from that clause 886. A court may, after conviction, award any sum up to \$1000 to any person aggrieved by the offence. Is this to be in addition to the punishment or in lieu thereof? The clause does not say a word about it. Then here is a party, so far a stranger to the record, who, after the conviction, suddenly appears and demands \$1000 for his loss. Has such an issue ever been tried, or how is it to be tried? what opportunity for his defence to that claim has the convicted person had? Then he is to be condemned summarily for a claim falling under the jurisdiction of the Civil Courts, and, *without appeal*, and for \$1000. Submitted, to repeal the clause.

SECTION 888, sub. sec. 4.

Section 888, sub. sec. 4, says that nothing in that section shall apply to an indictable offence under sec. 361.—Sec. 361 has nothing to do in the matter. It relates to another offence altogether.

SECTION 917.

As to bail generally.

Some further provisions should be made. Under the law, as heretofore administered, a criminal jumps his bail when he pleases, and his sureties are not the worse for it. I have known cases where the sureties themselves advised and helped the flight of the criminal.

Well known cases. One Larose, in Ottawa, within the last twelve months, for an offence against the Dominion Government, I believe, has left the country. Have his sureties paid up?

One McGreevy, in Quebec, not long ago, ran away just as the verdict against him was to be given. One Downie, in Montreal, an advocate, convicted of perjury, has gone to a *freer* country. Have their sureties ever been called upon to pay?

Do not such things bring the administration of justice into contempt?

Of course, it is on the provincial authorities to act, but it is on parliament to make laws in such a way that they should not so easily be laughed at.

SECTION 988.

On a proposed section identical with section 988 of ours, Lord Chief Justice Cockburn remarked :

"We have next a section which I cannot contemplate without much regret, as it proceeds upon a principle which I cannot help thinking fatal to the completeness of the Code, and seriously detrimental to its utility. While the Act abrogates the whole of the common law with reference to offences being proceeded against under it, which was, of course necessary, (and which our Code does not do) it keeps alive statutes, or parts of statutes relating to the Criminal Law, the whole of which, in the present Code, should cease to have a separate existence, and so far as it is desirable to keep these enactments alive, should be embodied in it. On turning to the second Schedule of the Bill, which deals with the repeal of existing statutes, I find that, out of 88 Acts of Parliament therein dealt with, no less than 89, some of them important ones, are thus partially repealed and partially left standing. Nor, in dealing with the latter class, is any system adopted. Sometimes a whole Act is repealed, with the exception of a section; Sometimes a single section, or one or two sections of a voluminous Act are abolished. I have no hesitation in saying that the course thus pursued is radically wrong, and can only lead to embarrassment and confusion.

Whatever is intended to form part of our penal law, whether derived from the common law or statute law, should be embodied in and form part of the intended Code, not by reference to Acts of Parliament to be found in statutes at large, but by its actual presence in the Code. After a careful study of the law, as exhibited in the proposed Code, a person would still remain ignorant of many important parts of it, contained in the portions of the Statute law thus remaining unrepealed and omitted from the Code. Is this the fitting result of codification? I cannot think so: and would earnestly recommend that the Statutes thus partially repealed should be entirely got rid of, and that the parts retained, so far as they relate to the offences dealt with by the Code should be introduced into the present statute and form part of the Code, a matter easy of accomplishment at the expense of a very little time and trouble."

How much more deficient is our Code in this respect is easily conceived when, it is remarked that besides a part of the Statutory law, the whole of the common law is left in force.

SECTION 958.

A fine may be imposed in addition to, or in lieu of, any other punishment in cases of imprisonment for not more than five years. At common law, a person fined must remain in gaol till the fine is paid, any number of years, all his life. Was that left to be so intentionally? The Imperial Code, sec 11, had limited to two years the time of imprisonment for non-payment of a fine, a proper provision, said Lord Cockburn.

SECTIONS 933-981.

See *ante* under next preceeding, but one.

Repeal, Common law.

This section enacts that where an offender is punishable under two or more Acts, or two or more sections of the same act, he may be punished under either. This is taken from the Imperial Code, but the Imperial Code went further, and enacted that thereafter no offence should be indictable at common law. This sec. 933 of our Code designedly, I assume, leaves the common law in force. The rule is, I beleive, that if a common law misdemeanour is made subject to a great punishment by statute, it may still be proceeded against as a common law misdemeanour; but if a common law misdemeanour is made a felony, the misdemeanour has ceased to exist. *Hawkins P. C. Book 2, c. 25, s. 4*; *R. v. Wigg, 2 Salked*; *R. v. Wright, 1 Burr, 543*, *R. v. Robinson, 2 Burr, 830*.

R. v. Carlile, 3 B. 2 Ad. 161 *R. v. Gregory, 5 B. 2 Ad. 555*, *R. v. Crawshaw, Bell 303*; *Bishop, Stat. Crimes, par. 163 to 166 and sec. 245*; *R. v. Dickenson, 1 Saund, 135*, and the late case of *R. v. Hall, 17 Cox 278*. Also *per Williams, J. in Eastern Archipelago v. the Queen, 2 Ellis and Bl. 879*; *R. v. Adams, Car and M., 299*; *R. v. Dixon, 10 Mod. 835*, *R. v. Buchanan 8, Q. B. 888*. What I should suggest would be an enactment similar to that contained in the last article of the Quebec civil Code, Art. 613, which decrees that the laws in force at the time of the coming into force of this Code are abrogated in all cases, 1o. In which there is a provision herein having expressly or impliedly that effect: 2nd in which such laws are contrary to or inconsistent with any provision herein contained: 3rd, in which express provision is herein made upon the particular matter to which such laws relate.

As to the provision of sec. 933, I cannot do better than to quote the Chief Justice of England's remarks, upon a similar one proposed by the Imperial Code. It is as follows: "It, (the section), goes on to provide that when an offence is punishable both under this act and any other statute a state of things, which, for the reasons I have given ought no longer to be possible, "he may be tried and punished either under this Act or any other statute." Why this confusion! Either "such other statute" is identical as regards the offence and its punishment with "this act" or it is not. If it is, then there is no necessity for keeping it alive; if it is not, then, as there ought not to be conflicting laws with reference to the same offence, there is the more reason for getting rid of it. I cannot see the use or purpose of this proviso, the effect of which, in appearance at least, is to make *the Bill inconsistent with itself*."—If it is law that when a common law misdemeanour is made a felony, the misdemeanour has ceased to exist, what will be the effect, on that law, of the abolition of the distinction between felonies and misdemeanours?

SECTION 981.

The Code is to come into force on the 1st July next, but the repeal of the Statutes described in schedule two comes into force only on the 2nd of July. So that for the offences committed on the 1st July, there will be two sets of laws in force! Such a contradiction is unintentional surely!

Why not say, simply "The several Acts.....are repealed....." Then the repeal and the Code will take effect at the same time. Then, against the well established rule, that alterations in procedure have always a retrospective effect so as to apply to all pending cases, or all cases instituted thereafter, this article decrees that, after the 1st July next, there will be, in the Criminal Courts of the country, two sets of procedure, the old one for the offences committed before that date, and the new one for the offences committed after that date, and both sets for the offences committed on that day. Has such a result been foreseen? For one, two, three years, what a confusion this will create. Challenges, indictments, division of crimes as felonies or misdemeanours, and all the old system for one set of offences, and all this altered and different for the other set. The Imperial Code provided for this, so as to make the procedure uniform after its coming into force.—Submitted, that such an enactment be adopted. See *R. v. Smith 1 L. & C, 131*.

SECTION 981a.

Repeal.

Schedule two read in conjunction with section 981 says that Chap. 157, Rev. Stat. is all repealed.

And section 983, sub-section 3, and Appendix page 379, say that one section of that same chap. 157, Rev. Statutes is not repealed.

Same as to 51 V. chap. 41, as to section 16, thereof.—*And others.*

PUNISHMENTS.

"The law in respect of punishments (say the English Commissioners, 1836), exhibits defects such as naturally result from long continued neglect and want of legislative supervision. Such punishments are applied indiscriminately, are often disproportioned to the offences in respect of which they are inflicted, unsystematic and frequently of a description ill adapted to the effectual prevention of crime."

Those remarks apply to our own law on the subject.—Why not take this opportunity to improve?

Examples of inconsistency, absurdity, &c.

Assault with intent to commit any indictable offence whatever, 2 years.

Assault with intent to commit abduction, 7 years.

Attempt to have carnal knowledge of a girl under fourteen, 2 years.

Attempt to steal by a poor servant for an amount, ever so small, 7 years.

Assault with attempt to commit sodomy, 7 years.

Wounding cattle, 14 years.

Attempt to rob by violence to the person, 8 years.

Attempting house-breaking, 7 years.

Attempts to discharge any kind of loaded arms at any person, with intent, 14 years, life.

Wounding cattle, 14 years.

Attempt to wound, kill, or poison cattle, 2 years.

Attempt to steal cattle, 7 years.

A guardian who seduces his ward or any superintendent of a factory seducing a girl, then employed under his control, 2 years.

Wounding cattle, 14 years.

The captain or other officer of a ship seducing any female passenger, 1 year.

Attempt to commit sodomy, 10 years.

Assault with attempt to commit sodomy, 7 years.

Procuring a woman to be a prostitute, 2 years.

A guardian who seduces his ward, 2 years.

Stupefying or overpowering any woman or girl by any drug, or by intoxicating liquor, or any other matter or thing so as to enable any person to have unlawful carnal connection with such woman or girl, 2 years.

Conspiracy to obstruct the course of justice, 7 years.

Obstructing the course of justice, 2 years.

Forgery of any notarial Act or of a promissory note, or of a warehouse receipt.—Life.

Forgery of any public register other than those specially mentioned, 14 years.

Forgery of any record of any Court of Justice or any document issuing from a Court of Justice, or from a Judge, or Magistrate, Letters Patent, &c., 7 years.