A DIGEST

OF THE

CRIMINAL LAW

OF CANADA

(CRIMES AND PUNISHMENTS)

FOUNDED BY PERMISSION ON

SIR JAMES FITZJAMES STEPHEN'S DIGEST OF THE CRIMINAL LAW.

BY

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PREFACE.

THIS Digest is intended to be a statement of that part of the Criminal Law of Canada which relates to the definition of crimes and of the punishments prescribed therefor, as it stood on September 1st, 1889.

The work is, by the kind permission of the author, founded on Sir James Fitzjames Stephen's Digest of the Criminal Law of England. The portions hereof that are taken from the latter work are enclosed in brackets [ ], and to enable the reader to distinguish such portions the more readily, and without turning backwards the leaf to which his attention is directed, the continuation of an extract beyond a page is indicated by the insertion of a bracket at the beginning of the page following.

The index and the tables of cases and of the statutes have been prepared by Charles H. Masters, Esquire, Barrister-at-Law, assistant reporter of the Supreme Court of Canada, to whom I am also greatly indebted for assistance in the preparation of the Digest, and for reading the proofs and verifying the references to cases and authorities.

Ottawa, January 2nd, 1890.

TABLE OF CASES CITED.

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TABLE OF STATUTES CITED.

UNITED KINGDOM.

CANADIAN STATUTES.

LIST OF ABBREVIATIONS.

The expression "Draft Code" means the Draft Code appended to the Report of the Criminal Code Commission published in 1879, and marked C. 2345.

The Canadian Statutes cited are designated by the letters D., P.C., etc., which are explained in the following list, placed after the Sovereign's name. The Statutes not so distinguished are those of the realm or the United Kingdom. In the table of Canadian Statutes, those not containing distinguishing letters are Dominion Statutes.

A. & E.	Adolphus & Ellis.
All.	Allen's New Brunswick Reports.
App. Cas.	Appeal Cases.
Arch.	Archibald's Pleading and Evidence, 20th ed.
B. & Ald.	Barnewall & Alderson.
B. & Ad.	Barnewall & Adolphus.
B. & B.	Broderip & Bingham.
B. & C.	Barnewell & Cresswell.
B. & S.	Best & Smith.
Bell, C. C.	Bell's Crown Cases.
Bing.	Bingham's Reports.
Bish. Cr. Law.	Bishop's Criminal Law.
Brooke's Abt.	Brooke's Abridgment.
Burr.	Burrow's Reports.
C. B.	Common Bench Reports.
C. B. N. S.	Common Bench Reports, New Series.
C. P.	Common Pleas (Law Reports).
C. P. D.	Common Pleas Division.
C. & F.	Clark and Finelly.
C. & K.	Carrington and Kirwan.
C. & M.	Carrington and Marsham.
C. & P.	Carrington and Payne.
C. L. J.	Canadian Law Journal.
C. L. T.	Canadian Law Times.
C. S. C.	Consolidated Statutes of Canada.
C. S. L. C.	Consolidated Statutes of Lower Canada.

C. S. U. C. . .	Consolidated Statutes of Upper Canada.
Cald. . . .	Caldecott's Settlement Cases.
Camp. . . .	Campbell's Reports.
Can. S. C. . .	Reports of Supreme Court of Canada.
Car. & Mar. . .	Carrington & Marsham.
Ch. App. . .	Chancery Appeals (Law Reports).
Ch. D. . . .	Chancery Division.
Chit. Cr. Law. .	Chitty's Criminal Law.
Co. Litt. . .	Coke on Littleton.
Com. Dig. . .	Comyn's Digest.
Cowp. . . .	Cowper's Reports.
Cox C. C. . .	Cox's Criminal Cases.
Cr. & M. . .	Crompton & Meeson.
D. & B. . . .	Dearsley & Bell.
Dalt. . . .	Dalton's Country Justices.
Dear. . . .	Dearsley.
Den. . . .	Denison's Crown Cases.
Dor. Q. B. . .	Dorion's Queen Bench Reports, Lower Canada.
Doug. . . .	Douglas.
Ea. . . .	East's Reports.
East, P.C. . .	East's Pleas of the Crown.
E. & B. . . .	Ellis & Blackburn.
E. B. & E. . .	Ellis, Blackburn & Ellis.
Esp. . . .	Espinasse.
Ex. . . .	Exchequer (Law Reports).
Ex. D. . . .	Exchequer Division.
F. & F. . . .	Foster & Finlayson.
Forsyth Con. Law.	Forsyth's Constitutional Law.
Foster . . .	Foster's Crown Cases.
G. & O. . . .	Geldert & Oxley's Reports, Nova Scotia.
Gen. View Cr. L. .	Stephen's General View of the Criminal Law.
Gr. . . .	Grant's Chancery Reports, Ontario.
H. & C. . . .	Hurlstone and Coltman.
H. & N. . . .	Hurlstone and Norman.
H. E. C. . . .	Hodgins' Election Cases, Ontario.
H. L. C. . . .	House of Lords Cases.
Hale, P.C. . .	Hale's Pleas of the Crown.
Han. . . .	Hannay's New Brunswick Reports.
Hawk. P. C. . .	Hawkins's Pleas of the Crown (Curwood's edition).
Hist. Cr. Law. .	Stephen's History of the Criminal Law.
Inst. . . .	Coke's Institutes.
Ir. C. L. R. . .	Irish Common Law Reports.

Keb. . . .	Keble's Reports.
Kel. . . .	Kelyng.
L. & C. . . .	Leigh and Cave's Crown Cases.
L. C. J. . . .	Lower Canada Jurist.
L. C. L. J. . .	Lower Canada Law Journal.
L. C. R. . . .	Lower Canada Reports.
L. J. (M.C.) . .	Law Journal, Magistrates' Cases.
L. J. (Q.B.) . .	Law Journal, Queen's Bench.
L. N. . . .	Legal News, P.Q.
L. R. C. C. R. .	Law Reports, Crown Cases Reserved.
L. R. C. P. . .	Law Reports, Common Pleas.
L. R. H. L. . .	Law Reports, English and Irish Appeals.
L. R. P. C. . .	Law Reports, Privy Council.
L. R. Q. B. . .	Law Reports, Queen's Bench.
L. T. (N.S.) . .	Law Times, New Series.
Ld. Raym. . .	Lord Raymond.
Lew. . . .	Lewin's Crown Cases.
M. & M. . .	Moody and Malkin.
M. & Rob. . .	Moody and Robinson.
M. & S. . .	Maule and Selywn.
M. & W. . .	Messon and Welsby.
M. L. R. . .	Montreal Law Reports, Queen Bench.
Man. L. R. . .	Manitoba Law Reports.
Mer. . . .	Merivale.
Mod. . . .	Modern Reports.
Moo. . . .	Moody's Crown Cases.
Moo. & R. . .	Moody & Robinson.
Moo. Ind. App. .	Moore's Indian Appeals.
Moo. P.C.C. . .	Moore's Privy Council Cases.
N. B. R. . . .	New Brunswick Reports.
N. S. R. . . .	Nova Scotia Reports.
O. R. . . .	Ontario Reports.
Old. . . .	Oldwright's Reports, Nova Scotia.
Ont. App. R. . .	Ontario Appeal Reports.
Ont. Dig. . .	Robinson & Joseph's Ontario Digest.
Ont. P. R. . .	Ontario Practice Reports.
P. & B. . . .	Pugsley & Burbidge's Reports, New Brunswick.
P. D. . . .	Probate Division (Law Reports.)
P. Wm. . . .	Peere Williams.
Paley Sum. Con. .	Paley on Summary Conviction.
Plowd. . . .	Plowden.
Pugs. . . .	Pugsley's Reports, New Brunswick.

Q. B. . . .	Queen's Bench Reports.
Q. B. D. . . .	Queen's Bench Division.
Q. L. R. . . .	Quebec Law Reports.
R. & C. . . .	Russell & Chesley's Reports, Nova Scotia.
R. & G. . . .	Russell & Geldert's Reports, Nova Scotia.
R. & M. . . .	Ryan & Moody.
R. & R. . . .	Russell and Ryan.
R. L. . . .	Revue Legale, P. Q.
R. S. C. . . .	Revised Statutes of Canada.
R. S. B. C. . .	Revised Statutes of British Columbia.
R. S. N. B. . .	Revised Statutes of New Brunswick.
R. S. N. S. . .	Revised Statutes of Nova Scotia.
Rep. C. L. C. . .	Report of the Criminal Law Commission.
W. Rob. . .	W. Robinson's Admiralty Reports.
Roscoe, Cr. Ev. .	Roscoe's Criminal Evidence, 10th ed.
Russ. Cr. . .	Russell on Crimes, 5th edition. 4th edition in Appendix.
S. D. . . .	Stephen's Digest of Criminal Law.
Salk. . . .	Salkeld's Reports.
Sm. L. C. . .	Smith's Leading Cases, 9th edition.
Starkie, N. P. .	Starkie's Nisi Prius Reports.
Steph. Com. . .	Stephen's Commentaries.
Stev. Dig. . .	Steven's Digest of New Brunswick Reports.
St. Tr. . . .	State Trials.
Str. . . .	Strange's Reports.
T. R. . . .	Term Reports.
Tasch. Can. Cr. Acts.	Taschereau's Canadian Criminal Acts, 2nd edition.
Taunt. . . .	Taunton's Reports.
Tyrw. . . .	Tyrwhitt.
U. C. C. P. . .	Upper Canada Common Pleas.
U. C. O. S. . .	Upper Canada Reports, Old Series.
U. C. Q. B. . .	Upper Canada Queen's Bench.
Ves. . . .	Vesey's Reports.
Viner's Abt. . .	Viner's Abridgment.
W. Bl. . . .	William Blackstone's Reports.
Wall. Jr. . .	Wallace Junior's United States Circuit Court Reports.
Wms. Saun. . .	William's Saunders Reports.

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A DIGEST

OF

THE CRIMINAL LAW

OF

CANADA.

PART I.

PRELIMINARY.

EXPLANATION OF TERMS.

INDICTMENT—INFORMATION—SUMMARY CONVICTION.

WHENEVER it is stated that an offender is liable to any punishment, the meaning is that he is so liable on conviction on indictment.[1]

[2] Whenever it is stated that an offender is liable, on summary conviction, to any punishment, the meaning is

[1] As to cases in which an information will lie see Arch. 121.

[2] R. S. C., c. 174, s. 2 (b); c. 178, s. 5. *Hatton's Case* (2 Salk. 477); Dalt. c. 6, s. 8; *R.* v. *Weale* (5 C. & P. 135). If (in any summary proceeding) no time is specially limited for making any complaint, or laying any information in the Act or law relating to the particular case, the complaint shall be made, or the information shall be laid within six

that he is so liable on summary conviction before one or any greater number of justices of the peace, or before any person having the authority of two or more justices of the peace.

[1] Whenever it is stated that any offender is liable, on summary conviction before two justices of the peace, to any punishment, the meaning is that he is so liable on summary conviction before two or any greater number[2] of justices of the peace, or before any person having the authority of two or more justices of the peace, but not before one justice of the peace.

[3] The following expressions have the meanings assigned to them whenever used in any provision of any Act relating to the criminal law:—

JUSTICE.

(*a.*) The expression "justice" means a justice of the peace, and includes two or more justices, if two or more justices act or have jurisdiction, and also any person having the power or authority of two or more justices of the peace.

INDICTMENT.

(*b.*) The expression "indictment" includes information,

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months from the time when the matter of complaint or information arose, except in the North-West Territories, and in that part of the county of Saguenay which extends from Portneuf, in the said county, to the eastward as far as the limits of Canada, including all the islands adjoining thereto, where the time within which such complaint may be made, or such information may be laid, shall be extended to twelve months from the time when the matter of complaint or information arose. R. S. C. c. 178, s. 11; 52 Vict. (D), c. 45, s. 5.

[1] R. S. C. c. 178, ss. 4, 10; Paley's Sum. Conv. (6th ed.), 35.

[2] There are, however, some exceptions to this rule, as in cases of prosecutions under the Inland Revenue Act (R. S. C., c. 34, s. 113) or the Canada Temperance Act (R. S. C., c. 106, s. 104), as enacted in 51 Vict. (D.) c. 34, s. 7, where it is provided that no other justice shall sit with the judge, magistrate or two justices before whom the prosecution is instituted.

[3] R. S. C., c. 174, s. 2; 14 & 15 Vict., c. 100, s. 30. *The Interpretation Act* (R. S. C. c. 1) also applies, but it is not thought necessary to insert its provisions here.

inquisition and presentment as well as indictment, and also any plea, replication or other pleading, and any record.

FINDING OF THE INDICTMENT.

(*c.*) The expression "finding of the indictment" includes also the taking of an inquisition, the exhibiting an information and the making of a presentment.

PROPERTY.

(*d.*) The expression "property" includes goods, chattels, money, valuable securities, and every other matter or thing, whether real or personal, upon or with respect to which any offence may be committed.

DISTRICT, COUNTY OR PLACE.

(*e.*) The expression "district, county or place" includes any division of any Province of Canada, for purposes relative to the administration of justice in criminal cases.

TERRITORIAL DIVISION.

(*f.*) The expression "territorial division" means county, union of counties, township, city, town, parish or other judicial division or place to which the context applies.

CATTLE.

The expression "cattle," when used in reference to any provision respecting larceny and other similar offences,[1] malicious injuries to property,[2] cruelty to animals, or the conveyance of cattle,[3] includes any horse, mule, ass, swine, sheep or goat, as well as any neat cattle or animal of the bovine species, and whatever is the age or sex of the animal, and whether castrated or not, and by whatever technical or trivial name it is known, and shall apply to one animal as well as to many.

[1] R. S. C., c. 164, s. 2.
[2] R. S. C., c. 168, s. 1.
[3] R. S. C., c. 172, s. 1.

HAVING IN POSSESSION.

"Having in possession," when used in reference to any person in any provision respecting larceny and other similar offences,[1] forgery,[2] offences relating to the coin,[3] public stores,[4] and the property of seamen in the navy,[5] includes not only having in his own personal possession, but also knowingly[6]

(*a.*) having in the actual possession or custody of any other person; and

(*b.*) having in any place (whether belonging to or occupied by himself or not) for the use or benefit of himself or of any other person.

[7] If there are two or more persons, any one or more of whom, with the knowledge and consent of the rest, has any such thing in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of all of them.

[8] The following expressions have the meanings assigned to them when used in reference to any provision respecting larceny and other similar offences.

BANKER.

(*a.*) The expression "banker" includes any director of any incorporated bank or banking company.

DOCUMENT OF TITLE TO GOODS.

(*b.*) The expression "document of title to goods" in-

[1] R. S. C. c. 164, s. 2 (*l*).
[2] R. S. C. c. 165, s. 2; 24 & 25 Vict. c. 98, s. 45.
[3] R. S. C. c. 167, s. 2; 24 & 25 Vict. c. 99, s. 1.
[4] 50 & 51 Vict. (D.) c. 45, s. 2 (*e*); 38 & 39 Vict. c. 25, s. 10.
[5] R. S. C. c. 171, s. 3; 32 & 33 Vict. c. 57, s. 5.
[6] or wilfully, R. S. C. c. 164, s. 2 (*l*), and wilfully, R. S. C. c. 165, s. 2, and c. 167, s. 2.
[7] R. S. C. c. 164, s. 2 (*l*).
[8] R. S. C. c. 164, s. 2; 24 & 25 Vict. c. 96, s. 1.

cludes any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing, bought and sold note, or any other document used in the ordinary course of business as proof of the possession or control of goods, authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such document to transfer or receive any goods thereby represented or therein mentioned or referred to.

DOCUMENT OF TITLE TO LANDS.

(*c.*) The expression "document of title to lands" includes any deed, map, paper or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real property, or to any interest in any real property, or any notarial or registrar's copy thereof, or any duplicate instrument, memorial, certificate or document authorized or required by any law in force in any part of Canada, respecting registration of titles, and relating to such title.

MUNICIPALITY.

(*d.*) The expression "municipality" includes the corporation of any city, town, village, township, parish or other territorial or local division of any Province of Canada, the inhabitants whereof are incorporated or have the right of holding property for any purpose.

NIGHT.

(*e.*) The night is deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day, and the day includes the remainder of the twenty-four hours.

PROPERTY.

(*f.*) The expression "property" includes

(i) every description of real and personal property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods; and

(ii) not only such property as was originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise; and

(iii) any postal card, postage stamp or other stamp issued or prepared for issue by the authority of the Parliament of Canada, or of the Legislature of any Province of Canada, for the payment of any fee, rate or duty whatever, and whether still in the possession of the crown, or of any person or corporation, or of any officer or agent of the Government of Canada, or of the Province by the authority of the Legislature whereof it was issued or prepared for issue; and such postal card or stamp shall be held to be a chattel, and to be equal in value to the amount of the postage, rate or duty which can be paid by it, and is expressed on its face in words or figures or both.

TESTAMENTARY INSTRUMENT.

(*g.*) The expression "testamentary instrument" includes any will, codicil, or any other testamentary writing or appointment, as well during the life of the testator whose testamentary disposition it purports to be, as after his death, whether the same relates to real or personal property, or both.

TRUSTEE.

(*h.*) The expression "trustee" means a trustee on some express trust created by some deed, will or instru-

ment in writing, or a trustee of personal property created by parol, and includes the heir or personal representative of any such trustee, and every other person upon or to whom the duty of such trust has devolved or come, and also an executor and administrator, and an official manager, assignee, liquidator or other like officer acting under any Act relating to joint stock companies, bankruptcy or insolvency, and any person who is, by the law of the Province of Quebec, an "*administrateur*"; and the expression "trust" includes whatever is by that law an "*administration*."

VALUABLE SECURITY.

(*i.*) [1]The expression "valuable security" includes

(i) any order, exchequer acquittance or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of Canada or of any Province thereof or of the United Kingdom, or of Great Britain or Ireland, or of any British colony or possession or of any foreign state, or in any fund of any body corporate, company or society, whether within Canada or the United Kingdom, or any British colony or possession, or in any foreign state or country, or to any deposit in any savings bank or other bank; and

(ii) any debenture, deed, bond, bill, note, warrant, order or other security whatsoever, for money or for payment of money, whether of Canada, or of any Province thereof, or of the United Kingdom, or of any British colony or possession, or of any foreign state, and any document of title to lands or goods as hereinbefore defined, and any stamp or writing which secures or evidences title to or interest in any chattel personal, or any release, receipt, discharge or

[1] An unstamped promise to pay in the hands of the maker is not a valuable security within the definition: *Scott. v. R.*, 2 Can. S. C. 349, reversing the decision of the Court of Queen's Bench for Lower Canada in R. v. Scott, 21 L.C. J. 225. See also *R. v. Rymal*, 17 O.R. 227. But an insufficiently or defectively stamped promissory note, the holder being ignorant of the defect, may be a valuable security; *R. v. Dewitt*, 21 N.B.R., 17.

other instrument evidencing payment of money. or the delivering of any chattel personal.

Every such valuable security shall, where value is material, be deemed to be of value equal to that of such unsatisfied money, chattel personal, share, interest or deposit, for the securing or payment of which, or delivery or transfer or sale of which, or for the entitling or evidencing title to which, such valuable security is applicable, or to that of such money or chattel personal, the payment or delivery of which is evidenced by such valuable security.

WRITING.

(*j.*) The expression "writing" includes any mode in which, and any material on which, words or figures at length or abridged are written, printed or otherwise expressed, or any map or plan is inscribed.

CHAPTER I.

OF THE APPLICATION OF THE CRIMINAL LAW.

ARTICLE 1.

APPLICATION OF THE CRIMINAL LAW.

THE criminal law of Canada extends to all offences committed by any person in Canada, or on such part of the sea adjacent to the coast of Canada as is within one marine league from ordinary low-water mark, or is deemed by international law to be within the territorial sovereignty of Her Majesty, or committed by any person on board any British ship or boat on the great lakes, or on the high seas, or in any place where the Admiralty of England has jurisdiction, and to piracy by the law of nations wherever committed.

ARTICLE 2.

APPLICATION OF THE LAW OF ENGLAND.[2]

The rules as to the application of the criminal law of England are not uniform throughout Canada.

[1] 12 & 13 Vict. c. 96; 41 & 42 Vict. c. 73; R. S. C. c. 174, s. 8; *R.* v. *Sharp* (5 P. R. Ont. 135). See 18 & 19 Vict. c. 91, s. 21, as to the commission of any offence by a British subject on board a British ship on the high seas, or in a foreign port, or by any person on board a British ship on the high seas; *R.* v. *Dillon*, 6 Allen 61; *R.* v. *Martin*, 8 G. & O. 125. See 30 & 31 Vict. c. 124, s. 11, as to the commission of any offence by a British subject on board any British ship, or on board any foreign ship to which the offender does not belong. See also *R.* v. *Kinsman*, James, 62.

[2] When a colony is founded by the settlement by British subjects of an unoccupied country, there are at once in force therein, so far as the same are applicable to its condition and situation, the common law of England and such parts of the statute law as are general and not local or municipal in character; 2 P. Wm. 75; *Forbes* v. *Cochrane* (2 B. & C. 463); *Blankard* v. *Galdy* (2 Salk. 411); *Mayor of Lyons* v. *E. Ind. Co.* (1 Moo.

Subject to

(1.) any Act of the Parliament of the United Kingdom passed subsequently to the respective dates or times hereinafter mentioned, that by the terms thereof is applicable to Canada, or any Province thereof as a part of Her Majesty's dominions;

(2.) any Act of the Legislature of any Province now forming part of Canada, passed prior to the date at which such Province so became a part of Canada; and

(3.) any Act of the Parliament of Canada,

P. C. C. 175, 272); Com. Dig. Ley (C.); *Falkland Islands Coy.* v. *The Queen* (2 Moo. P. C. C. N. S. 266, 273); *Kielley* v. *Carson* (4 Moo. P. C. C. 84); *Campbell* v. *Hall* (20 St. Tr. Col. 289); *Freeman* v. *Fairlie* (1 Moo. Ind. App. 305); *Colonial Bank* v. *Warden* (5 Moo. P. C. C. 340); *Atty.-General* v. *Stewart* (2 Mer. 143, 159-161); *Yeap Cheah Neo* v. *Ong Cheng Neo.* (L. R. 6 P. C. 381); *Bentinck* v. *Willink* (2 Hare 1); *Dillingham* v. *Wilson* (6 U. C. C. O. S. 85); *Leith* v. *Willis* (5 U. C. C. O. S. 101); *Doe d. Anderson* v. *Todd* (2 U. C. Q. B. 82); *R.* v. *Rose* (14 U. C. C. P. 307); *Hesketh* v. *Ward* (17 U. C. C. P. 667); *Stinson* v. *Pennock* (14 Gr. 604); *Carr* v. *The Fire Assurance Association* (14 O. R. 487) *Ex parte Rousse* (Stuart's L. C. R., 321); *Wilson* v. *Jones* (1 Allen, 658); *Kavanagh* v. *Phelon* (1 Kerr 472); *Doe d. Hanington* v. *McFadden* (Berton 153); *R.* v. *Appleby* (Berton 397); but no Act of Parliament made after a colony is planted is construed to extend to it without express words, showing the intention of the legislature to be that it should; *R.* v. *Vaughan* (4 Burr. 2500) 2 P. Wm. 75, *Harrison* v. *Spencer* (15 O. R. 692). In *Uniacke* v. *Dickson* (James 237), it was held that the whole of the English common law, excepting such parts thereof as are obviously inconsistent with the circumstances of the country, were in force in Nova Scotia, while on the other hand none of the statute law of England was in force there excepting such parts as are obviously applicable and necessary. In the one case the exclusion, and in the other the reception, forms the exception.

The Statute 5 & 6 Ed. 6, c. 16 against buying and selling offices was in *Dawes* v. *Painter* (Freeman 175) held not to be in force in Barbadoes (a settled colony), and in *Blankard* v. *Galdy* (2 Salk. 411), the same statute was held not to be law in Jamaica (a conquered colony). But in the latter case the decision was put upon the ground that the colony was acquired by conquest, in which case the rule is not the same as in the case of a colony acquired by settlement. In *R.* v. *Vaughan* (4 Burr. 2500) Lord Mansfield, referring to the statute 12 R. 2. c. 2. that no officer shall be appointed for gifts, and to 5 & 6 Ed. 6, c. 16, said that "the argument is strong that these statutes do not extend to Jamaica, though "they were enacted long before that island belonged to the Crown of England. If "Jamaica was considered as a conquest they would retain their old laws till the conqueror "had thought fit to alter them. If it is considered as a colony (which it ought to be, the "old inhabitants having left the island), then these statutes are positive regulations of "police, not adapted to the circumstances of a new colony; and, therefore, no part of the "law of England which every colony from necessity is supposed to carry with them at "their first plantation." The case, however, as Lord Mansfield observed, did not turn upon the question as to whether or not the statutes referred to were in force in Jamaica.

The statute 5 & 6 Ed. 6, c. 16, was probably in force in Upper Canada by virtue of 40 Geo. 3, (P. C.) c. 1, and was clearly extended thereto by 49 Geo. 3, c. 126, which made it applic-

The criminal law of England, so far as it is applicable to the situation and condition of the people of Canada, is applied to Canada as follows:

(*a.*) In Ontario,[1] as it stood on the 17th of September, 1792

(*b.*) In Quebec,[2] as it stood in 1764.

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able to His Majesty's dominions; *R.* v. *Mercer* (17 U. C. Q. B. 602); *R.* v. *Moodie* (20 U. C. Q. B. 889); *Foott* v. *Bullock* (4 U. C. Q. B. 480).

Henley, A. G., and Yorke, S. G., (1757) were of the opinion that the statute 1 Mar., c. 6, declaring, among other things, the counterfeiting of strange coins current within the realm to be treason, did not apply to Nova Scotia, as it formed no part of the realm; (Forsyth's Con. Law, 2). See Art. 56.

In *the Att'y.-General* v. *Ranee Surnamoye Dossee* (9 Moo. Ind. App. 387), it was held that the English law as to the forfeiture of goods and chattels was not applicable to the case of a native Hindoo (though a British subject) who committed suicide at Calcutta.

In Ontario the following statutes, relating to the criminal law and its administration, have been held to be in force:—12 Geo. 2, c. 28, 13 Geo. 2, c. 19, and 27 Geo. 3, c. 1, relating to lotteries, gaming, &c.; *Cronyn* v. *Widder* (16 U. C. Q. B. 356); *Corby* v. *McDaniel* (16 U. C. Q. B. 378); *Marshall* v. *Platt* (8 U. C. C. P. 189); *Loyd* v. *Clark* (11 U. C. C. P. 248); *Cronyn* v. *Griffiths* (18 U. C. Q. B. 396); *Battersby* v. *Odell* (23 U. C. Q. B. 482); *R.* v. *Matheson* (4 O. R., 559; 1 Wm. & M., c. 18, s. 15, (against disturbers of religious worship); *Reid* v. *Inglis* (12 U. C. C. P. 191); 59 Geo. 3, c. 69, respecting foreign enlistment; *R.* v. *Schram* (14 U. C. C. P. 318); 18 Eliz. c. 5, relating to actions by common informers: *Garrett* v. *Roberts* (10 Ont. App. R. 650); 21 Geo. 3, c. 49, respecting disorderly places of entertainment opened on the Lord's Day; *R.* v. *Barnes* (45 U. C. Q. B. 276). It has been doubted whether 7 & 8 Wm. 3, c. 4, against treating at elections, is in force; *Dundas Election Case* (1 H. E. C. 205). The statute 28 Geo. 3, c. 49, enabling justices in certain cases to act beyond the limits of the counties in which they resided, was held to be local and not applicable to Upper Canada; *R.* v. *Rowe* (14 U. C. C. P. 307).

The statutes 9 Geo. 1, c. 19, and 6 Geo. 2, c. 35, against foreign lotteries were in *Ex parte Rousse* (Stuart's L. C. R. 321) held to be in force in Lower Canada.

The statute 28 Ed. 3, c. 13, allowing aliens a jury *de medietate linguæ* was held not to be in force in Nova Scotia; *R.* v. *Burdell* (1 Old. 125); and if it was ever in force in Prince Edward Island it was superseded by local statutes; *R.* v. *Thompson* (1 P. E. I. R. 226).

The statute 13 Geo. 2 c. 19 against gaming was thought by Blanchard, J. C. C., to be in force in Nova Scotia, but McDonald, J., on appeal, doubted its application; *Doran* v. *Chambers* (20 N. S. R. 309).

The statute 25 Ed. 3, Stat. 5 c. 2, respecting treason is in force in the North-West Territories; *R.* v. *Riel* (2 Man. L. R. 321; 10 App. Cas. 675.)

There are in the reports of the several Provinces many cases respecting the application of the common and statute law of England in civil matters to which no reference has been made in this note or in the note on the following page, as that could not be done without too greatly extending the length of the notes.

[1] R. S. C., c. 144, s. 1.

[2] 14 Geo. 3 c. 83, s. 11.

(*c.*) In Nova Scotia,[1] New Brunswick, and Prince Edward Island, as it stood at dates which have not been definitely determined, but which are indicated in a general way in the note hereto.

[1] These Provinces were, according to Forsyth (Cases and Opinions on Constitutional Law 26) acquired in 1497 by settlement. It is true that they were not thereafter continuously subject to the English Crown. The rule in such cases appears, however, to be that a country re-conquered from the enemy reverts to the same state that it was in before the conquest. The second acquisition is, in fact, considered rather as a resumption than a conquest (*Gumbes's case* 2 Knapp 269. Forsyth's Cons. Law 16). It would, however, be an error to assume that no statute passed in England subsequent to 1497 applied to such Provinces without express words. A reference to the decisions of the courts of these Provinces will show that the contrary is the fact. Regard must always, in such cases, be had to usage, and it often happens that English statute law is introduced by charters and commissions from the crown, or by Provincial statutes respecting the jurisdiction of courts and the practice therein.

In *Rex* v. *McLaughlin*, Chipman, J. said: "It might not be a clear point as to what "period of time should be deemed the time of the settlement of the Colony; the period "of the restoration of Charles II, it was understood, was adopted in practice by the "General Assembly of New Brunswick at its first session as the period anterior to which "all Acts of Parliament should be considered as extending." (See Cassels's Manual of Procedure in the Supreme and Exchequer Courts, p. 33.)

By the commission to the first Chief Justice of New Brunswick (1784) he was given authority, to which the Supreme Court of the Province has succeeded, to hear and determine all pleas whatsoever, civil, criminal and mixed, according to the laws, statutes and customs of England and the laws of the Province not repugnant thereto, and to do all things which any of the justices of either bench or the barons of the exchequer in England might do; *Atty. Gen.* v. *Baillie* (1 Kerr, 443); *Kelly* v. *Jones* (2 Allen 473).

The first General Assembly of Nova Scotia, which then included New Brunswick and Prince Edward Island, met at Halifax in 1758, and perhaps the most that can be said with certainty is, that no English statute passed after that date would apply to either of those Provinces unless there were express words therein making its provisions applicable to such Province, or to Her Majesty's Dominions in general, or unless the same were otherwise, by competent authority brought into force there; (Per Cockburn, A. G. and Bethell, S. G. Forsyth, p. 19.)

In Nova Scotia the following statutes passed subsequently to 1497 have been held to be in force:—

31 H. 8, c. 1 (1539), Partition; *Doane* v. *McKenny* (James, 328).

13 Eliz. c. 5 (1571) and 27 Eliz. c. 4 (1584-5), Fraudulent conveyances; *Foster* v. *Fowler* (1 Old. 753); *Moore* v. *Moore* (1 R. & G. 525); and other cases.

21 Jac. 1, c. 14 (1623-4), Information of intrusion; *Scott* v. *Henderson* (2 Thomson, 115, 135, 141); *Smyth* v. *McDonald* (1 Old. 274, 278): *Costin* v. *Chappell* (1 R. & C. 40, 45).

And in New Brunswick the following:—

27 H. 8, c. 10, Statute of Uses. 27 H. 8, c. 16, Statute of Enrolments (1535-6). *Doe d. Hanington* v. *McFadden* (Berton, 153.)

33 H. 8, c. 39, ss. 50, 79 (1541-2), Crown bonds and relief of Crown debtors; *Rex.* v. *McLaughlin* (Stev. Dig. 275).

43 Eliz. c. 6 (1601) and 22-23 Car. 2, c. 9 (1670-1) against trivial and vexatious actions; *Kelly* v. *Jones* (2 Allen 473); *Marks* v. *Gilmour* (3 Allen, 170).

(*d.*) In Manitoba[1] and the North-West Territories as it stood on the 15th of July, 1870; and

(*e.*) In British Columbia,[2] as it stood on the 19th of November, 1858.

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3 Jac. 1, c. 7 (1605-6), Delivery by attorney of bill of costs: *James* v. *McLean* (3 Allen, 164).

13 Car. 2, stat. 2, c. 2, s. 10 (1661), Vexatious delays on writs of error; *Gilbert* v. *Sayre* (2 Allen, 512).

9 Wm. 3. c. 15 (1697-8), Arbitration; *Doe d. Allen* v. *Murray* (2 Kerr, 359); *Brown* v. *Harding* (3 Allen, 351).

4 & 5 Anne, c. 3, s. 20 (1705) Assignment of bail bonds; Per Chipman, C. J. in *Doe d. Hanington* v. *McFadden* (Berton, 163).

14 Geo. 2, c. 17, s. 1 (1740-1) Judgments as in case of non-suit; Per Chipman, C. J. in *Doe d. Hanington* v. *McFadden* (Berton, 163).

[1] 51 Viet. (D) c. 33, s. 1 and R. S. C. c. 50, s. 11.

[2] R. S. C. c. 144, s. 2.

CHAPTER II.

[1] OF PUNISHMENTS.

ARTICLE 3.

PUNISHMENT AFTER CONVICTION ONLY.

[2] WHENEVER a person who does or omits to do anything is declared to be guilty of any offence, and to be liable to punishment therefor, the meaning is that such person shall only be deemed guilty of such offence and liable to such punishment after being duly convicted of such act or omission.

ARTICLE 4.

DISCRETION OF THE COURT.

[3] Whenever it is provided that the offender is liable to different degrees or kinds of punishment, the punishment to be inflicted is, subject to the limitations contained in the enactment, in the discretion of the court or tribunal before which the conviction takes place.

ARTICLE 5.

OFFENDER PUNISHABLE UNDER TWO OR MORE PROVISIONS.

[4] Whenever any offender is punishable under two or more Acts, or two or more sections of the same Act, he may be tried and punished under any of such Acts or

[1] [See 1 Hist. Cr. Law, ch. xlii, p. 451; see Draft Code, Pt. II, ss. 7-8.]

[2] R. S. C. c. 181, s. 1.

[3] R. S. C. c. 181, s. 2.

[4] R. S. C. c. 181, s. 3; *R.* v. *Sherman*, 27 U. C. C. P. 166; R. S. C. c. 150, s. 14; c. 154, s. 2 (2); c. 169, s. 4; c. 171, s. 4; 50 & 51 Vict. (D.) c. 45, s. 14; 51 Vict. (D.), c. 31, s. 10.

sections, but no person shall be twice punished for the same offence.

ARTICLE 6.

ENUMERATION OF PUNISHMENTS. [1]

The following punishments are inflicted by the law of Canada for the crimes hereinafter defined:—Death, imprisonment, whipping, fines, and putting under recognizance.

ARTICLE 7.

PUNISHMENT OF DEATH.

[2] [The punishment of death is inflicted by hanging the offender by the neck till he is dead.

ARTICLE 8.

PUNISHMENT OF IMPRISONMENT.

[3] The punishment of imprisonment consists in the detention of the offender in prison, and in his subjection to the discipline appointed for prisoners during the period expressed in the sentence.

Imprisonment is of two kinds:

(i.) Imprisonment with hard labor.

(ii.) Imprisonment without hard labor.]

[1] See S. D., Art. 1.

[2] R. S. C. c. 181, ss. 5, 6; 54 Geo. 3, c. 146, s. 1: 24 & 25 Vict., c. 100, s. 2; S. D. Art. 2. With respect to the pronouncing of sentence of death, the judge's report, the treatment of prisoners under sentence of death, and the carrying of the same into execution, see R. S. C. c. 181, ss. 4-22 and the rules published with the Acts of the Parliament of Canada relating to the Criminal Law (1881) p. 199.

As to the judge's report and postponing execution in the North-West Territories and the District of Keewatin, see R. S. C. c. 50, s. 70, and c. 53, s. 27 (5).

[As to the history of the punishment of death and benefit of clergy, see 1 Hist. Cr. Law, 467-80.]

[3] R. S. C. c. 181, s. 28 (7); S. D. Art. 4. [As to the history of the punishment of imprisonment, see 1 Hist. Cr. Law 483-7]. Solitary confinement, except as a matter of prison discipline or reformation, was abolished by R. S. C. c. 181, s. 34.

[1] Every one who is liable to imprisonment for life or for any term of years, or other term, may be sentenced to imprisonment for any shorter term : Provided, that no one shall be sentenced to any shorter term of imprisonment than the minimum term, if any, prescribed for the offence of which he is convicted.

[2] Every one who is sentenced to imprisonment for life, or for a term of years not less than two, must be sentenced to imprisonment in the penitentiary for the Province in which the conviction takes place :

Every one who is sentenced to imprisonment for a term less than two years must if no other place is expressly mentioned, be sentenced to imprisonment in the common gaol of the district, county or place in which the sentence is pronounced, or if there is no common gaol there, then in that common gaol which is nearest to such locality, or in some lawful prison or place of confinement other than a penitentiary, in which the sentence of imprisonment may be lawfully executed :

But any prisoner sentenced for any term by any military, naval or militia court martial, or by any military or naval authority under any Mutiny Act, may be sentenced to imprisonment in a penitentiary.

The term of imprisonment, in pursuance of any sentence, shall, unless otherwise directed in the sentence, commence on and from the day of passing such sentence, but no time during which the convict is out on bail shall be reckoned as part of the term of imprisonment to which he is sentenced.

ARTICLE 9. [3]

HARD LABOR.

[4] Imprisonment in a penitentiary, in the Central Prison

[1] R. S. C. c. 181, s. 26.
[2] R. S. C. c. 181, s. 28 (1), (2), (3), (6).
[3] S. D., Art. 6.
[4] R. S. C. c. 181, s. 28 (4).

for the Province of Ontario, in the Andrew Mercer Ontario Reformatory for females, and in any reformatory prison for females in the Province of Quebec, is with hard labor, whether so directed in the sentence or not:

[1] Imprisonment in a common gaol or a public prison other than those last mentioned,—

(*a.*) may be with or without hard labor in the discretion of the court or person passing sentence if the offender is convicted on indictment or under "*The Speedy Trials Act*," or before a Judge of the Supreme Court of the North-West Territories;

(*b.*) may in other cases be with hard labor, if hard labor is part of the punishment for the offence of which such offender is convicted.

And if such imprisonment is to be with hard labor the sentence must so direct.

[2] ARTICLE 10.

REFORMATORIES.

[3] The court or person before whom any offender whose age at the time of his trial does not, in the opinion of the court, exceed sixteen years is convicted, whether summarily or otherwise, of any offence punishable by imprisonment, may sentence such offender to imprisonment in any reformatory prison in the Province in which such conviction takes place, subject to the provisions of any Act respecting imprisonment in such reformatory; and such imprisonment shall be substituted, in such case, for

[1] R. S. C. c. 181, s. 28 (5) as enacted in 51 Vict. (D.) c. 47, s. 1.

[2] S. D. Arts. 10, 21.

[3] R. S. C. c. 181, s. 29; 29 & 30 Vict. c. 117, s. 14. As to the imprisonment of boys under sixteen and females in reformatories see R. S. C. c. 182 ss. 25-30 (Ontario Reformatory for boys); ss. 31-38 (The Andrew Mercer Ontario Reformatory for females); ss. 39-41 (The Ontario Industrial Refuge for girls); ss. 42-48 (General provisions in respect of such reformatories); ss. 49-54 (Reformatory School for Boys in Quebec); ss. 55-58 (Reformatory prisons for females in Quebec); ss. 61-64 (The Halifax Industrial School); ss. 65-71 (The Halifax Reformatory School for boys of the Roman Catholic faith) ss. 72-74 (Reformatory prison Prince Edward Island).

the imprisonment in the penitentiary or other place of confinement by which the offender would otherwise be punishable under any Act or law relating thereto :

Provided, that the sentence must not in any case be less than two years nor more than five years' confinement in such reformatory prison ; and in every case where the term of imprisonment is fixed by law to be more than five years, then such imprisonment must be in the penitentiary.

Every person imprisoned in a reformatory is liable to perform such labor as is required of such person.

[1]ARTICLE 11.

WHIPPING.

[2] Whenever whipping may be awarded for any offence, the court may sentence the offender to be once, twice or thrice whipped, within the limits of the prison under the supervision of the medical officer of the prison ; and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence ; and, whenever practicable, every whipping shall take place not less than ten days before the expiration of any term of imprisonment to which the offender is sentenced for the offence :

Whipping shall not be inflicted on any female.

[1] S.D. Art 12.

[2] R.S.C. c. 181, s. 30.

[When no special provisions are made as to the punishment of whipping, the number of strokes and the instrument to be used are left to the discretion of the person by whom the whipping is inflicted. Such was the practice when whipping was inflicted as a common law punishment, and such must still be the practice where no statutory directions are given as to the mode of inflicting it. The only limitation is contained in the declaration of the Bill of Rights against "illegal and cruel punishments" (1 W. & M. sess. 2, c. 2, preamble).

As to the law in England see S.D. Art. 12 and notes. 25 & 26 Vict. c. 18, s. 1 ; 24 & 25 Vict. c. 96, s. 119 ; c. 97, s. 75 ; c. 100, s. 70 ; 26 & 27 Vict. c. 44, s. 1.

[1] ARTICLE 12.

FINE.

[The punishment of fining consists in ordering the offender to pay to Her Majesty a sum of money expressed in the sentence.]

[2] Every one who is convicted of any misdemeanor may, in addition to or in lieu of any other punishment otherwise authorized, be fined.

[3] Whenever a fine may be awarded or a penalty imposed for any offence, the amount of such fine or penalty is, within such limits, if any, as are prescribed in that behalf, in the discretion of the court or person passing sentence or convicting, as the case may be.

[4] [When no particular sum is limited as the maximum amount of a fine, the fine imposed must not be excessive.

[5] ARTICLE 13.

PUTTING UNDER RECOGNIZANCES.

[The punishment of putting under recognizances consists in ordering the offender to promise to pay to Her Majesty a sum of money expressed in the recognizance if he breaks the condition thereof, and to find other persons to make a similar promise on his behalf and as his sureties.

In cases in which the court or magistrate is authorized to require such securities, they may direct the offender to be imprisoned till he enters into the recognizance and finds the sureties.]

[6] Every one who is convicted of any felony or misde-

[1] S.D. Art. 13.

[2] R.S.C. c. 181, s. 31 (2); 24 & 25 Vict. c. 96, s. 117, c. 97, s. 73, c. 98, s. 51, c. 99, s. 38, c. 100, s 71.

[3] R.S.C. c. 181, s. 33.

[4] [1 W. & M. sess. 2, c. 2. See also Magna Charta, 'Salvo contenemento suo.']

[5] S.D Art. 14.

[6] R.S.C. c. 181, s. 31; 24 & 25 Vict. c. 96, s. 117, c. 97, s. 73, c. 98, s. 51, c. 99, s. 38, c. 100, s. 71.

meanor may, in addition to or in lieu of any punishment otherwise authorized, be required to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behavior: but a person must not be imprisoned for not finding sureties under this provision, for any term exceeding one year.

[1] Whenever any person who has been required to enter into a recognizance with sureties to keep the peace and be of good behavior has, on account of his default therein, remained imprisoned for two weeks, the sheriff, gaoler or warden shall give notice, in writing, to a judge of a superior court, or to a judge of the county court of the county or district in which such gaol or prison is situate, and in the cities of Montreal and Quebec to a judge of the sessions of the peace for the district, and such judge may order the discharge of such person thereupon, or at a subsequent time, upon notice to the complainant or otherwise, or may make such other order as he sees fit, respecting the number of sureties, the sum in which they are bound, and the length of time for which such person may be bound.

[1] R.S.C. c. 181, s. 32 as enacted in 51 Vict. (D) c. 47, s. 2.

CHAPTER III.

[1]*CLASSIFICATION OF CRIMES AND GENERAL PROVISIONS AS TO THEIR PUNISHMENT—PARDONS &c.*

[2]ARTICLE 14.

TREASON, FELONY, AND MISDEMEANOR.

[EVERY crime is either treason, felony, or misdemeanor. Every crime which amounts to treason or felony is so denominated in the definitions of crimes hereinafter contained. All crimes not so denominated are misdemeanors.]

ARTICLE 15.

CONSEQUENCES OF A CONVICTION OF TREASON OR FELONY IN CERTAIN PROVINCES.

The consequences among others of a conviction of treason or felony, and of such conviction followed by sentence, are in the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island and British Columbia, as follows :—

[3](*a*) On attainder for treason the offender forfeits forever

[1] [2 Hist. Cr. Law, Ch. xx, pp. 192-6.]

[2] S.D. Art. 15.

[3] 4 Steph. Com. (6th ed) 511 : 2 Hawk. c. 49. *Doe d. Griffith* v. *Pritchard* (5 B. & Ad. 765) *Eastwood* v. *McKenzie* (5 U.C. O.S. 708). Attainder imports that extinction of civil rights and capacities which takes place whenever an offender receives judgment of death or outlawry for a capital offence. It is the immediate inseparable consequence (not of the conviction) but of such judgment (1 Steph. Com. (6th ed.) 456; 4 Steph. Com. 543, 551; Wharton's Law Lexicon *Verb. attainder.*) At common law, lands so forfeited were not vested in the actual possession of the Crown during the life of the offender without an office (2 Hawk. c. 49, s. 2); but by 33 Hen. 8, c. 20, s. 3 it was provided that in cases of high treason the king should be deemed and adjudged in actual and real possession of the lands, tenements, hereditaments, uses, goods, chattels and all other things of the person attainted that the king ought lawfully to have, and the offender to forfeit, without any office or inquisition ; (2 Hawk. c. 49, ss. 18-32 ; *Doe d. Gillespie v. Wixon*, 5 U. C. Q. B. 132 ; *Doe d. Sheldon* v. *Rumsay*, 9 U. C. Q. B. 105).

to the crown all his lands and tenements of inheritance of freehold tenure whether fee simple or fee tail and all his rights of entry on lands and tenements of such tenure, which he had at the time of the offence committed, or at any time afterwards, to be forever vested in the crown; and also the profits of all lands and tenements of such tenure which he had in own right for life or years so long as such interest shall subsist.

The forfeiture relates backward to the time of the treason committed, so as to avoid all intermediate sales and incumbrances, but not those before the fact.

[1] *(b)* On attainder for murder the offender forfeits to the crown not only the profits of his freehold estates during life, but also (in the case of lands held by him in fee simple, though not in the case of those held in tail) the lands themselves for a year and a day, with power to the crown of committing upon them what waste it pleases.

[2] *(c)* On a conviction of treason or any felony the offender forfeits to the crown his personal estate, but not such as he has as executor or administrator.

[3] *(d)* On attainder for treason the blood of the offender

[1] 4 Steph. Com. (6th ed.) 548; 2 Hawk. c. 49, s. 8; *R. v Bridges* 1 M. & W. 149.

[2] 2 Hawk. c. 49, ss. 9-13; 4 Steph. Com. (6th ed.) 550 *Bullock v Dodds*, 2 B. & Ald. 258. See also as to forfeiture of goods and chattels upon a *fugam fecit* and in other cases, 2 Hawk. c. 49, ss. 14-17. But in modern times it became unusual for the jury to find the flight, forfeiture being looked upon, since the vast increase of personal property, as too large a penalty for an offence to which a man is prompted by the natural love of liberty; and by the statute of the United Kingdom 7 & 8, Geo. 4, c. 28, s. 5 it was provided that where any person should be indicted for any treason or felony, the jury empanelled on his trial should not be charged to inquire whether he fled for such treason or felony (4 Steph. Com. 6th ed. 550, 551.)

By R.S. C., c. 174, s. 187, it is provided that the jury empanelled to try any person for treason or felony, shall not be charged to inquire concerning his lands, tenements or goods, nor whether he fled for such treason or felony.

No forfeiture accrues upon a summary conviction (4 Steph. Com., 6th ed. 550).

It was once the practice for the grand jury, on indictments for homicide, to find the value and description of the instrument of death, to enable the crown or its grantee to claim the deodand (2 Steph. Com. 6th ed. 586); but it is now the law that there shall, in respect of such death, be no forfeiture of any chattel which has moved to or caused the death of any human being; (R. S. C., c. 181, s. 35; 9 & 10 Vict. c. 62.)

[3] 4 Steph. Com. (6th ed.) 550; 2 Hawk. c. 49, s. 47, *et seq.* By the common law the offender's blood was corrupted by attainder of treason or felony. By 7 Anne, c. 21, s. 10

is corrupted both upwards and downwards so that he can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir, but the same escheat.[1]

(1708), it was enacted that after the death of the Pretender and his sons no attainder for treason should operate to the prejudice of any other than the offender himself; but this provision (the operation of which was postponed by 17 Geo. 2, c. 39, s. 3 (1744), it is said was repealed by 39 & 40 Geo. 3, c. 93 (1800), (1 Steph. Com. 6th ed. 460 note (*m*). Mr. Wicksteed, Q.C., formerly Law Clerk to the House of Commons, thinks, however, that such was not the effect of the latter statute (Tasch. Can. Crim. Acts, 1071). But whether it was or not would not be material in any case arising in any Province of Canada other than British Columbia; Art. 2 (*e*).

It is also doubtful whether, in the other Provinces mentioned in this Article, the law is as stated in clause (*d*). Tasch. Can. Crim. Acts, 1069-1074; 2 Hawk. 649 note (1). What on this subject is the law of England that by virtue of statutes, or the rules governing the application of that law to colonies (Art. 2 (*a*) (*b*) and (*c*)) is to be applied to the Provinces mentioned? Is it the common law, as represented in the text and recognized as existing by 7 Anne, c. 21, or the law as therein declared, namely, that after a date indefinite, but certain of determination, and since determined (1897), corruption of blood for treason should be abolished?

There are, I think, no decisions, but the Parliament of Canada, following the Parliament of the United Kingdom, has in its legislation assumed that the common law on this subject is in force in Canada. By R. S. C., c. 181, ss. 36 and 37 (32 & 33 Vict. (D.) c. 29, ss. 55 and 56; 54 Geo. 3, c. 145), it is provided that—

"**36.** *Except in cases of treason, or of abetting, procuring or counselling the same*, no "attainder shall extend to the disinheriting of any heir, or to the prejudice of the right "or title of any person, other than the right or title of the offender during his natural "life only."

"**37.** Every one to whom, after the death of any such offender, the right or interest to "or in any lands, tenements or hereditaments should or would have appertained if no "such attainder had taken place, may, after the death of such offender, enter into the "same."

Referring to these provisions and to Articles 32-36 of the Civil Code of Quebec, Mr. Justice Taschereau suggests a question as to the legislative authority of the Parliament of Canada in respect of the consequences of attainder: (Tasch. Can. Crim. Acts, 1073). It is not doubted, however, that the Parliament of Canada may deprive an offender of life or liberty, or impose on him any fine or forfeiture that to it seems meet. That is constantly done without question, and it is submitted that to legislate in respect of other consequences of crime, and to abolish or restore corruption of blood therefor, is equally legislating in respect of the criminal law, as in the cases mentioned, and no greater interference with property or civil rights in the Province than in such cases.

In the statute 54 Geo. 3, c. 145, attainder for murder was also excepted. See also 3 & 4 Wm. 4 c. 106, s. 10.

[1] Escheat should be carefully distinguished from forfeiture to the crown, as the consequences, by reason of their similitude in such cases, and because the crown is frequently the immediate lord of the fee and therefore entitled to both, have often been confounded together; (1 Steph. Com., 6th ed. 457).

[1] ARTICLE 16.

CONSEQUENCES OF A CONVICTION OF TREASON OR FELONY IN MANITOBA AND THE NORTH-WEST TERRITORIES.

The consequences, among others, of a conviction of treason or felony in the Province of Manitoba and the North-West Territories are, so far as such provisions are applicable thereto, as follows:

[(*a.*) [2] Every person convicted of treason or felony may be condemned to the payment of the whole or any part of the costs and expenses incurred in and about his prosecution and conviction.

(*b.*) [3] Immediately upon the conviction of any person for felony, the court before which he is convicted may award any sum of money not exceeding £100, by way of satisfaction or compensation for any loss of property suffered by any person through or by means of such felony, upon the application of such person. Such sum is to be deemed to be a judgment debt due to the person entitled to receive the same from the person so convicted.

(*c.*) [4] Every person sentenced to death, to penal servitude, or to any term of imprisonment with hard labor, or exceeding twelve months:

(i.) Becomes incapable of holding any military or naval office, or any civil office under the crown, or other public employment, or any ecclesiastical benefice, or of being elected, or sitting, or voting as a member of either House of Parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise whatever in England, Wales, or Ireland.

[1] S. D. Art. 16.

[2] [33 & 34 Vict. c. 23, s. 3. The section contains various subsidiary provisions as to costs, which do not bear on the punishment of the offence. See 1 Hist. Cr. Law, 487-9.]

This Act came into force on the 4th of July 1870. See Art. 2 (*d.*) It does not affect the law of forfeiture consequent upon outlawry which in Manitoba and the North-West Territories is as indicated in the article next preceding.

[3] 33 & 34 Vict. c. 23, s. 4. [4] 33 & 34 Vict. c. 23 s. 2.]

[Such incapacity continues until such person has suffered the punishment to which he has been sentenced, or such other punishment as by competent authority may be substituted for the same, or until he receives a free pardon from Her Majesty.

(ii.) If any such person holds, at the time of his conviction, any military or naval office, or any civil office under the crown, or other public employment, or any ecclesiastical benefice, or any place, office, or emolument in any university, college, or other corporation, or is entitled to any pension or superannuation allowance, payable by the public or out of any public fund; such office, benefice, employment, or place, forthwith becomes vacant, and such pension or superannuation allowance, or emolument, forthwith determines and ceases to be payable, unless such person receives a free pardon from Her Majesty within two months after such conviction, or [1] before the filling up of such office, benefice, employment, or place, if given at a later period.

(*d.*) [2] Every person sentenced to death, or to penal servitude, or against whom sentence of death is recorded, is disabled from suing any person, from alienating or charging any property, and from making any contract.

(*e.*) [3] The custody and management of the property of any such person may be committed to an administrator, or interim curator, appointed in the manner and invested with the powers described in the statute, 33 & 34 Vict. c. 23.

(*f.*) [4] Any person subject to the provisions of clauses (*d.*) or (*e.*) ceases to be affected by them when he dies, or is made bankrupt, or has suffered any punishment to which sentence of death has been commuted, or has undergone the full term of penal servitude to which he was sen-

[1] [I suppose this means if the pardon is given more than two months after the conviction.
[2] 33 & 34 Vict. c. 23, s. 8.
[3] See ss. 9-29 inclusive.
[4] 33 & 34 Vict. c. 23, s. 7.]

[tenced, or such other punishment as may have been substituted for it by lawful authority, or receives Her Majesty's pardon.]

[1] ARTICLE 17.

IMPRISONMENT WHERE THERE IS NO EXPRESS PROVISION.

[2] Every one who is convicted of any felony for which no punishment is specially provided, is liable to imprisonment for life.

Every one who is convicted on indictment of any misdemeanor for which no punishment is specially provided (other than fraud, cheating and conspiracy), is liable to five years' imprisonment.

[3] Every one who is convicted of fraud, or of cheating, or of conspiracy, is liable to seven years' imprisonment, if no special punishment is provided by statute.

[4] Every one who is summarily convicted of any offence for which no punishment is specially provided, is liable to a penalty not exceeding twenty dollars, or to imprisonment, with or without hard labor, for a term not exceeding three months, or to both.

[5] ARTICLE 18.

PREVIOUS CONVICTIONS.

[6] Every one who is convicted of felony, not punishable with death, committed after a previous conviction for felony, is liable to imprisonment for life, unless some other

[1] S. D. Arts. 18, 22.]

[2] R. S. C. c. 181, s. 24. [7 & 8 Geo. 4, c. 28, ss. 8, 9 modified by 7 Wm. 4 & 1 Vict. c. 90, s. 5; 9 & 10 Vict., c. 24, s. 1; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.] There are also certain limitations as to the term of imprisonment, &c., where the offender is tried in a particular manner, as for instance where he is tried under *The Summary Trials Act* (R. S. C. c. 176, ss. 10, 11), or summarily by a stipendiary magistrate in the District of Keewatin for certain offences defined in R. S. C., c. 53, s. 26.

[3] R. S. C. c. 173, s. 26.

[4] R. S. C. c. 181, s. 24.

[5] S. D. Art. 19.

R. S. C. c. 181, s. 25; 7 & 8 Geo. 4, c. 28, s. 11.

punishment is directed by any statute for the particular offence,—in which case the offender is liable to the punishment thereby awarded, and not to any other.

[1] ARTICLE 19.

CUMULATIVE PUNISHMENTS.

[2] When an offender is convicted of more offences than one, before the same court or person at the same sitting, or when any offender, under sentence or undergoing punishment for one offence, is convicted of any other offence, the court or person passing sentence may, on the last conviction, direct that the sentences passed upon the offender for his several offences shall take effect one after another.

ARTICLE 20.

CONDITIONAL RELEASE OF FIRST OFFENDERS.[3]

In this Article the expression "court" means and includes any superior court of criminal jurisdiction, any

[1] S. D. Art. 23.

[2] R. S. C. c. 181, s. 27. This section, which is substantially in the terms of the first clause of the 17th section of the Draft Code, is, as to felonies, founded on 32 & 33 Vict. (D.) c. 29, s. 92, and as to misdemeanors on the common law. 32 & 33 Vict. (D.) c. 29, s. 92 is taken from 7 & 8 Geo. 4, c. 28, s. 10.

[When felonies as a rule were capital, there could be no cumulative sentences in regard of them, whether they were charged in different indictments or in different counts of the same indictment. If they were charged in separate indictments, the prisoner having been convicted and sentenced on one, might plead "autrefois attaint" to any subsequent charge. There was no use in passing two sentences of death upon him, (see Chitty's Criminal Law, 463). If two felonies were charged in one indictment, the prosecutor was put to his election—as indeed he still is. When death ceased to be the punishment for felonies as such (7 & 8 Geo. 4, c. 28, s. 7) it was necessary to make provision for the punishment of persons already under sentence. Hence the provision in the text. Cumulative punishment in cases of misdemeanor depends on the common law principles. See opinion of the judges in *Wilkes's Case*, 19 St. Tr. 1132-3, and *R. v. Castro*, L. R. 5 Q. B.D. 490. In the case of Renwick Williams (1 Leach, 529, A.D. 1790) cumulative sentences, amounting in all to six years' imprisonment, were passed upon three indictments for similar offences.]

[3] 52 Vict. (D.) c. 44; 50 & 51 Vict. c. 25. The court may direct the offender to pay the cost of prosecution or a portion thereof; s. 2 (2). See also R.S.C. c. 177, ss. 14, 15.

"Judge" or "Court" within the meaning of "*The Speedy Trials Act*" and any "Magistrate" within the meaning of "*The Summary Trials Act.*"

In any case in which a person is convicted before any court of any offence punishable with not more than two years' imprisonment, and no previous conviction is proved against him, if it appears to the court before whom he is so convicted, that, regard being had to the youth, character, and antecedents of the offender, to the trivial nature of the offence, and to any extenuating circumstances under which the offence was committed, it is expedient that the offender be released on probation of good conduct, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a recognizance, with or without sureties, and during such periods as the court directs, to appear and receive judgment when called upon, and in the meantime to keep the peace and be of good behavior:

If a court having power to deal with the offender in respect of his original offence or any justice of the peace is satisfied by information on oath that the offender has failed to observe any of the conditions of his recognizance, such court or justice of the peace may issue a warrant for his apprehension:

An offender, when apprehended on any such warrant, shall, if not brought forthwith before the court having power to sentence him, be brought before the justice issuing such warrant, or before some other justice in and for the same territorial division, and such justice shall either remand him by warrant until the time at which he was required by his recognizance to appear for judgment, or until the sitting of a court having power to deal with his original offence, or admit him to bail with a sufficient surety conditioned on his appearing for judgment:

The offender when so remanded may be committed to a prison, either for the county or place in or for which

the justice remanding him acts, or for the county or place where he is bound to appear for judgment; and the warrant of remand shall order that he be brought before the court before which he was bound to appear for judgment, or to answer as to his conduct since his release:

The court, before so directing the release of an offender, must be satisfied that the offender or his surety has a fixed place of abode or regular occupation in the county or place for which the court acts, or in which the offender is likely to live during the period named for the observance of the conditions.

ARTICLE 21.

PARDONS.

[1] The Crown may extend the Royal mercy to any person sentenced to imprisonment by virtue of any statute, although such person is imprisoned for non-payment of money to some person other than the Crown.

[2] Whenever the Crown is pleased to extend the Royal mercy to any offender convicted of a felony punishable with death or otherwise, and grants to such an offender either a free or a conditional pardon, by warrant under the Royal Sign Manual, countersigned by one of the principal Secretaries of State, or by warrant under the hand and seal-at-arms of the Governor General, the discharge of such offender out of custody in case of a free pardon, and the performance of the condition in the case of a conditional pardon, shall have the effect of a pardon of such offender, under the Great Seal, as to the felony for which such pardon has been granted.

But no free pardon, nor any discharge in consequence thereof, nor any conditional pardon, nor the performance of the condition thereof, in any of the cases aforesaid,

[1] R.S.C. c. 181, s. 38; 22 Vict. c. 32, s. 1.
[2] R.S.C. c. 181, s. 39; 7 & 8 Geo. 4, c. 28 s. 13; 9 Geo. 4, c. 32 s. 3.

shall prevent or mitigate the punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any felony or offence other than that for which the pardon was granted.

ARTICLE 22.

COMMUTATION OF SENTENCE.

[1] The Crown may commute the sentence of death, passed upon any person convicted of a capital crime, to imprisonment in the penitentiary for life, or for any term of years not less than two years, or to imprisonment in any other gaol or place of confinement for any period less than two years, with or without hard labor; and an instrument under the hand and seal-at-arms of the Governor General, declaring such commutation of sentence, or a letter or other instrument under the hand of the Secretary of State, or of the Under Secretary of State, shall be sufficient authority to any judge or justice, having jurisdiction in such case, or to any sheriff or officer to whom such letter or instrument is addressed, to give effect to such commutation, and to do all such things and to make such orders, and to give such directions, as are requisite for the change of custody of such convict, and for his conduct to and delivery at such gaol or place of confinement or penitentiary, and his detention therein, according to the terms on which his sentence has been commuted.

ARTICLE 23.

UNDERGOING SENTENCE EQUIVALENT TO A PARDON.

[2] When any offender has been convicted of an offence not punishable with death, and has endured the punishment to which such offender was adjudged, or if such

[1] R.S.C. c. 181, s. 40.
[2] R.S.C. c. 181 s. 41; 9 Geo. 4 c. 32 s. 3.

offence is punishable with death and the sentence has been commuted, then if such offender has endured the punishment to which his sentence was commuted, the punishment so endured shall, as to the offence whereof the offender was so convicted, have the like effect and consequences as a pardon under the Great Seal; but nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced, on a subsequent conviction for any other offence.

[1] When any person convicted of any offence has paid the sum adjudged to be paid, together with costs, under such conviction, or has received a remission thereof from the Crown, or has suffered the imprisonment awarded for non-payment thereof, or the imprisonment awarded in the first instance, or has been discharged from his conviction by the justice of the peace in any case in which such justice of the peace may discharge such person, he shall be released from all further or other proceedings for the same cause.

[1] R.S.C. c. 181 s. 42; 24 & 25 Vict. c. 96 s. 109, c. 97 s. 67.

CHAPTER IV.

[1] *GENERAL EXCEPTIONS.*

[2] ARTICLE 24.

DEFINITIONS SUBJECT TO EXCEPTIONS.

[EVERY definition hereinafter contained of any crime is subject to the following general exceptions, except in the cases in which the contrary is expressed :—

[3] ARTICLE 25.

CHILDREN UNDER SEVEN.

[4] No act done by any person under seven years of age is a crime.

[5] ARTICLE 26.

CHILDREN BETWEEN SEVEN AND FOURTEEN.

[6] No act done by any person over seven and under fourteen years of age is a crime, unless it be shewn affirmatively that such person had sufficient capacity to know that the act was wrong

[7] ARTICLE 27.

INSANITY.

[8] No act is a crime if the person who does it is at the

[See 2 Hist. Cr. Law, chaps. xviii, xix., pp. 94–186. See Draft Code, Pt. III. ss. 69–70.]

[1] S. D. Art. 24.

[2] S. D. Art. 25.

[3] [1 Hale P. C. 27–8; 1 Russ. Cr. 108; Draft Code, s. 20.]

[4] S. D. Art. 26.

[5] [*R.* v. *Owen*, 4 C. & P. 236; and see cases collected 1 Russ. Cr. 108-113; Draft Code, s. 20.]

[6] S. D. Art. 27.

[7] [The whole subject is discussed at full length in 2 Hist. Cr. Law, ch. xix. pp. 124–196. Cf. Draft Code, s. 22.]

[time when it is done prevented ([1] either by defective mental power or) by any disease affecting his mind.

(*a.*) from knowing the nature and quality of his act; or,

(*b.*) from knowing that the act is [2] wrong; (or, [1]

(*c.*) from controlling his own conduct, unless the absence of the power of control has been produced by his own default.)

But an act may be a crime although the mind of a person who does it is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act.

Illustrations.

(1.) A kills B under an insane delusion that he is breaking a jar. A's act is not a crime.

(2.) A kills B knowing that he is killing B, and knowing that it is wrong to kill B; but his mind is so imbecile that he is unable to form such an estimate of the nature and consequences of his act as a person of ordinary intelligence would form. A's act is not a crime if the words within the first set of brackets are law. If they are not, it is.

(3.) A kills B knowing that he is killing B, and knowing that it is illegal to kill B; but under an insane delusion that the salvation of the human race will be obtained by his execution for the murder of B, and that God has commanded him (A) to produce that result by those means. A's act is a crime if the word "wrong" has the second of the two meanings ascribed to it in the note.[3] It is not a crime if the word "wrong" has the first of those two meanings.

(4.) A suddenly stabs B under the influence of an impulse caused by disease, and of such a nature that nothing short of the mechanical restraint of A's hand would have prevented the stab. A's act is a crime if (*c.*) is not law. It is not a crime if (*c.*) is law.

(5.) A suddenly stabs B under the influence of an impulse caused by

[1] [The parts of the Article in parentheses are doubtful.

[2] The word "wrong" is variously interpreted as meaning:—1. Morally wrong. 2. Illegal. The practical effect of these differences is shown in Illustrations (4), (5), and (6).

[3] In extreme strictness this ought to be, "If the word 'wrong' has the first of these two meanings, the criminality of the act would depend upon the question whether the jury thought that God's command under the circumstances altered the moral character of the act."]

[disease, and of such a nature that a strong motive, as, for instance, the fear of his own immediate death, would have prevented the act. A's act is a crime whether (c.) is or is not law.

(6.) A permits his mind to dwell upon and desire B's death; under the influence of mental disease this desire becomes uncontrollable, and A kills B. A's act is a crime whether (c.) is or is not law.

(7.) A, a patient in a lunatic asylum, who is under a delusion that his finger is made of glass, poisons one of his attendants out of revenge for his treatment, and it is proved that the delusion had no connection whatever with the act. A's act is a crime.

[1] ARTICLE 28.

PRESUMPTION OF SANITY.

[2] Every person is presumed to be sane, and to be responsible for his acts. The burden of proving that he is irresponsible is upon the accused person; but the jury may have regard to his appearance and behavior in court.

[3] ARTICLE 29.

DRUNKENNESS.

[4] Voluntary drunkenness is not regarded as a disease affecting the mind within the meaning of Article 27; but involuntary drunkenness, and diseases caused by voluntary drunkenness, fall, so far as they affect the mind, within that Article.

If the existence of a specific intention is essential to the commission of a crime, the fact that an offender was drunk when he did the act which, if coupled with that intention, would constitute such crime, should be taken into account by the jury in deciding whether he had that intention.

[1] S. D. Art. 28.

[2] [*R.* v. *Oxford*, 9 C. & P. 525; *R.* v. *Stokes*, 3 C. & K. 185; Draft Code, s. 22;] *R.* v. *Riel*, 2 Man. L. R. 321.

[3] S. D. Art 29.

[4] [1 Hale, P. C. 32-8. Illustrations (1), (2), and (3) are founded on this passage.]

Illustrations.

[(1.) A, in a fit of voluntary drunkenness, shoots B dead, not knowing what he does. A's act is a crime.

(2.) A, under the influence of a drug fraudulently administered to him, shoots B dead, not knowing what he does. A's act is not a crime.

(3.) A, in a fit of delirium tremens caused by voluntary drunkenness, kills B, mistaking him for a wild animal, attacking A. A's act is not a crime.

[1] (4) A is indicted for inflicting on B an injury dangerous to life with intent to murder B. The fact that A was drunk when he inflicted the injury ought to be taken into account by the jury in deciding whether A intended to murder B or not.

[2] ARTICLE 30.

MARRIED WOMEN.

[3] If a married woman commits a theft, or receives stolen goods, knowing them to be stolen, in the presence of her husband, she is presumed to have acted under his coercion, and such coercion excuses her act; but this presumption may be rebutted if the circumstances of the case show that in point of fact she was not coerced.

It is uncertain how far this principle applies to felonies in general.

It does not apply to high treason or murder.

It probably does not apply to robbery.

[1] [*R.* v. *Cruse*, 8 C. & P. 546.] *R.* v. *Doherty*, 16 Cox, C. C. 306.

[2] S. D. Art. 30. See Appendix, Note 1.

[3] [1 Hale, P. C. 45; 1 Hawk. P. C. 4; *R.* v. *Hughes*, 1 Russ. Cr. 147; *R.* v. *Atkinson*, 1 Russ. Cr. 141, 154; *R* v. *Smith*, D. & B. 553; *R.* v. *Archer*, 1 Moody, 143; *R.* v. *Brooks*, Dear. 184; *R.* v. *Wardroper*, Bell, C. C. 249. As to felonies in general, see 1 Russ. Cr. 139-141. As to high treason, murder and robbery, see 1 Hale, P. C. 45; Dalton, c. 157; 1 Hawk. P. C. 4; *R.* v. *Buncombe*, 1 Cox, C. C. 183; but as to robbery, see Mr. Carrington's argument in *R.* v. *Cruse*, 8 C. & P. 556. In *R.* v. *Torpey*, Mr. Russell Gurney, Recorder of London, held that the doctrine applied to robbery, 12 Cox, C. C. 48-9; cf. Draft Code, s. 23. As to misdemeanors in general, see note to *R.* v. *Price*, 8 C. & P. 20; and 1 Russ. Cr. p. 145, note (e.), 5th ed.; See too *R.* v. *Torpey*, 12 Cox, C. C. 48-9. As to uttering, see *R.* v. *Price*, 8 C. & P. 19. As to false swearing, *R.* v. *Dicks*, 1 Russ. Cr. 141. As to the general doctrine, see Appendix, Note I. The principle is not affected by the Married Womens' Property Act, 45 & 46 Vict., c. 75.]

[It applies to uttering counterfeit coin.
It seems to apply to misdemeanors generally.

[1] ARTICLE 31.

COMPULSION.

An act which if done willingly would make a person a principal in the second degree and an aider and abettor in a crime, may be innocent if the crime is committed by a number of offenders, and if the act is done only because during the whole of the time in which it is being done, the person who does it is compelled to do it by threats on the part of the [2] offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury, or the command of any one not the husband of the offender, do not excuse any offence.

Illustrations.

[3] (1.) A, B, and C, engaged in a rebellion, force D to join the rebel army and to do duty as a soldier by threats of death continuing during the whole of his service. D's act is not a crime.

[4] (2.) A mob employed in breaking threshing machines force several persons to go with them, and force each person to give each threshing machine a blow with a sledge hammer: A, one of the persons so forced, runs away as soon as he can. A's act is not a crime.

[5] ARTICLE 32.

NECESSITY.

An act which would otherwise be a crime may in some cases be excused if the person accused can shew that it was done only in order to avoid consequences which could

[1] S. D. Art. 31. Draft Code, s. 23.

[2] [1 Hale, P. C. 43-4, 49; and see Illustrations.

[3] *R.* v. *McGrowther*, 18 St. Tr. 394 (A. D. 1746).

[4] *R.* v. *Crutchley*, 5 C. & P. 133. The report says nothing as to the nature of the force. Probably it was by threats of personal violence. It is singular that the law upon this subject should be so very meagre. The subject is treated at some length in 1 Hale, cc. vii., viii., and ix., pp. 43-52, but in a very unsatisfactory way. It would seem that in all common cases the fact that a crime is done unwillingly and in order to avoid injury, ought to affect rather the punishment than the guilt.]

[5] S. D. Art. 32.

[not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided.

[1] The extent of this principle is unascertained. It does not extend to the case of shipwrecked sailors who kill a boy, one of their number, in order to eat his body.

[1] [*R.* v. *Dudley & Stephens*, L. R. 14 Q. B. D. 273. In this case the Court commented on the passage in the text, and Lord Coleridge in delivering judgment said (p. 286), "We have the best authority for saying that" my "language was not meant to cover the case then under consideration." I authorized this statement, and on consideration I feel that my language was not vague enough—vague as it was—to represent fully the vagueness of the law. I have slightly altered it, so as to make it more vague. I should have agreed with the rest of the Court had I been a member of it in *R.* v. *Dudley*, though not in all the reasoning of the judgment. I should have based my judgment on the fact that the special verdict found only that if the boy had not been killed and eaten, the survivors "would *probably* not have survived"; and on the principle that in this particular class of cases an error on the side of severity is an error on the safe side. Great danger would be involved in admitting a principle which might be easily abused. I could not go so far as to say, as the judgment delivered by Lord Coleridge says, that any case can impose on a man "a duty" (if the word means a legal duty) "not to live but to die." Nor do I agree with what is said on p. 287, which appears to me to base a legal conclusion upon a questionable moral and theological foundation, and to be rhetorically expressed. "It would be a very easy and cheap display of commonplace learning" (it is said with obvious truth) to "quote from" four specified Greek and Latin authors, passage after passage in which the duty of dying for others has been laid down in glowing and emphatic language as resulting from the principles of heathen ethics. It is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow. Whatever estimate may be formed of self-sacrifice, it seems to me to be a duty of which the law can take no notice, if indeed it is a duty at all, which is not a legal question. I can discover no principle in the judgment in *R.* v. *Dudley*. It depends entirely on its peculiar facts. The boy was deliberately put to death with a knife in order that his body might be used for food. This is quite different from any of the following cases—(1) The two men on a plank. Here the successful man does no direct bodily harm to the other. He leaves him the chance of getting another plank. (2) Several men are roped together on the Alps. They slip, and the weight of the whole party is thrown on one, who cuts the rope in order to save himself. Here the question is not whether some shall die, but whether one shall live. (3) The choice of evils. The captain of a ship runs down a boat, as the only means of avoiding shipwreck. A surgeon kills a child in the act of birth, as the only way to save the mother. A boat being too full of passengers to float, some are thrown overboard. Such cases are best decided as they arise. See on the whole subject my History of Criminal Law, II. 108-15. In the United States (*U. S.* v. *Holmes*, 1 Wall. Jr. 1, quoted at length in Wharton on Homicide, s. 561), shipwrecked sailors and passengers escaping in a boat which could not hold all, the sailors threw some of the passengers overboard. The Court held that the passengers ought to have been preferred to the sailors, unless

Illustrations.

[(1.) [1] A, the Governor of Madras, acts towards his council in an arbitrary and illegal manner. The council depose and put him under arrest, and assume the powers of government themselves. This is not an offence if the acts done by the council were the only means by which irreparable mischief to the establishment at Madras could be avoided.

(2.) [2] A and B, swimming in the sea after a shipwreck, get hold of a plank not large enough to support both; A pushes off B, who is drowned. This is not a crime.

[3] ARTICLE 33.

IGNORANCE OF LAW.

[4] The fact that an offender is ignorant of the law is in no case an excuse for his offence, but it may be relevant to the question whether an act which would be a crime if accompanied by a certain intention or other state of mind, and not otherwise, was in fact accompanied by that intention or state of mind or not.

[5] In interpreting a statute which makes unlawful a continuous act which till the statute passed was not unlawful, it is to be presumed that the legislature intended to allow a reasonable time for the discontinuance of the act so made unlawful, and the ignorance of the accused that the statute had been passed is a fact relevant to the question whether his discontinuance of it was within such reasonable time or not.

[the presence of the sailors was required for the common safety, but "under any circumstances it was held the proper method of determining who was to be the first victim out of the particular class was by ballot." I doubt whether an English Court would take this view. It would be odd to say that the two men on the raft were bound to toss up as to which should go.

[1] *R.* v. *Stratton & Others*, 21 St. Tr. 1045; see Lord Mansfield's judgment, pp. 1222-6.

[2] Bacon's Maxims, No. 5.]

[3] S. D. Art. 33.

[4] [Draft Code, s. 24.] *R.* v. *Mailloux*, 3 Pugs. 493.

[5] [See Illustration (3). See also *Thompson* v. *Farrer*, L. R. 9 Q. B. D. 372.

Illustrations.

[(1.) [1] A, a foreigner unacquainted with the law of England, kills B in a duel in England. A's act is murder, although he may have supposed it to be lawful.

(2.) [2] A, a poacher, sets wires for game, which are taken by B, a gamekeeper, under the authority of an Act of Parliament (5 Anne, c. 14, s. 4), of the existence of which A is ignorant. A forcibly takes the wires from B, and is tried for robbery. His ignorance of the Act is relevant to the question whether he took the wires under a claim of right.

(3.) [3] A is in command of a ship on a voyage, which during its continuance is rendered unlawful by the passing of the kidnapping Act, 1872 (35 & 36 Vict. c. 19), but A was not aware that the Act had been passed till a considerable time afterwards, and he continued his voyage in ignorance of the Act. The fact of A's ignorance is relevant to the question whether the particular voyage in which A was engaged was one to which the Act was intended by the legislature to apply.

[4] ARTICLE 34.

IGNORANCE OF FACT.

An alleged offender is in general deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence.

When an offence is so defined by statute that the act of the offender is not a crime unless some independent fact co-exists with it, the court must decide whether it was the intention of the legislature that the person doing the forbidden act should do it at his peril, or that his ignorance as to the existence of the independent fact, or his mistaken belief in good faith and on reasonable grounds that it did not exist, should excuse him.

Voluntary or negligent ignorance of any such fact is no excuse for any such offence.

[1] [*Ex parte Barronet*, 1 E. & B. 1.

[2] *R.* v. *Hall*, 3 C. & P. 409. In *R.* v. *Reed*, Car. & Mar. 308, Coleridge, J., said: "Ignorance of the law cannot excuse any person, but at the same time when the question is with what intent a person takes, we cannot help looking into his state of mind, as if a person takes what he believes to be his own it is impossible to say he is guilty of felony."

[3] *Burns* v. *Nowell*, L. R. 5 Q. B. D. 444.]

[4] S. D. Art. 34.

[In cases of the infliction of bodily harm or restraint for the purpose of arresting or retaking a person honestly and reasonably, but erroneously, supposed to be liable to be arrested or retaken, the person inflicting such harm or restraint is not justified by such belief, unless the state of facts in the existence of which he erroneously believed would, if it had really existed, have made it his legal duty to act as he did, or would have been such as to make his conduct an act of defence of his person or habitation.

Illustrations.

(1.) [1] A, under an insane delusion, kills B. If the delusion is such that its truth would justify him in doing so, his act is not a crime. The delusion would also be evidence that A did not know he was doing wrong even if its truth would not justify the act.

(2.) [2] A, making a thrust with a sword at a place where, upon reasonable grounds, he supposes a burglar to be, kills a person who is not a burglar. A is in the same situation as if he had killed a burglar.

(3.) [3] A abducts B, a girl under fifteen years of age, from her father's house, believing in good faith and on reasonable grounds that B is eighteen years of age. A commits the offence of abduction, although if B had been eighteen years of age she would not have been within the statute.

(4.) [4] A, in the last illustration, abducts B, in ignorance of her age, and

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[1] [*M'Naghten's Case*, 10 Cl. & Fin. 200.

[2] *Levet's Case*, 1 Hale, 474.

[3] *R.* v. *Prince*, L. R. 2 C. C. R. 151.

[4] *R.* v. *Prince*, Ibid. See judgment of Brett, J., p. 169, and see p. 174. It has been doubted whether a person commits bigamy who contracts a second marriage under a *bonâ fide* belief that the first husband or wife is dead. In *R.* v. *Turner*, 9 Cox, C. C. 145, Martin, B., directed a jury that if a woman had an honest belief that her husband was dead she was not guilty of bigamy, and this ruling was followed by Cleasby, B., in *R.* v. *Horton*, 11 Cox, C. C. 670. In *R.* v. *Gibbons*, 12 Cox, C. C. 237, Brett, J., after consulting Willes, J., held (says the report) "that a *bonâ fide* belief that the husband was dead was no defence, unless the seven years had passed." In that case, however, the "*bonâ fide* belief" appears to have arisen solely from the fact that the woman had not heard of her husband for upwards of six years. It was thus a gratuitous belief, founded on ignorance It seems to me that if the belief was founded on positive evidence the case would be otherwise. Suppose, *e.g.*, a woman saw her husband fall overboard in the middle of the Atlantic, and saw a boat go out to search for him, and return without him; suppose that she took out administration to his estate, heard nothing of him for five years, and then married again, would she be guilty of bigamy if by some strange chance he had escaped? Surely not. I am informed that this view was taken by Denman, J., and Amphlett, J.A., in a case of *R.* v. *Moore*, tried at Lincoln Spring Assizes, 1877. I think the proviso in 24 & 25 Vict., c. 100, s. 57] R. S C. 161, s. 4 (b), (Art. 330) [ought clearly to be read not as

[without making any inquiry about it. A commits the offence of abduction.

(5.) [1] A received into her house, not being a registered lunatic asylum, several persons to be medically treated, being persons who were in fact lunatics, though A honestly believed on reasonable grounds that they were not lunatics but sufferers under other disorders. Notwithstanding such a belief, A committed an offence against 8 & 9 Vict., c. 100, s. 14.

(6.) [2] A, a constable, honestly and on reasonable grounds believing B to have committed murder, and not being able otherwise to arrest him, shoots at him and kills him. A is justified. If A had been a private person his act would have been manslaughter at least.

(7.) [3] B, pretending by way of a practical joke to be a robber, presents an empty pistol at A and demands his money. A, believing that B really is a robber, kills B. A is justified.

(8.) (SUBMITTED.) A breaks into B's house in Cornwall, at 5.45 a.m., local mean time, supposing that it is past six, but forgetting that A's watch is set to London time. A commits burglary.]

[excluding the general common law principle stated in this Article, but as supplementing and completing it, by providing that a second marriage, after seven years' ignorance as to the life of the first husband or wife, shall not be criminal, although the party so marrying has no positive reason to believe, and perhaps does not believe, that the absent person is dead.]

And it has since been so held. In *R.* v. *Tolson*, L. R. 23 Q. B. D. 168, in which the question was reserved by Stephen, J., to obtain the decision of the Court in view of the conflicting opinions of single judges on the point, it was held by Lord Coleridge, C.J. Hawkins, Stephen, Cave, Day, A. L. Smith, Wills, Grantham and Charles, JJ. (Denman, Field, and Manisty, JJ., and Pollock and Huddleston, BB., dissenting), that a *bonâ fide* belief on reasonable grounds in the death of the husband at the time of the *second* marriage, afforded a good defence to an indictment for bigamy, although the second marriage took place within seven years of the time when she last knew of her husband being alive.

[1] [*R.* v. *Bishop*, L. R. 5 Q. B. D. 259.

[2] 2 Hale, P. C. 82, 85.

[3] 1 Hale, P. C. 474.]