A CRITIQUE OF CANADIAN CRIMINAL LEGISLATION *

PART ONE

1.—Introduction

Scope of the study :

The main object of this study is an examination of the concepts of Canadian legislators as to the nature of criminality and their attitude toward the problem of crime. Its purpose is not an exposition, either descriptive or critical, of Canadian criminal law and procedure.

It is to be noted at the outset that all the legislation in force in Canada which in some way pertains to the subject of crime is by no means to be found in some section of the Criminal Code[1]. However, in view of the fact that the Code, with its 1152 sections, deals with the great bulk of Canadian criminal law and procedure, it seems justifiable to assume that its history may be taken as fairly representative of the development of Canadian criminal legislation. Therefore the present discussion will be confined primarily to the Criminal Code, with only incidental reference to other statutes. It will be an attempt to consider, in a general way, the sources of the Code, the circumstances surrounding its adoption, its underlying principles, and the course of amendment since it was first established.

The matter which will be made the subject of a more detailed consideration will be the attitudes of the legislators towards the crime problem and the results thereof as shown in the development of the Code from the date of its adoption to the present time. To this end, after a discussion of the back-

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[1] There are many statutes scattered throughout the Dominion statute books dealing either directly with the subject of crime; (e. g. the Juvenile Delinquents Act (1929) 19-20 Geo. V. (Dom.) c. 46); the Fugitive Offenders Act, R. S. C., 1927, c. 81; the Identification of Criminals Act, id. c. 38; the Prisons and Reformatories Act, id. c. 163) or dealing with some other matter within Dominion legislative jurisdiction, and having incidental penal consequences; (e. g. the Currency Act, R. S. C., 1927, c. 40; the Customs Act, id. c. 42; the Dominion Elections Act, id. c. 53; the Excise Act, id. c. 60; the Food and Drug Act, id. c. 76; the Fisheries Act, (1932), 22-23 Geo. V. (Dom.) c. 42; the Opium and Narcotic Drug Act, (1929), 19-20 Geo. V. (Dom.) c. 49). These examples are taken at random from the Canadian statutes. Throughout the course of this study other examples of criminal statutes outside the Criminal Code will be noted; e. g. Imperial statutes in force in Canada, and so-called "provincial criminal laws".

ground, adoption, and sources of the Code, an effort will be made to trace the course of subsequent amendments in regard to two subjects which stand out prominently in the course of amendment. These two subjects bear an important relation to the legislators' conception of the nature of crime. They are change of penalties and the creation of new offences. They will accordingly be the primary matters considered, in an endeavor to see what principles, if any, have directed the course of legislation. Thereafter an attempt will be made to evaluate critically this legislative product, from the point of view of modern criminology and jurisprudence, and to suggest in broad outline proposals for the reform of such unsatisfactory conditions as this evaluation may reveal.

In the preparation of this thesis some attention has been given to American comparisons, which should be of interest in view of the prevalent popular notion, both in Canada and the United States, as to the superiority of Canadian criminal justice.

This study is divided into two parts. Part I deals with the sources of the Code, the circumstances surrounding its adoption, and its underlying principles. Part II consists of a critical discussion of the course of amendment to the Code, and some general observations concerning reform.

II.—General Background of the Code:

The codification movement in England and its fruition in Canada:

The Parliament of the Dominion of Canada was the first British legislature[2] to adopt a comprehensive code of criminal law and procedure, and came close to being the first legislative body in any common law jurisdiction[3] to carry such a project to completion. In England, the reduction of the criminal law,

[2] With the exception of the Indian Penal Code (which came into force in 1860) and the Indian Code of Criminal Procedure (1861). See Anglo-Indian Codes, edited by Dr. Whitley Stokes, Oxford, 1887; Sir Courtenay Ilbert's Government of India, Chap. IV; also Ilbert's articles in 5 Law Quarterly Review, (1889) p. 347 and 10 id. p. 222.

[3] The New York Penal Code and Code of Criminal Procedure both ante-date the Canadian Code. See Pound, R., Outlines of Lectures on Jurisprudence (4th ed. 1928) p. 83. A contemporary observation is not without interest:

> 'The *Irish Times* says: "The Canadians are the first English-speaking people to enact and possess such a code", that is, a criminal code "utterly freed from technicalities, obscurities, and other defects which experience has disclosed". Guess not. The New York Code of Criminal Procedure and Penal Code answer this description, and the former has been in force eleven years and the latter ten years. If the Canadians have anything better, at least they have nothing older, and, if better, it is merely because they had ours to improve on'. *Albany Law Journal*, quoted in 28 *Canada Law Journal* (1892) p. 552.

written and unwritten, into one code had been much considered, and the Canadian enactment marked the culmination of an English movement during about half a century which bore no[4] fruit in England. From 1833 to 1880 a series of Commissions was established by the British Government, a large number of reports was made, and several bills were introduced in Parliament, but without success. Most of these earlier reports and bills were concerned merely with codification of some particular branch of criminal law,[5] but the draft code prepared by the Commissioners[6] in 1879 aimed to codify as completely as possible all the law and procedure relative to indictable offences. Early in 1880 a bill substantially the same as the draft code was introduced in the House of Commons by the Attorney General, Sir John Holker, but it was "wrecked in an Irish storm in the Grand Committee of the Commons".[7] The only English legislation resulting from this period of activity was seven Acts, passed in 1861, which were known as the Greaves' Criminal Consolidation Acts.[8] These statutes make no attempt at codification. They are merely a consolidation[9] of a large part of the statute law.[10] The efforts in England during this period in the cause of codification were not, however, entirely without results. The Canadian Government, utilizing to a large extent the work of the various English commissions, prepared a code which received legislative sanction in 1892,[11] and which was substantially the same as the present Criminal Code.

[4] That is, it did not produce any comprehensive code.

[5] E. g. the bill for the codification of the law as to offences against the person, which was introduced in the House of Lords by Lord St. Leonards in 1852.

[6] The Commissioners were Colin Baron Blackburn, Charles Robert Barry, Sir Robert Lush, and Sir James Fitzjames Stephen.

[7] Chalmers, M. D., An Experiment in Codification, 2 *Law Quarterly Review*, (1886) 125, 126.

[8] 24-25 Vict. (Imp.) c. c. 94, 95, 96, 97, 98, 99, 100.

[9] "A code, on the other hand, differs from a consolidation Act inasmuch as it embodies the common law of the subject it deals with, while a consolidation Act merely gathers together and harmonizes the various statutory enactments relating to some particular matter". Chalmers, M. D., *op. cit.*, (*supra* note 7), p. 125.

[10] This summary account of the codification movement in England is taken chiefly from the report of the Royal Commission, 1879, pp. 5-6: See also *Hansard's Parliamentary Debates* (3rd series) Vol. 250, pp. 244, 1236.

[11] 55-56 Vict. (Dom.) c. 29. This Code came into force on July 1, 1893 (see s. 2). This code, with its amendments, was consolidated in 1906 on the general revision of the statutes of Canada (R. S. C., 1906, c. 146). It was again consolidated in 1927, so that in its present form the Code consists of R. S. C., 1927, c. 36, and the following amendments: (1930) 20-21 Geo. V. (Dom.) c. 11; (1931) 21-22 Geo. V. (Dom.) c. 28; (1932) 22-23 Geo. V. (Dom.) c. c. 7, 8, 9, 28; (1932-33) 23-24 Geo. V. (Dom.) c. c. 25, 53.

As a preliminary requirement to a study of the Code, it is necessary to have in mind a general picture of the criminal law and legislation prevailing in Canada prior to the codification in 1892. This is a very important matter, because, as will be shown presently, much of this law and legislation has not been superseded by the Code and is still in force. Therefore it is advisable to consider briefly the following topics: (a) The law in the colonies prior to Confederation. (b) The distribution of criminal legislative jurisdiction under the *British North America Act, 1867*. (c) The legislative system resulting from this distribution. (d) Legislation in Canada between the federation in 1867 and the Code in 1892.

(*a*) *The law in the colonies prior to Confederation :*

In each of the colonies[12] which, in 1867, entered into the union established by the *British North America Act*[13] the criminal law was English. It consisted of English common and statutory law, except as the same had been modified from time to time by statutes of the colonial assemblies.[14] There were different rules in the colonies as to the amount of English law in force therein. In upper Canada the Legislature in 1800 affirmed the introduction of English criminal law as it stood on the 17th day of

[12] Upper Canada (now Ontario); Lower Canada (now Quebec); New Brunswick, and Nova Scotia. Strictly speaking there were only three colonies, for upper and lower Canada had been reunited under one Government in 1840 by the Union Act, 3-4 Vict. (Imp.) c. 35. It was the failure of this union which led to the federation in 1867. See Kennedy, W. P. M., *The Constitution of Canada* (1922) Chap. XVII.

[13] 30 Vict. (Imp.) c. 3.

[14] The Colonial Laws Validity Act (1865) 28-29 Vict. (Imp.) c. 63 definitely confirmed this colonial power to modify both English common law and English statutes in force in the colonies, except such statutes as were expressly made applicable to the colonies. The Act reads :

> " 1. . . . An Act of Parliament, or any provision thereof, shall, in construing this Act, be said to extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of Parliament;" . . .
>
> " 2. Any colonial law, which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force or effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."
>
> " 3. No colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation, as aforesaid."

(This statute is now repealed so far as it relates to the Dominions, see note 41 *infra*.)

For a discussion of the causes and scope of this statute see: Keith, A. B., "*Responsible Government in the Dominions*", (2nd ed. 1928) Vol. I, pp. 339-49.

September, 1792.[15] In Lower Canada, the introduction of the English common and statutory criminal law as of 1763 was confirmed by the *Quebec Act* of 1774.[16] As to New Brunswick and Nova Scotia, there are no statutes, either Imperial or Colonial, in regard to this subject. The English common law as to crime became operative on the settlement of these provinces except where it was obviously inapplicable to local conditions. The English statutory law was introduced only where it was obviously applicable. For the purpose of introduction of English law the provinces of New Brunswick and Nova Scotia are regarded as acquired by settlement rather than by cession of Acadia under the Treaty of Utrecht in 1713.[17] The other five provinces which became part of the Dominion at various times after 1867[18] have similar rules as to the amount of English law in force therein.[19] For present purposes it is sufficient to note that in all of the Canadian provinces the basis of the criminal law is English law.[20]

The situation in Quebec deserves more than passing notice. There existed in that province prior to Confederation, and there still exists therein, a unique jural system. One finds side by side two systems of law having diametrically opposite principles and techniques. The criminal law in Quebec, as has been observed, has an English common law basis. The law which governs property and civil rights in that province has a Roman French foundation. The cause of this two-fold legal system lies in early Canadian colonial history. After the cession of the French possessions in North America to Great Britain by the Treaty of Paris in 1763, a royal Proclamation was issued on October 7, 1763 introducing the law of England, both civil and criminal, into the whole of the ceded territory. The French Canadians were very dissatisfied with the introduction of the English law relating to civil matters, and claimed that they

[15] 40 Geo. III. (Upper Can.) c. 1. This provision is now embodied in s. 10 of the Criminal Code.

[16] 14 Geo. III. (Imp.) c. 83, s. 11.

[17] See: *Uniacke* v. *Dickson*, (1848) James (Nova Scotia) 287; R. V. Burdell, (1861) 1 Old. (Nova Scotia) 126; *Emerson* v. *Maddison*, [1906] A. C. 569; *R.* v. *Porter*, (1888) 20 N. S. R. 352; *Cooper* v. *Stuart*, (1889) 58 L. J. P. C. 93, 96; *Doe dem. Harrington* v. *McFadden*, (1836) Berton (New Brunswick) 260; Ex. p. Ritchie, (1842) 2 Kerr (New Brunswick) 75; Ex. p. Bustin, (1851) 2 Allen (New Brunswick) 211; *Wilson* v. *Jones*, (1850) 1 Allen, 658; *James* v. *McLean*, (1855) 3 Allen, 164.

[18] See note 86 *infra*.

[19] For a discussion of the particular rules in each of these provinces see: Tremeear, W. J., *Annotated Criminal Code* (4th ed. 1929) pp. 32-35, 769-771.

[20] For a general discussion of the introduction of English Law into Canada, see Clement, W. H. P., *Canadian Constitution* (3rd ed. 1916) Chap. XIV.: See also Tremeear, W. J., *op. cit.*, pp. 27-35.

were entitled to their old laws relating to property and civil rights. It appears, however, that they were not dissatisfied with the English criminal law. Harsh as it was at that time, they preferred it to the still more cruel and uncertain laws of France, which they had formerly endured.

To allay the dissatisfication the *Quebec Act*[21] was passed in 1774, by which French law was re-introduced in civil matters. In regard to criminal matters the introduction of the criminal law of England was affirmed. By this same statute the limits of the Province of Quebec were enlarged to include the whole of the territory later formed into Upper Canada. The British colonists became dissatisfied with the *Quebec Act,* and in 1791, by the *Constitutional Act,*[22] the Province of Quebec was divided into the provinces of Upper Canada and Lower Canada. A separate legislature was granted to each province. As has been seen,[23] Upper Canada passed an Act in 1800 declaring the criminal law of England as of September 7, 1792, to be the criminal law of Upper Canada. By the first Act[24] of its first session the Legislature of Upper Canada restored in that province the English law in regard to property and civil rights.[25]

The introduction of English criminal law into Quebec bears an important relation to subsequent developments. The fact that Lower Canada had essentially the same criminal law and technique as the other provinces rendered it possible in 1867 to give criminal legislative jurisdiction to the Dominion Parliament. Consequently it was possible in 1892 to enact a uniform code of criminal law for the whole of Canada.

The legislation passed from time to time by the colonial legislatures did not affect fundamentally the criminal law in force in the colonies. Most of the statutes were procedural, or merely dealt with the amount of punishment for different offences.[26] Therefore when the colonies were united in 1867

[21] 14 Geo. III. (Imp.) c. 83.
[22] 31 Geo. III. (Imp.) c. 31.
[23] See note 15 *supra.*
[24] 32 Geo. III. (Upper Can.) c. 1.
[25] The sources used for this account of the Quebec situation are, Hoyles, N. W., *"The Criminal Law of Canada"*, 38 *Canada Law Journal* (1902) pp. 225-8; Tremeear, W. J., *op. cit.*, pp. 27-28; Clement, W. H. P., *op. cit.*, pp. 283-5. See also note 12 *supra.*
[26] This estimate or pre-Confederation legislation is based upon an examination of the criminal statutes of New Brunswick and Nova Scotia. It is unlikely that the general nature of the legislation in the other colonies would be very different.

One New Brunswick statute is rather interesting. It shows the severity of the criminal law in the colonies in the early part of the nineteenth century, as well as a growing feeling that the law should be more humane.

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there existed in each a distinct body of criminal law, having for its foundation English common and statutory law, but modified to some extent by colonial legislation.

(b) *The distribution of criminal legislative jurisdiction under the British North America Act, 1867 :*

The *British North America Act* transferred to the Parliament of the Dominion the exclusive legislative authority as to the criminal law, except the constitution of courts of criminal jurisdiction but including the procedure in criminal matters.[27] But the provinces were also given power to impose punishment by fine, penalty, or imprisonment for enforcing any provincial law.[28] This new distribution of legislative authority did not *ipso facto* affect the prior colonial legislation. Any offence created by a statute passed by a province prior to Confederation remained an offence in that province, if the statute was not inconsistent with Dominion legislation.[29] The power to repeal such a statute henceforth resided only in the Dominion Parliament.[30] Therefore at the present day in Canada it is possible for offences to be committed which are created solely by provincial pre-Confederation legislation.

One reason for placing criminal legislative jurisdiction in the Dominion Parliament was a general policy of the "Fathers of Confederation" to make the federal government strong. With such an end in view, it was natural to give as many subjects of legislation as possible to the Dominion. The American Civil War, then being waged, was regarded in the British North

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In 1862 the Legislature of New Brunswick passed a statute (125 Vict. (N. B.) c. 21) which removes the death penalty in the following cases : (1) Intent to kill by setting fire to ships; (2) rape, and carnal knowledge of a girl under ten years of age; (3) Buggery' (4) arson; (5) burglarious entry, etc., with intent to kill; (6) robbery, with grievous bodily harm; (7) endangering vessels by false lights.

[27] S. 91, clause 27: See also s. 92, clause 14.

[28] S. 92, clause 15.

[29] See B. N. A. Act, s. 129; *R.* v. *Strong*, (1915) 43 N. B. R. 190 holds a pre-Confederation statute of New Brunswick making adultery an indictable offence, to be still operative in New Brunswick, although the Dominion Parliament had, in 1886, repealed the pre-Confederation statute of the province which dealt with the procedure on prosecution for the offence. See also *R.* v. *Quick*, (1910) 17 Can. C. C. 61; *Kennedy* v. *Hokoleadis*, (1910) 17 Can. C. C. 4.

[30] *R.* v. *Halifax Tramway Co.* (1898) 30 N. S. R. 469. See also : *Dobie* v. *Temporalities Board* (1881-2) 7 App. Cas. 136,137. Strictly speaking the Dominion cannot repeal such legislation, but can only override it by repugnancy so that on repeal of the Dominion Act the old Act will revive in its full extent. *Att. Gen. for Ontario* v. *Att. Gen. for the Dominion*, [1896] A. C. 348; Lefroy, A. H. F., *Legislative Power in Canada:* (1897-8) pp. 365-71; 38 *Canadian Law Times*, (1902) 163-8.

American colonies as chiefly caused by too much local autonomy.[31] Some of the "Fathers", particularly John (later Sir John) A. Macdonald, preferred a legislative union, which would eliminate the separate provincial legislatures. But a unitary government was not practicable, owing to the opposition of the French Canadians, who feared the ultimate domination of Upper Canada. Furthermore, local feeling was too strong in the Maritime Provinces to permit of such a system.[32] The result was a compromise by the adoption of a federal system, but with a determination to make the central government as strong as possible. This centralization of power, despite local feeling in Lower Canada and the Maritimes, was found easier than in the federation of the American states. The Canadian provinces were already accustomed to a large measure of external control. They were not independent states giving up sovereign rights.[33]

This general policy of centralization is quite apparent on looking at the *British North America Act.* In the list of subjects expressly assigned to the Dominion Parliament one finds many matters which in the United States are left with the state legislatures.[34] Furthermore, the residuary powers of legislation are expressly assigned to the Dominion Parliament, while in the United States the residuary powers are reserved to the states.[35] Another indication of this same policy is seen in the

[31] See Trotter, R. G.: *Canadian Federation,* (1924) p. 109, and the sources cited therein. See also *Angers* v. *The Queen Insurance Co.,* (1877) 21 L. C. J. 77, 80.

[32] See Trotter, R. G., *op. cit.,* p. 108.

[33] See Trotter, R. G., *op. cit.,* p. 109; See also *Tai Sing* v. *Maguire* (1878) 1 B. C. R. 101, 105.

[34] Compare the twenty-nine subjects enumerated in s. 92 of the B. N. A. Act for the exclusive legislative jurisdiction of the Dominion with the list of powers assigned by Art. I, s. 8 of the United States Constitution to the Federal Legislature. The Canadian enumeration contains practically everything in s. 8, and in addition several other important subjects, e. g., navigation and shipping; sea-coast and inland fisheries; banking, incorporation of banks, etc.; savings banks; bills of exchange and promissory notes; marriage and divorce, interest, etc.

[35] See the opening clause of s. 91 of the B. N. A. Act, which provides that the Parliament of Canada has legislative authority in relation to all matters not assigned exclusively to the provincial legislatures.

Cf: the Tenth Amendment to the United States Constitution, which expressly provides that the powers not delegated to the United States are reserved to the States, or to the people. This amendment was adopted in 1791, but it was practically a part of the original Constitution for the first ten amendments were proposed to the legislatures of the several states by the First Congress, on September 25, 1789 (see Long, J. R., *Cases on Constitutional Law* (2nd ed. 1932), p. 1152, footnote).

On the Dominion residuary power: see *Dow* v. *Black* (1875) L. R. 6 P. C. 272, 280; *Valin* v. *Langlois* (1880) 5 App. Cas. 115, 120; *Russell* v. *The Queen* (1882) 7 App. Cas. 829, 836; *Bank of Toronto* v. *Lambe* (1887) 12 App. Cas. 587, 588.

There is no doctrine of reservation "to the people" in Canada, for "the Federation Act exhausts the whole range of legislative power, and . . . whatever is not thereby given to the Provincial Legislatures rests with Parliament". *Bank of Toronto* v. *Lambe* (1887) 12 App. Cas. 587, 588.

power of disallowance of provincial legislation which is given to the Dominion Executive.[36] This power is very unlikely to be used today,[37] but it is indicative of the general attitude of the founders of the Dominion.

The "Fathers of Confederation" had also a more specific policy of making the criminal law of Canada uniform. When the British North America Act came before the House of Lords, Lord Carnarvon expressed his approval of this policy :

> "To the Central Parliament will also be assigned the enactment of criminal law. The administration of it indeed is vested in the local authorities; but the power of general legislation is very properly reserved for the Central Parliament. And in this I cannot but note a wise departure from the system pursued in the United States, where each State is competent to deal as it may please with its Criminal Code, and where an offence may be visited with one penalty in the State of New York, and with another in the State of Virginia. The system here proposed is, I believe, a better and safer one; and I trust that before long the criminal law of the four Provinces may be assimilated—and assimilated, I will add, upon the basis of English procedure".[38]

The common law basis of the criminal law of Lower Canada, of course, facilitated the carrying out of this policy of uniformity.[39]

(c) *The legislative system resulting from the distribution under the British North America Act :*

The transfer of criminal legislative jurisdiction to the Dominion did not, however, result in a system under which all legislation having penal consequences emanated from the Dominion Parliament. Two classes of statutes need to be mentioned.

(1) Certain statutes of the Imperial Parliament were made expressly applicable[40] to the Dominions and thus had the force of law in Canada. But the Dominion Parliament now has the legal power to repeal such statutes as regards their application to Canada[41]. Therefore they will continue to be law in the Dominion only until such time as the Canadian Parliament sees fit to repeal them.

[36] See B. N. A. Act, s. 90: See Keith, A. B., *op. cit.*, Vol. I. 560 *et seq;* Lefroy, A. H. F., *Canada's Federal System* (1913) pp. 30-44.

[37] See the discussion in Lefroy, A. H. F., *op. cit.*, (*supra* note 36) pp. 34-44.

[38] *Hansard's Parliamentary Debates* (3rd series) Vol. 185, p. 564.

[39] See *supra*, the heading, *The Law in the Colonies prior to Confederation.*

[40] E. g. The Foreign Enlistment Act, 1870, 33-34 Vict. (Imp.) c. 90; and the Fugitive Offenders Act, 1881, 44-45 Vict. (Imp.) c. 69.

[41] The Statute of Westminster, 1931, 22 Geo. V. (Imp.) c. 4 provides :

> "2. (1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

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(2) There is another large class of statutes having penal consequences which is not the product of the Dominion Parliament. These are the statutes often called "Provincial criminal laws",[42] i.e. statutes dealing with matters within the competence of the provincial legislature, which have penalties attached to secure enforcement. The *British North America Act* expressly gives to the provinces—

> "The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section".[43]

It is possible, therefore, that an offence may be committed in Canada against, (a) common law;[44] (b) an Imperial statute expressly applicable to Canada; (c) a provincial statute having incidental penal consequences; (d) a provincial pre-Confederation criminal statute which has not been superseded by Dominion legislation;[45] (e) a statute of the Dominion Parliament, which may deal directly with crime, as such, or may merely have incidental penal consequences; (f) in Ontario, Manitoba, and British Columbia, an English statute not expressly applicable, but introduced therein as part of the English law in force in those provinces,[46] The provision of the Criminal Code[47] which

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(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such act, order, rule or regulation in so far as the same is part of the law of the Dominion."

But note s. 7, which excepts the British North America Acts, 1867 to 1930 from this Dominion power of repeal.

[42] See the remarks of Sir Montague Smith in *Russell* v. *The Queen*, (1882) 7 App. Cas. 829, 840.

[43] S. 92, clause 15; *Att.-Gen. for Ontario* v. *Att.-Gen. for Canada*, [1896] A. C. 348; *Union Colliery* v. *Bryden*, [1899] A. C. 580; *Canadian Pacific Railway* v. *Dame de Bonsecours*, [1899] A. C. 367; *Re Greene*, (1900) 4 Can. C. C. 182; *Cunningham* v. *Tomey Homma*, [1903] A. C. 151; *Re McNutt*, (1912) 47 S. C. R. 259; *Quong Wing* v. *The King*, (1914) 49 S. C. R. 440; *R.* v. *McLeod*, (1902) 6 Can. C. C. 94.

See also *Huson* v. *Norwich*, (1895) 24 S. C. R. 145, 160; *Blouin* v. *City of Quebec*, (1880) 7 Que. L. R. 18, 22; *R.* v. *Lorette*, [1918] 3 W. W. R. 324; *R.* v. *Shaw* (1891) 7 Man. R. 518.

For a general discussion, see Lefroy, A. H. F., *op. cit.*, (*supra* note 36) pp. 574-627.

[44] See the Criminal Code, ss. 15, 16; see also *R.* v. *Cole* (1902), 3 O. L. R. 389; *R.* v. *Walkem*, (1908) 14 B. C. R. 1, 7; *Union Colliery* v. *The Queen* (1900) 31 S. C. R. 81; *Brousseau* v. *The King*, (1917) 56 S. C. R. 22; *R.* v. *Elnick*, [1920] 2 W. W. R. 606, 612.

[45] See note 29 *supra*.

[46] See the Criminal Code, ss. 10, 11, 12, 589, and discussion by Tremeear, W. J., *op. cit.*, pp. 769-771.

[47] S. 589. See note 46, *supra*.

forbids proceedings for an offence against any Imperial statute which is not expressly made applicable to Canada has full effect in the other provinces.

A somewhat analogous situation exists in the United States. There an offence may be committed against (a) common law in force in a state,[48] with the exception of certain states,[49] (b) an early English statute which has been introduced or adopted as part of the law in force in a state,[50] (c) a state statute either dealing directly with crime,[51] or having incidental penal enforcement provisions,[52] (d) a federal statute,[53] whose penal consequences may also be either direct[54] or incidental.[55] As is well known there are no common law crimes against the United States. A federal crime must be created by some statute of Congress.[56]

[48] See *Corpus Juris*, Vol. 12, p. 195; 22 L. R. A. 507. As to the date of which the common law is adopted, see *id.*, p. 192 (s. 21).

[49] E. g. the New York Penal Law, s. 22 provides that no act or omission shall be a crime except by statute. For a list of states in which there are no common law crimes, see *Corpus Juris*, Vol. 12, p. 126, note 43. See also the collection of authorities in Sayre, F. B.; *Cases on Criminal Law*, (1927) p. 104, note 2.

[50] For the doctrines in various states, see *Corpus Juris*, Vol. 12, p. 192 p. 192 (s. 22). English Statutes have not been adopted in some states: *id.*, p. 192, note 24. For a list of statutes adopted and not adopted in various states, see *id.* p. 193, note 30 (a) (b) (c).

[51] E. g. the New York Penal Law, art. 118 (kidnapping) 122 (larceny) 158 (perjury), etc.

[52] E. g. the Massachusetts fisheries and game provisions, G. L. (1921) c. 130 or the Massachusetts labour and industries law, *id.*, c. 149.

[53] By virtue of the United States Constitution, art. I, s. 8.

[54] E. g. U. S. C. (1926) Title 18. Criminal Code and Criminal Procedure, s. 1 (treason), s. 6 (seditious conspiracy) s. 443 (kidnapping), etc.

[55] E. g. U. S. C. (1926) Title 19. Customs Duties; or The Interstate Commerce Act, U. S. C. (1926) Title 49, c. 1.

[56] *U. S.* v. *Hudson*, 7 Cranch 32 (U. S. 1812); *U. S.* v. *George*, (1913) 228 U. S. 14; *Todd* v. *U. S.*, (1895) 158 U. S. 278, 282; *U. S.* v. *Grossman*, (1924) 1 F. (2d) 941; See *Corpus Juris*, Vol. 12, p. 197.

The great bulk of crimes committed in the United States are offences against a state only, with which the federal government is not concerned. Crimes against the United States may be (1) federal offences by the nature of the act, that is, acts in fields entrusted to the federal government by the Constitution, (e. g. counterfeiting United States coin, piracies and felonies on the high seas, offences against the Law of Nations: United States Const. art. I., s. 8; or treason against the United States, *id.*, Art III., s. 3) or acts interfering with the activities of the federal government (e. g. postal offences, or offences connected with collection of federal revenues). (2) Federal offences solely by the place of their commission, that is, acts which ordinarily would be offences against a State, but which, because committed in some place subject only to the jurisdiction of the United States e. g. the District of Columbia, or a military post become offences against the United States. See *Corpus Juris*, Vol. 16, p. 61 (s. 75). See also the *Pothier Case*, (1923), D. C. R. I.) 285 F. 623; (1923, C. C. A.) 291 F. 311); (1924) 264 U. S. 399.

Of course, the same act may sometimes constitute both a state and a federal crime, but two distinct offences have been committed, one against the state, and another against the United States: *Crossley* v. *California*, (1898) 168 U. S. 640; *Sexton* v. *California*, (1903) 189 U. S. 319. See also *Corpus Juris*, Vol. 16, p. 62 (s. 18).

When one turns from legislative to executive and judicial jurisdiction over crime, analogies between Canada and the United States largely disappear. While in both countries an offence may be created either by a local or by a federal statute, the system in the United States carries this principle farther, and has a dual set of crimes. There are crimes against the states and crimes against the United States.[57] This principle is carried into the judicial set-up, and one finds a dual system of American courts. There is a hierarchy of state courts, which have jurisdiction over state crimes, and a similar hierarchy of federal courts having jurisdiction over crimes against the United States. The jurisdictions of these courts are mutually exclusive. If an offence is made such only by a federal statute, state courts have no jurisdiction over the offence. Similarly the United States courts have no jurisdiction over acts which are offences solely by state law.[58] Furthermore Congress has no power to confer jurisdiction on any courts not created by itself[58a] This principle of dualism is also carried into the field of law enforcement. The United States Government has its own set of officers to enforce federal laws. The states have their own officers to enforce state laws.[59]

In Canada all offences are against the Crown, regardless of the legislature by which the offence was created. This is reflected in the judicial set-up. The legislature of each province is given exclusive power regarding the administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and criminal jurisdiction.[60] The judges of the Supreme and County courts of the provinces, are, however, appointed by the Dominion Executive.[61] The Dominion Parliament is also given power to provide a general court of appeal for Canada and to establish "any additional Courts for the better Administration

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[57] See U. S. Lanza (1922) 260 U. S. 377, 382.

It is to be noted that in Canada while an act may be an offence against either a Dominion or a provincial statute, or both, it is an offence against only one sovereign, namely, the Crown. Similarly, it is in strict legal theory one and the same sovereign who may pardon an offender, although this sovereign may act upon the advice of different advisers and agencies, depending on which legislature created the offence.

See Keith, A. B.: *op. cit.*, Vol. I., pp. 91-92, 512-517, 532.

[58] See *Corpus Juris*, Vol. 16, p. 160 (s. 185); *id.*, p. 151 (s. 174). For an account of the hierarchy of federal courts, see Munro, W. B., *The Constitution of the United States* (1930) pp. 95-98.

[58a] *Houston* v. *Moore*, 5 Wheaton 1 (U.S. 1820).

[59] See *Kentucky* v. *Dennison*, 24 Howard 66 (U. S. 1860).

[60] B. N. A. Act, 1867, s. 92, clause 14.

[61] *Id.*, s. 96.

of Laws of Canada".[62] The Dominion has power to impose new duties upon the existing provincial courts, or to give them new powers, as to matters which do not come within the classes of subjects assigned exclusively to the legislatures of the provinces.[63] Parliament, for the administration of its laws, "can either have recourse to the provincial courts already in existence, or create new courts, as it chooses".[64] The reader will recall that Congress cannot have recourse to state courts to administer United States laws.[65] The opinion has also been expressed that Parliament can create new courts of criminal jurisdiction, and enact that all crimes shall be tried exclusively before these new courts.[66] This opinion was expressed in 1879, but Parliament has not set up a separate system of courts to deal exclusively with offences under its own legislation. The Dominion has left the administration of its criminal laws generally to the courts of the provinces,[67] with a limited right of appeal from these courts to the Supreme Court of Canada.[68] Hence it is seen that a criminal case originates in a provincial court before a trial judge, and after appeal to the Supreme Court of the province in banco, or such other appeal court as exists in the province, it

[62] *Id.*, s. 101. In 1875 a Supreme Court and Exchequer Court of Canada, with a right of appeal to the Supreme Court from the judgments of courts of last resort in the provinces, was established : (38 Vict. (Dom.) c. 11). By a statute of 1887 (50-51 Vict. (Dom.) c. 16) original Exchequer jurisdiction was taken away from the judges of the Supreme Court of Canada, and the Exchequer Court has since then been an entirely distinct tribunal from the Supreme Court, but with a right of appeal to the Supreme Court. See the Exchequer Court Act, R. S. C., 1927, c. 34, and the Supreme Court Act, *id.*, c. 35.

In 1877 the Dominion Parliament constituted a court of Maritime Jurisdiction for the Province of Ontario : (see R. S. C., 1886, c. 137; the Picton (1879) 4 S. C. R. 648; and R. S. C., (1927), c. 33). These are the chief courts set up by the Dominion. Their original jurisdiction is very limited. The vast bulk of Dominion law is still administered by the provincial courts.

[63] *Valin* v. *Langlois* (1880) 5 App. Cas. 115 (affirming 3 S. C. R. 1). See *Ward* v. *Reed* (1882) 22 N. B. R. 279; In *Re Vancini* (1904) 34 S. C. R. 621; In *Re Bell Telephone Co.*, (1885) 7 O. R. 605.

[64] *Valin* v. *Langlois*, (1879) 3 S. C. R. 1, 74.

[65] See note 58 (a) *supra.*

[66] *Valin* v. *Langlois*, (1879) 3 S. C. R. 1, 75.

[67] See note 62 *supra;* see Criminal Code, ss. 2 (38), 705 (e), 1026, 823, 771, 576.

[68] *Id.*, s. 1025; see *Hill* v. *R.* [1928] S. C. R. 156; *Brunet* v. *R.*, *id.*, 161; see also Criminal Code, s. 1023, and Tremeear, W. J., *op. cit.*, pp. 1404-5. The effect of the Code provisions cited is that an appeal lies to the Supreme Court of Canada in three cases: (1) Where a conviction of an indictable offence has been affirmed by an appellate court, the defendant may appeal on any question of law on which there has been dissent in the appellate court. (2) Where the judgment of an appellate court on an indictable offence conflicts on a question of law with the judgment of any other court of appeal in a like case, either the Crown or the defendant may, with leave of the Supreme Court of Canada, appeal to that court. (3) Any person whose acquittal has been set aside may appeal to the Supreme Court of Canada against the setting aside of such acquittal.

may sometimes be appealed to a court set up by the Dominion.[69] There is no dual hierarchy of federal and provincial courts, with mutually exclusive jurisdictions. Similarly the Dominion laws are in the main enforced by provincial officers, for the latter are servants of the Crown, and as such it is their duty to enforce all the law which is in force in the province, regardless of its source.[69a]

The root of these differences between the Canadian and American systems of administration of justice is to be found in one very fundamental distinction. In the American system, there are two sovereignties, that of the states and that of the United States. In Canada there is only one sovereign. The Crown is one and indivisible throughout the King's dominions.[70] It is true that for certain purposes, as when the Crown in the right of a province sets up a claim against the Crown in the right of another province, or of the Dominion, the Crown is treated as acting in different aspects.[71] But whenever the aspect feature is unimportant the unity principle will be effective.

(*d*) *Legislation in Canada between 1867 and 1892 :*

The main criminal legislation passed by the Parliament of the Dominion during the period between Confederation and the Criminal Code was a group of consolidating statutes enacted in 1869. Up to this time several statutes had been passed, some of which consolidated and repealed certain provincial Acts.[72] But the first general consolidation came in 1869, when a group of nine statutes[73] was passed, consolidating a large amount of provincial legislation. These statutes begin with the preamble,

[69] It is to be noted that this picture of the course of a Canadian criminal case is very general. It takes no account of preliminary hearing, summary convictions, from which appeal is to County courts, and provincial variations. It is merely intended to show that most Canadian Criminal cases begin and end in the provincial courts.

[69a] *R.* v. *St. Louis,* (1897), 1 Can. C. C. 141; *Attorney-General* v. *Niagara.* (1873) 20 Grant (Ont.) 34, 38.

[70] *Williams* v. *Howarth,* [1905] A. C. 551; In *Re Bateman's Trusts,* (1873) 42 L. J. Ch. 553; See also: *R.* v. *Bank of Nova Scotia,* (1885) 11 S. C. R. 1, 19.

[71] *South Australia* v. *Victoria,* (1911) 12 C. L. R. 667, 674; *Amal. Society of Engineers* v. *Adelaide Steamship Co.,* (1920) 28 C. L. R. 129, 152; *Attorney-General* v. *G. S. and W. Ry. Co. of Ireland,* [1925] A. C. 754, 773, 779. See Keith, A. B., *op. cit.,* Vol. II., pp. 1153-4.

[72] E. g., 31 Vict. (Dom.) cc. 14, 69, 70, 71, 72, 75.

[73] 32-33 Vict. (Dom.) c. 18 (coinage offences), 19 (forgery), 20 (offences against the person), 21 (larceny and similar offences), 22 (malicious injuries to property), 23 (perjury), 29 (procedure in criminal cases), 30 (justices of peace and indictable offences), 31 (justices of peace and summary convictions).

C. 36 is a general repeal statute of provincial statutes inconsistent with the consolidation. A list of the statutes repealed is set out in Schedule B to this chapter.

"Whereas it is expedient to assimilate, amend and consolidate the Statute law of the several Provinces of Quebec, Ontario, Nova Scotia and New Brunswick respecting"—(the particular offence, E.G. larceny, forgery, etc.)—"and to extend the same as so consolidated, to all Canada":, and were undoubtedly in furtherance of a general policy of making Canadian criminal law uniform throughout the Dominion. The model for the first six of these statutes was the Greaves Consolidation of 1861 in England[74]. They deal with the substantive law. The last three deal with procedure, and are not modeled upon any definite English counterpart.[75]

After 1869 a large number of statutes were passed. They consist chiefly of amendatory and piecemeal legislation, dealing with procedure,[76] changing punishments[77], or creating new offences.[78] There is no further general attempt to secure that uniformity of criminal law which was the aim of the founders of the Dominion until the enactment of the Criminal Code in 1892.[79]

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[74] See note 8 *supra*; see Tachereau, H. E., *"The Criminal Law Consolidation and Amendment Acts of 1869"* (1st ed. 1874) Vol. I., in which the sections are taken up one by one, with citations of the corresponding sections of the Imperial Consolidation.

[75] See note 73, *supra;* cc. 29, 30, 31. Although not modeled upon any definite English counterpart, still many sections of these statutes were adopted from English statutes. See Tachereau, H. E., *op. cit.*, Vol. II., p. 1 *et seq.*

[76] E. g. 50-51 Vict. (Dom.) c. 50; 51 Vict. (Dom.) cc. 43, 44.

[77] E. g. 53 Vict. (Dom.) c. 37, s. 12; 36 Vict. (Dom.) c. 50.

[78] E. g. 51 Vict. (Dom.) c. 42; 52 Vict. (Dom.) cc. 42, 43.

[79] An interesting statute during this period is one of 1889, which involves principles contrary to those underlying the course of legislation of which it is a part. Its purpose, as expressed in the preamble, is to bring about the reformation of first offenders without imprisonment, and it provides that in case of a first conviction for an offence punishable with not more than two years imprisonment, the court may, having regard to the antecedents of the offender, the nature of the offence, and the extenuating circumstances, release the offender on probation of good conduct. 52 Vict. (Dom.) c. 44, s. 2.

It will be observed that here are two notions at variance with the classical theory of punishment as the "wages of sin", and as due in equal portions to all who commit the same kind of offence. These two notions are (1) reformation, (2) individualization of treatment, regard being had to the offender, as well as to the offence.

The provisions of this statute were incorporated into the Criminal Code in 1892 (s. 971). In 1893 the following amendment was added: "Where the offence is punishable with more than two years' imprisonment the court shall have the same power as aforesaid with the concurrence of the counsel acting for the Crown in the prosecution of the offender." 63-64 Vict. (Dom.) c. 46, s. 3.

In 1921 it was provided that the court may place such an offender on probation under supervision of a court officer. 11-12 Geo. V. (Dom.) c. 25, s. 19. See present Code s. 1081.

III—The Code of 1892 :

Reasons for adoption of the Code :

It is rather difficult to determine whether there was any general agitation either in the legal profession or elsewhere, for a codification of the criminal law of Canada. There is little on the subject to be found in the *Canada Law Journal* or the *Canadian Law Times* during the period immediately prior to the adoption of the Code.[80] However, it does appear that certain leading members of the legal profession in public life had the ideal of codification before them, and were directing their efforts toward that end. In the words of the *Canada Law Journal:*

> "The science of penal law is, in Canada, almost in its infancy, very few of our legal minds having devoted much attention to it. Codification of the criminal law has long been the hope of some, but with few, and a few only, did the hope form itself into any tangible shape. Among these latter was Sir John Macdonald, the late Premier of Canada, who gave much consideration to criminal law, and had long looked forward to codification, as had also Judge (now Senator) Gowan, his life-long friend, who, in Sir John Macdonald's consolidations of and improvements in the criminal law during the whole time he was Attorney General and Minister of Justice, rendered his friendly services to him in the preparation of criminal law measures. The codification of the Criminal law of Canada was first undertaken by the Macdonald Government, and after the late Premier's death was adopted by the Abbott Government and carried to a successful issue by the present[81] able and energetic Minister of Justice".[82]

These efforts for codification were doubtless prompted by the policy of uniformity aimed at by the framers of the *British North America Act,*[83] which had been partially carried out by the consolidation of 1869. Instances of the lack of uniformity in the criminal law were coming to the attention of the legislators.[84]

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[80] See 4 *Canadian Law Times* (1884) 432; 26 *Canada Law Journal* (1890) 577.

[81] This was Sir John Thompson.

[82] 28 *Canada Law Journal* (1892) 450.

[83] See *supra.*, the heading, *The distribution of criminal legislative jurisdiction under the B.N.A.Act, 1867.*

[84] E. g. Sir John Thompson, when moving the second reading of a criminal law amendment bill in 1890, said :

> "The sixth section is materially changed in the reprint of the Bill, and is intended to establish a penalty for the crime of incest, as to which there has been no legislation, although some attempted legislation, in the Parliament of Canada. As a matter of fact, most of the small Provinces had, before the Union, penal legislation for that offence, and very severe legislation. That legislation is still in force, and offenders are occasionally being tried before the courts having criminal jurisdiction in the Provinces of Nova Scotia, New Brunswick, British Columbia, and, I think, Prince Edward Island, for the crime of incest. We have, in the prisons of those Provinces, now, convicts

(Continued on page 561)

In addittion, there seems to have been a good deal of petitioning to the federal government just prior to the adoption of the Code for certain amendments to the criminal law. For example, in 1891 there was a very large number of such petitions,[85] coming from all of the provinces.[86] This agitation for amendment and change undoubtedly led Sir John Thompson and his associates to strive harder to provide a uniform system of criminal law for the whole Dominion.

Furthermore, as pointed out before,[87] the adoption of the Canadian Code marks the culmination of the long movement for codification in England. It is interesting to observe that it took about the same length of time for the English Code bill of 1880 to be reflected in Canadian legislation as was required for the Greaves Consolidation of 1861 to result in a Canadian counterpart.[88] In those formative days the Canadian leaders in public life were continually looking to the mother country for guidance, and any significant legislation in England was usually copied by either the Dominion or the provincial legislatures.[89]

(*Continued from page 560*)

who are serving long terms for that offence. The anomaly exists that in the two Provinces which formerly constituted the Province of Canada, that which is a highly punishable offence in the other Provinces, is not an offence at all, not involving, even, one hour's imprisonment." Debates of House of Commons, 1890, Vol. II., 3162.

[85] See: Journals of the House of Commons, 1891, pp. 15, 32, 51, 100, 109, 123, 140, 165, 180, 188, 255.

[86] At this time the Dominion of Canada consisted of seven provinces, (Ontario, Quebec, New Brunswick, Nova Scotia, Manitoba, British Columbia and Prince Edward Island) the North-West Territories and the Yukon Territory.

British Columbia entered the union in 1871. See R. S. C., 1906, Vol. IV., p. 3165. Prince Edward Island was admitted in 1873; see *id.*, p. 3175. The Province of Manitoba was organized and its local government established in 1870. See the Manitoba Act, 1870, 33 Vict. (Dom.) c. 3. See also 44 Vict. (Dom.) c. 14 and 2 Geo. V. (Dom.) c. 32 by which the boundaries of the province were extended.

Alberta and Saskatchewan were established in 1905 out of part of the North-West Territories. See the Alberta Act, 1905, 4-5 Edw. VII. (Dom.) c. 3 and the Saskatchewan Act, *id.*, c. 42.

For special provisions as to the present North-West Territories, see the N. W. T. Act, R. S. C., 1927, c. 142, and the Criminal Code, s. 9. As to the Yukon Territory, see the Yukon Act, R. S. C., 1927, c. 215; also Criminal Code, s. 9.

[87] See *supra*, the heading, *The codification movement in England and its fruition in Canada.*

[88] I. e. from 1861 to 1869 for the consolidation, and from 1880 to 1892 for the code.

[89] E. g. cf. the English Bills of Exchange Act, 1882, 45-46 Vict. (Imp.) c. 61 with the Canadian Bills of Exchange Act, 1890, 53 Vict. (Dom.) c. 33 (now R. S. C., 1927, c. 16), or the English Sale of Goods Act, 1893, 56-57 Vict. (Imp.) c. 71 with the Nova Scotia Sale of Goods Act, 1910, 10 Edw. VII. (N. S.) c. 1 (now R. S. N. S., 1923, c. 202; see also R. S. N. B., 1927, c. 149) or the English Partnership Act, 1890, 53-54 Vict. (Imp.) c. 39 with the Nova Scotia Partnership Act, 1911, 1 Geo. V. (N. S.) c. 1 (now R. S. N. S., 1923, c. 205); see also R. S. N. B., 1927, c. 155.

Wherever these English statutes could be applied to local conditions, this was probably a sound policy to follow, for it meant that the courts in Canada would have the benefit of the English decisions on these statutes to guide them in the administration of justice.[90]

Formal steps in the adoption of the Code :

As one would expect, the initiative in introducing, and the responsibility for carrying through, the codification bill, were taken by the Government of the day.[91] On May 12, 1891, Sir John Thompson, the Minister of Justice, introduced in the House of Commons a bill to codify the criminal law of Canada. He stated that it was his intention to print the bill and to submit it for consideration; also that it was desirable that a bill of this extensive character should be circulated through the country and be very generally discussed. On the second reading he would state briefly the proposed changes in the law, and ask the House whether the bill should be proceeded with, or deferred until next session.[92] The bill received only a first reading during that session.

On March 8, 1892, Sir John again introduced a codification bill, which he said was substantially the same as the one introduced last session, but contained some improvements which had been suggested in consequence of the circulation of the bill.[93] On April 12, he moved the second reading of the bill, and stated briefly its objects and the sources of its provisions. He said that he had endeavoured to eliminate matters of evidence from the bill, with a view to introducing later a bill[94] relating to evidence in all matters under the control of the Dominion Parliament.[95] The bill was read the second time and referred to a select joint committee of the Senate and House of Commons[96] for consideration and revision. The purpose of adopting this procedure was, of course, to enable the bill to be passed more quickly by the Senate after its final passage by the Commons. After its return from the joint committee, the bill was fully discussed in each House by a committee of the whole,[97] and was

[90] See 4 *Canadian Law Times*, (1884) 432.

[91] The Government of the Hon. John Joseph Caldwell Abbott, D. C. L.; Q. C.

[92] Debates of House of Commons; 1891, Vol. I., 156.

[93] *Id.*, 1892, Vol. I., 106.

[94] In its present form this statute is the Canada Evidence Act, R. S. C., 1927, c. 59.

[95] Debates of House of Commons, 1892, Vol. II., 1312-7.

[96] *Id.*, 1319; see also: Debates of Senate, 1892, 156.

[97] Debates of House of Commons, 1892, Vol. II., 2701. Debates of Senate, 1892, 484.

passed by both Houses.[98] It received the royal assent on July 9, 1892,[99] and came into force on July 1, 1893.[100]

General form and content of the Code :

The Code as enacted in 1892 consists of 983 sections covering both substantive law and procedure. Matters of evidence, however, are as far as possible excluded,[101] and are dealt with by a separate statute, the *Canada Evidence Act, 1893*.[102] This statute provides certain rules of evidence in regard to matters under Dominion legislative jurisdiction, but leaves much to be determined by the laws of evidence of the different provinces.[103] The subject of prisons and reformatories is also excluded from the Code and dealt with by separate statutes.[104] Furthermore, a number of Acts and parts of Acts of the Dominion Parliament are expressly preserved by the Code of 1892.[105]

Unlike the English draft code prepared by the Royal Commissioners in 1879[106] the Canadian Code deals not only with indictable offences, but includes also offences punishable upon summary conviction. The omission of a large number of minor crimes, due to restricting codification to indictable offences, was one of the objections of Lord Chief Justice Cockburn to the proposed English code. His objections to such a limitation on the scope of a criminal code may be best expressed in his own words :

> "It is obvious that the reason for the retention of these sections is the intended omission from the Code of all offences punishable on summary conviction; and herein, as it seems to me, is to be found a radical defect, which must necessarily mar the completeness of the work, namely, that when dealing with offences, its operation is limited to such offences when the subject of indictment; but surely, whatever constitutes an offence against the penal law should properly find its place in a code which can only be complete if it sets forth that law in its entirety. The offence being established, the mode in which, under different circumstances, the offender may be proceeded against, and the punishment which, according to the degree of guilt, may be

[98] Commons, *id.*, 4348; Senate, *id.*, 495.
[99] Debates of Senate, 1892, 522.
[100] The Criminal Code, 1892, 55-56 Vict. (Dom.) c. 29, s. 2.
[101] Of course some sections of the Code cover phases of evidence, e. g. s. 592 (now 685) re confessions and admissions, and s. 684 (now 1002) re corroboration. See, generally, the present sections 978-1003.
[102] 56 Vict. (Dom.) c. 31 (now R. S. C., 1927, c. 59).
[103] *Id.*, s. 21 (now 35).
[104] E. g. the Prisons and Reformatories Act, R. S. C., 1927, c. 163; the Ticket of Leave Act, *id.*, c. 197. Of course some sections of the Code deal incidentally with prisons, e. g. s. 3 (u) (now 2 (29)); 938 (now 1064); 963 (now 1031).
[105] See s. 983 (3) and the appendix to the Code.
[106] See note 6 *supra*.

> awarded, should be set forth. It is all important to those who have to administer the penal law in its subordinate departments, to have the law before them as an entire and unbroken whole. The present code does that for them when, as magistrates, they are called upon to take the information against a party accused; why should it not do so when they are called upon to deal with offences summarily as judges in a judicial capacity. . . . . The offences being, as they necessarily must be, specified, it would occupy but comparatively little space, and cause little additional trouble, to say under what circumstances such of them as it is intended to make the subject of summary proceedings shall be so subject, and what, in such a case, shall be the method of proceeding and the measure of punishment.[107] The statement of the law applicable to the offence would then be complete.[108]

The general form of the Code follows very closely that of the English draft of 1879. It is broken up into very similar divisions. There are ten "Titles", these Titles being made up of "Parts", and the Parts divided into sections. There are eight such general "Titles" in the English draft code, and they correspond almost exactly with those in the Canadian statute.[109] The "Parts" also correspond very closely, but of course there are more Parts and more sections within the Parts in the Canadian Code,[110] since it deals with both indictable and summary conviction offences.

Since it purports to be a codification of the law as a whole, and not merely a consolidation[111] of statutes, the Code defines the elements of the offences which it penalizes. For example, it defines homicide, and specifies what homicides are culpable. It further sets forth what kinds of homicide are murder, and what kinds are manslaughter.[112] The consolidation of 1869, in contrast to the Code, merely sets out the penalties for murder

[107] This proposal is adopted in the Canadian code.

[108] Copy of Letter from the Lord Chief Justice of England, dated 12 June, 1879, containing Comments and Suggestions in relation to the Criminal Code (Indictable Offences) Bill. Ordered, by the House of Commons, to be printed, 16 June, 1879. Sometimes bound with the Report of the Royal Commission, 1879.

[109] The Canadian Titles are as follows: I. Introductory Provisions; II. Offences against public order, internal and external; III. Offences affecting the administration of law and justice; IV. Offences against religion, morals and public convenience; V. Offences against the person and reputation; VI. Offences against rights of property and rights arising out of contracts, and offences connected with trade; VII. Procedure; VIII. Proceedings after convictions; IX. Actions against persons administering the criminal law; X. Repeal, etc., The English Titles I. to VII. are almost identical with the first seven Canadian ones, and the English VIII. is the same as the Canadian X.

[110] The Canadian Code has 68 parts and 983 sections. The English draft code has 65 parts and 552 sections.

[111] See note 9 *supra*.

[112] Ss. 218-30 (now 250-62); c. s. 65 (now 74) as to treason; s. 258 (now 290) as to assaults, or s. 266 (now 298) as to rape.

and manslaughter, leaving the definition and delimitation of these offences entirely to the common law.[113]

General sources of the Code provisions :

The general sources of the provisions of the Criminal Code are (1) the draft code prepared by the Royal Commission[114] in England in 1879 and introduced, with some changes, in the Imperial House of Commons in 1880. Sir John Thompson, when moving the second reading of the code bill in the Canadian House of Commons, spoke of the great help received from the English efforts of the past sixty years.[115] (2) the 1887 edition of Stephen's *Digest of the Criminal Law*, (3) Burbridge's *Digest of the Canadian Criminal Law*, of 1889, and (4) the Canadian statutory law.[116]

Hence it appears that the Code was based wholly upon the common law of England and such statutory modifications thereof as had been worked out in England and Canada. The New York Penal Code of 1887 does not appear to have had any appreciable influence on the Canadian Code,[117] which is not surprising, in view of the Canadian tendency at that time to look to England for statutory models.[118] Since Quebec had the same system of criminal law as the other provinces, there were no peculiar French law sources. The substantive part of the law, as an examination of the Code will reveal, is taken largely from the English draft code. Most of the procedural provisions are taken over from the earlier Canadian statutes.[119]

Underlying Principles of the Code :

One fundamental principle of the Canadian Codification is that the common law is not superseded.[120] In the words of Sir John Thompson :

> "the Bill aims at a codification of both common law and statutory law relating to these subjects, but . . . . . it does not aim at com-

[113] 32-33 Vict. (Dom.) c. 20, ss. 1, 5. In a few instances the Code also leaves the definition of offences to the common law, e. g. by s. 174 (now 202) buggery is an offence, but is not defined. Cf. the definition of sodomy in s. 690 of the New York Penal Law.

[114] See note 6 *supra*.

[115] Debates of House of Commons, 1892, Vol. II., 1312.

[116] *Ibid.*

[117] The debates on the Code in Parliament do not indicate any such influence, and a comparison of the two codes reveals little evidence of any connection between them.

[118] See note 89 *supra*.

[119] If one examines the procedural provisions, Parts XIII. to XXI. inclusive, in Tremeear, W. J., *op. cit.*, one will find that the origin of a great many of the procedural sections is R. S. C., 1886.

[120] Cf. the New York Penal Law, s. 22, which provides that there shall be no offences except under some statute.

pletely superseding the common law, while it does aim at completely superseding the statutory law relating to crimes. In otherwords, the common law will still exist and be referred to, and in that respect the code, if it should be adopted, will have the elasticity which has been so much desired by those who are opposed to codification on general principles. But it will not provide for the punishment of anything which has been hitherto a statutory offence unless that offence is proscribed by the terms of the enactment itself".[121]

The criticism of lack of elasticity had been directed against the proposed English codification, which expressly preserved the common law so far as it might afford a justification or excuse to the accused,[122] but which expressly abrogated all common law offences not embodied in some statute.[123] This abrogation of common law offences was sharply criticized by some leading English judges. Baron Parke said :

"In my opinion, the proposed measure, *which is to abrogate the common law with respect to criminal offences*, and to put an end to all its rules and definitions of offences, is a measure likely to produce no benefit in the administration of criminal justice, but decidedly the reverse. My objection to the proposed measure is founded on the danger of confining provisions against crimes to enactments and repealing in this respect the rules of the common law, which are clear and well understood and have the incalculable advantage of being capable of application to new combinations of circumstances, perpetually occuring, which are decided, when they arise, by inference and analogy to them and upon the principles on which they rest. Whatever care be used in defining offences and in the language of the proposed enactments, it will be impracticable to make the definitions embrace every possible case that can arise, and consequently many acts which are criminal, and closely fall within the principle of the rules of the common law, will be dispunishable, *whereas, if the common law is suffered to continue*, it may justly and legally be applied to them."[124]

In the Canadian Code the common law is left untouched as regards prosecutions.[125], and judicial interpretation of the Code has been to the effect that the common law remains in force except where repealed, either expressly or by necessary implication, by the Code.[126] The revision of the Code in 1906

[121] Debates of House of Commons, 1892, Vol. II., 1313.
[122] Draft Code, s. 19.
[123] *Id.*, s. 5.
[124] Quoted in Introduction to Crankshaw, J., *Criminal Code of Canada*, (4th ed. 1915). Lord Chief Baron Pollock and Mr. Justice Crompton voiced the same objection, *ibid.*
[125] See s. 933 (now 15).
[126] "It has never been contended that the Criminal Code of Canada contains the whole of the criminal common law of England in force in Canada. Parliament never intended to repeal the common law, except in so far as the Code either expressly or by implication repeals it. So that if the facts stated in the indictment constitute an indictable

(*Continued on page 567*)

modified S.933 by expressly providing that where an offender is punishable both under a statute and at common law he may be prosecuted and punished either under the statute or at common law.[127] The Code expressly retains the common law relating to matters of justification or excuse.[128] *In Canada, therefore the common law is preserved not only in matters of defence, but also as a ground of prosecution, in the absence of any contrary statutory provision.*

Since the main principles of the Code are derived from the common law and its modifications down to the latter part of the nineteenth century, it is not surprising that its fundamental attitude toward criminality is that of the classical school of criminology. The doctrines of this school, as expounded by Beccaria[129] and Bentham,[130] are based upon a premise of free—willing human beings consciously choosing between right and wrong. If one chooses to do wrong, one is "responsible" or "guilty", and justice requires that one pay the wages of one's wrong-doing. In line with the abstract, individualistic,[131] *a priori* speculation so characteristic of the eighteenth and most of the nineteenth century, little attention was paid to the concrete offender. On the contrary, this school regarded the abstract crime as the important thing. The punishment should fit the crime. For each offence there should be provided a penalty proportionate to the supposed seriousness of the offence.[132] The test of their seriousness was "the injury done to society".[133]

The doctrines of this school are very apparent in the Code. Crimes are set forth, and the punishment varies with the seriousness of the abstract offence. Murder is deemed one of the most serious offences, and if one chooses to commit this crime, one must pay the price of death[134]. Treason is considered equally serious, and requires the same punishment.[135] Manslaughter is

(*Continued from page 566*)

offence at common law, and that offence is not dealt with in the Code, then unquestionably an indictment will lie at common law; even if the offence has been dealt with in the Code, but merely by way of statement of what is law, then both are in force."

Union Colliery v. *The Queen* (1900) 31 S.C.R. 81, 87. See also *R.* v. *Cole* (1902) 3 O. L. R. 389, 5 Can. C. C. 330. *R.* v. *Elnick* (1920) 30 Man. R. 415, 53 D. L. R. 298 33 Can. C. C. 174.

[127] See R. S. C., 1906, c. 146, s. 15.

[128] S. 7 (now 16).

[129] Essay on Crimes and Punishments, 1764.

[130] Works (Bowring ed. 1843) I. chap. XVI.

[131] I. e. individualistic as opposed to socialistic.

[132] For a discussion of the classical school see Saleilles, R., "*The Individualization of Punishment*" (translation by Jastrow, 1913) chap. III.

[133] Beccaria, *op. cit.*, chap. VIII.

[134] S. 231 (now 263).

[135] S. 65 (now 74).

not quite so serious, with the result that its maximum price is life imprisonment.[136] Robbery is deemed much less serious, and requires only a maximum punishment of fourteen years imprisonment and whipping,[137] unless it is an aggravated robbery, in which case society can demand life imprisonment.[138] It is immaterial that some robbers may be far more dangerous to society than some murderers. The assumption has been made that murder is more injurious to society than robbery, and this must be the criterion of punishment. Sir John Thompson expressed the essence of the classical attitude when he told the House of Commons that the Code "aims at making punishment for various offences of something like the same grade more uniform".[139]

The Code also recognizes the usual exceptions to the doctrine of responsibility as expounded by the classical school. It provides that insane persons,[140] children under seven years, of age,[141] children between seven and fourteen, unless they are able to appreciate that their conduct was "wrong",[142] and, with certain limitations, persons acting under compulsion,[143] shall not be responsible. In regard to insanity, the hallowed rule of the *McNaghten Case*[144] is adopted, and, of course, its moral criterion of ability to know "that such act or omission was wrong"[145] fits into a theory of punishment based on free will and moral guilt. Children under seven years of age, it is assumed, have not sufficient moral discernment to enable them to make a conscious choice between right and wrong. In the case of children between seven and fourteen, it is conceded that they may possess this discernment, but its presence must be shown, and will not be taken for granted as in the case of adults. In regard to compulsion, the exception is rather inconsistently made subject to another exception. When one commits certain serious offences, such as murder, robbery, or arson, compulsion is no excuse.[146] It is difficult to see how a person under compulsion has a greater freedom of choice in one offence than in another, unless, of course, in case of compulsion to commit a serious crime, one assumes that a moral issue is raised. The offender may choose

[136] S. 236 (now 268).
[137] S. 399 (now 447, where whipping is added to the fourteen years).
[138] S. 398 (now 446).
[139] Debates of House of Commons, 1892, Vol. II., 1313.
[140] S. 11 (now 19).
[141] S. 9 (now 17).
[142] S. 10 (now 18).
[143] S. 12 (now 20).
[144] (1843) 4 St. Tr. N. S. 847; 10 Cl. & F. 200.
[145] S. 11 (1) (now 19 (1)).
[146] S. 12 (now 20).

to save himself and commit the offence, or to sacrifice himself to the cause of society, and refuse to do the act. The explanation, however, probably lies not in any such theory of free choice, but in the exigencies of public policy and the general security. The defence of compulsion, in the case of major offences, is deemed too pregnant with potential danger to permit of its recognition.

The Canadian Code, however, does not work out the classical principle of varying punishments for crimes of varying seriousness into such logical detail as do some American codes. In some of these codes, notably the New York Penal Law, one finds an attempt, in the "degrees" of crime, to carry the theory of punishment to fit the crime to the extent of subdividing the crime itself into more and less serious forms. In the New York Penal Law, for example, one finds three degrees of arson,[147] assault,[148] burglary,[149] forgery,[150] larceny[151] and robbery,[152] and two of murder,[153] manslaughter[154] and rape.[155] The punishment fits the degree of the offence. Arson in the first, second, and third degrees is punishable by maximum terms of imprisonment of forty, twenty-five and fifteen years respectively.[156] The degree is determined by certain circumstances which are rather arbitrarily assumed to affect the seriousness of the offence. Robbery in the first degree must be committed by a person armed with a dangerous weapon, or aided by an accomplice actually present, or aided by the use of a motor vehicle, or who inflicts grievous bodily harm in order to accomplish the robbery.[157] In the second degree of robbery, the law requires the use of violence, or putting the person robbed in fear of immediate injury to his person or that of someone in his company.[158] All other robbery is in the third degree.[159]

In the Canadian Code the term "degree" is not used, but the same principle is found in many sections, although the details are not developed so completely as in some American codes. Under the law of Canada there are, in effect, two degrees

[147] Ss. 221-3.
[148] Ss. 240, 242, 244.
[149] Ss. 402-4.
[150] Ss. 884, 887, 889.
[151] I. e. grand larceny in the first and second degree and petit larceny. Ss. 1294, 1296, 1298.
[152] Ss. 2124, 2126, 2128
[153] Ss. 1044, 1046.
[154] Ss. 1050, 1052.
[155] S. 2010.
[156] S. 224.
[157] S. 2124.
[158] S. 2126.
[159] S. 2128.

of robbery, ordinary and aggravated.[160] Furthermore, the bases of differentiation between aggravated and ordinary robbery are similar to those which distinguish the degrees of the offence under the New York Penal Law.[161] The punishments vary for the two degrees.[162] Similarly there are, in effect, three degrees of forgery. Certain kinds of documents are set out, and forgery of them is punishable with life imprisonment. Forgery of another set calls for fourteen years. The forger of a third set is liable to seven years.[163] Another good example is the offence of mischief, of which there are five kinds, depending upon the thing destroyed. The punishments range from life imprisonment to two years.[164] The same principle is seen in defamatory libel, where the amount of punishment depends upon whether the offender knew the libel to be false.[165] Similarly burglary and housebreaking are in effect degrees of the same offence, and the distinction between the two depends mainly upon whether the offence was committed by day or by night.[166] Many other examples appear in the Code.[167] It is apparent, therefore, that the conception of degrees of crime is to be found in Canadian law, although the terminology thereof is absent.

It remains to refer to a few principles embodied in the Code which seem to be contrary to the fundamental doctrine of the classical school. One of these is to be found in section 971 (now 1081) which incorporates the provisions of a statute of 1889[168] providing for the conditional release of first offenders in certain cases. The theory underlying this principle being reformation and individualization of treatment to fit the offender instead of the abstract offence, it is at variance with the fundamental classical attitude of the Code as a whole. Another principle found therein, since it savors of individualization of justice, seems to be contrary to the classical theory. It is provided that where an offender is liable to different degrees or kinds of punishment, the punishment to be inflicted shall, subject to the

[160] Code, ss. 398-9 (now 446-7).

[161] E. g. use of personal violence, presence of an accomplice, or being armed.

[162] See notes 137, 138 *supra*.

[163] S. 423 (A), (B), (C) (now 468-70).

[164] S. 499 (A), (B), (C), (D), (E) (now 510).

[165] S. 301-2 (now 333-4).

[166] S. 410-11 (now 457-8).

[167] E. g. theft, ss. 319-57 (now 358-88), receiving stolen goods, 314-6 (now 399-401), extortion by threats, 405-6 (now 453-4), neglecting aid in childbirth, 239 (now 271), attempting to cause bodily injuries by explosives, 248 (now 280), personation, 456-8 (now 408-10), combinations in restraint of trade, 520 (now 498), and perjury, 146 (now 174); see also 152 (now 174); see also 152 (now 178), and 187 (now 217).

[168] See note 79 *supra*.

limitations in the enactment, be in the discretion of the court.[169] A similar provision exists as to fines.[170] Discretion is also given to th ecourt in case of imprisonment to sentence for any shorter term than that mentioned in the enactment, but subject to the minimum term, if any, prescribed.[171] This really embodies the principle of "individualization of justice",[172] even though it may be carried out in an unscientific manner, due to the absence of proper materials to guide the exercise of the discretion.

General changes in the law made by the Code:

The Code substantially incorporates the law as it existed prior thereto, but several important general changes are introduced, with a view to getting away from certain technicalities and obscurities. It is not here purported to cover exhaustively all the changes made, but an attempt is made to discuss the most significant ones. For this purpose, the changes may be classified as those dealing with (1) the elements and classification of offences, (2) parties to offences, and (3) procedure. These changes will now be discussed in the order indicated.

(*1*) *Elements and classification of offences:* The time honoured distinction between felony and misdemeanor is abolished by the Code,[173] and crimes are now classified as either "indictable offences" or merely "offences". The indictable offences, of course, are punishable upon proceedings by indictment.[174] The simple offences are punishable upon summary conviction.[175] The section of the Code creating an offence expressly states the class to which that offence belongs. Every provision of the Code creating an offence reads either "Every one is guilty of an indictable offence and liable to" (punishment) "who"—, or "Every one is guilty of an offence and liable, on summary conviction to" (punishment) who"—and the classification of the offence is thereby determined.

[169] S. 932 (now 1028).

[170] S. 934 (now 1029).

[171] S. 953 (now 1054).

[172] But see Saleilles, R., *op. cit.*, pp. 56-7, where he suggests that the modification of set and invariable punishments involved no change in the essential principles of the classic theory. It is conceded that the basis of responsibility, that is, freedom of the will, remains the same, but it is submitted that in so far as the punishment no longer exactly fits the crime, there is a departure from classic principles.

[173] S. 535 (now 14).

[174] See also Code Part LIV. (now XVIII.) re speedy trials of indictable offences, and Part LV. (now (XVI.) re summary trial of certain indictable offences; and Part LVI. (now XVII.) re trial of juvenile offenders for indictable offences.

[175] For procedure on summary conviction, see Code, Part LVIII. (now XV.).

The abolition of the distinction between felony and misdemeanor was recommended by the English Royal Commission in 1879. They point out in their report that the distinction had become practically meaningless, and that any classification of crimes based upon it rested upon no sound principle.[176] This recommendation is the source of the provision of the Canadian Code which abolishes the distinction.[177] In regard to the manner in which each section of the Code clearly specifies the class to which an offence belongs, it will be recalled that such a method was strongly urged by Lord Chief Justice Cockburn, in his comments on the proposed English codification.[178]

The terms "larceny" and "embezzlement" have also been abolished, as well as the technical distinctions relating to them. In their place is found a definition of *theft* which covers these older concepts.[179] An example of the abolition of technical distinctions may be seen in subsection 3 of the section defining theft:

> "It is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of the conversion, in the lawful possession of the person converting".[180]

According to the old law, in order to have larceny it was necessary that the obtaining of possession and the *animus furandi* must coincide.[181] If a person acquired lawful possession and later converted the thing to his own use, it was merely embezzlement, or in certain cases larceny by a bailee, if it was an offence at all.[182] The abolition of the technicalies and distinctions relating to larceny and embezzlement was recommended by the English Commission,[183] and the definition of theft in the Code is substantially taken from the English draft code.[184]

[176] Report, p. 14.

[177] See draft code, s. 431; Debates of House of Commons, 1892, Vol. II., 1313.

For a discussion of cases where the distinction is still important see Tremeear, W. J., *op. cit.*, pp. 37-8.

[178] See *supra*, the heading, *General form and content of the Code.*

[179] S. 305 (now 347). Offences formerly coming within the term "embezzlement" are designated "theft" under the Code, ss. 305 (now 347), 308-10 (now 355-7). This change does not affect the liability to extradition of a person charged with what was larceny at common law and is by the Code still an offence in Canada under the name of "theft" or "stealing". Re Gross (1898) 25 O. A. R. 83.

[180] Now S. 347 (4).

[181] *Regina* v. *Ashwell*, (1885) 16 Cox c. c. 1; *Regina* v. *Hehir*, (1895) 2 Ir. 709.

[182] See Report of English Royal Commission, 1879, pp. 27-8, and Kenny, C. S., *Outlines of Criminal Law* (13th ed., 1929) ch. XIII.

[183] *Id.* p. 28.

[184] S. 246.

Another change suggested by the English Commissioners was the discontinuance of the use of the words "malice" and "maliciously" in regard to offences.[185] This suggestion was followed in the Canadian codification.[186] The reason for the change was that the term "malice" was used in a legal sense quite contrary to its popular meaning, with the result that nobody in practice understood it but lawyers. This caused difficulty and uncertainty in the administration of criminal law by juries.[187] Following the suggestion of the English Commissioners, the Code embodies a definition of murder[188] and new definitions of those other crimes with reference to which the word "malice" was previously used. The definition of murder adopted to effect this change is copied from the English draft code.[189]

(*2*) *Parties:* There is no distinction in the Code, even in name, between accessories before the fact and principals. They may all be indicted as principal offenders.[190] This change was also recommended by the English Commissioners, but they said that the change was not so much in the substance as in the form of the law; that the old law was technical but that it was practically superseded by 24-25 Vict., C.94, which put accessories before the fact upon the same footing in all respects as principals.[191]

The Code also defines accessories after the fact,[192] and it goes beyond the English draft code in this respect by providing that not only shall the wife not become an accessory after the fact by receiving, comforting and assisting her husband, but also that the husband shall have a like immunity as regards offences by the wife.[193] The draft code provisions[194] extended

[185] Report pp. 15, 23.

[186] "Malice" appears in only two places; s. 521 (now 499) dealing with criminal breaches of contract, where it is stated to be immaterial whether any offence defined in the section is committed from malice toward the person with whom the contract is made, and in s. 676 (now 963) where the expression "mute of malice" is retained. See 38 *Canada Law Journal* (1902) 225, 231-2.

[187] Debates of House of Commons, 1892, Vol. II., 1317.

[188] S. 227 (now 259).

[189] S. 174. Following the suggestions of the English Commissioners (Report pp. 24-5) the Code defines provocation which may reduce murder to manslaughter, making it clear that words as well as acts may amount to provocation, s. 229 (now 261).

[190] Ss. 61-2 (now 69-70). For a brief discussion of the common law doctrines as to principals and accessories, see 38 *Canada Law Journal* (1902) 225, 235. See also Kenny, C. S., *op. cit.*, ch. VI., and Annotation [1933] 2 D. L. R. 1.

[191] Report, p. 19.

[192] S. 63 (now 71).

[193] At common law the husband may be an accessory for the receipt of his wife who has committed a felony. See 38 *Canada Law Journal* (1902) 225, 236.

[194] S. 73.

the privilege of the wife to receiving, comforting or assisting in her husband's presence and by his authority any other person who has been a party to the offence, and this has also been adopted by the Code;[195] but the English draft does not place the husband and wife on the same footing as regards offences committed by each other. With the exceptions above mentioned, the sections of the Code as to parties embody the provisions of the English draft code.[196]

(3) *Procedure:* The Code contains several important changes in procedure, the purpose of which is to get rid of technicalities and sources of delay, while at the same time protecting the interests of the accused. The main changes are in reference to (a) indictments, (b) venue, (c) appeals, and (d) presumptions.

(a) *Indictments:* The Code provides that every count of an indictment shall be sufficient if it contains in substance a statement that the accused has committed some offence therein specified. This statement may be made in popular language without any technical averments or any allegations of matter not essential to be proved. The statement may be in any words sufficient to give the accused notice of the offence with which he is charged.[197] Absence or insuffiency of details will not vitiate the count.[198] Offences may be charged in the alternative.[199] In addition, the Code sets out a number of technical objections which shall not vitiate counts.[200] With the exception of a murder charge, any number of counts for any offences whatever may be joined in the same indictment.[201] Furthermore no accused person is entitled, as of right, to traverse or postpone the trial of any indictment, or to have time allowed him to plead or demur to any such indictment. The court, however, is given power to grant further time or to adjourn the trial, upon the application of the accused.[202] In addition, the court is given wide discretionary powers as to amendment of indictments.[203]

[195] S. 63 (2) (now 71 (2)).
[196] Cf: ss. 71-3 of draft code with present ss. 69-71 of the Canadian Criminal Code.
[197] S. 611 (now 852).
[198] S. 611 (now 853).
[199] S. 612 (now 854).
[200] S. 613 (now 855). For example, it is no objection that it does not contain the name of the person injured, or that it does not state who is owner of any property therein mentioned, or that it does not set out the words used where words used are the subject of the charge, or that it does not specify the means by which the offence was committed.
[201] S. 626 (now 856).
[202] S. 630 (now 901).
[203] Ss. 723 (now 889), 612 (now 891), 613 (now 859), 629 (now 898). See also present s. 893.

In fact, *a large amount of discretion in the court to see that substantial justice is done, rather than an absolute right in the accused to avail himself of technical objections,* runs all through the provisions as to indictments. The result is that in Canada, unlike many American jurisdictions,[204] there is not much opportunity for the accused to escape or to delay proceedings by objections to the indictment.

The simplification of the law as to indictments was recommended by the English Commissioners,[205] and the more important provisions dealing with the subject are taken from the English draft code.[206]

(*b*) *Venue:* Prior to the Code the common law rule as to venue, with certain statutory modifications,[207] prevailed in Canada. Under this rule it was required that the offence be tried in the county where it was committed. The inconvenience of such a rule, and the absence of any sound reason for its existence in a time when juries no longer decided cases on the basis of their own knowledge, led the English Commissioners to propose the abolition of the common law rule, and the substitution of a rule based on convenience.[208] The provision of the English draft code[209] designed to effect the change was adopted in the Canadian Code.[210] It is provided that every court of criminal jurisdiction in Canada is competent to try all offences wherever committed, if the accused is found or apprehended or is in custody within the jurisdiction of such court, or if he has been committed for trial to such court, or ordered to be tried before such court. The only limitation is that no court in one province can try any person for any offence committed

[204] For examples of the extreme technicality in some American jurisdictions as to indictments, see Cantor, N. F., *Criminals and Criminal Justice* (1932) p. 179, note 11.

[205] Report, pp. 35-6.

[206] E. g. 610 from 481, 611 from 482, 612 from 483, 613 from 484, 614 from 489, 615 from 485, 616 from 486 (but see also R. S. C., 1886, c. 174, s. 107), 617 from 487, 626 from 493, 723 from 488 (see also R. S. C., 1886, c. 174, ss. 237, 238, 239), 713 from 492. (The Canadian Code citations refer to the 1892 Code).

[207] E. g. 32-33 Vict. (Dom.) c. 29, s. 8 provides that when an offence is committed on the boundary, or within one mile of the boundary, of two or more counties, or when it is begun in one county and completed in another, such offence may be tried in any one of the said counties, as if it had been actually and wholly committed therein. S. 9 provides that in case of offences committed on persons or property while in transitu by land or water, they shall be triable in every county through which the vessel, etc., passed. S. 10 makes similar provision for offences committed on highways, rivers, etc., dividing two counties. S. 11 provides for change in venue in discretion of court. (This provision is now s. 884 of the Code).

[208] See Report, pp. 31-2, 35.

[209] S. 504.

[210] S. 640 (now 577). See also present s. 888.

entirely in another province, except in the case of defamatory libel.[211]

(c) *Appeals:* The English Commissioners stated that the procedure, under the then existing law in England, subsequent to the trial, and in the nature of an appeal, might be arranged under three separate heads, (1) proceedings in error, (2) cases for the Court of Crown Cases Reserved, (3) motions for a new trial.[212] It seems that all of the three procedures mentioned were present in Canada before the adoption of the Code.[213] The English Commissioners suggested that in order to form a complete system these various forms of proceeding ought to be combined. They proposed to constitute a single court of criminal appeal, resembling the Court for Crown Cases Reserved, but consisting of only five members, and with the minority bound by the majority, as in other courts. However, if on a point of importance, the court should be divided, it might be desirable that a further appeal be possible. In such a case, they proposed that the court should have power to grant an appeal to the House of Lords.[214]

The system proposed by the Commissioners has been adopted in the Canadian Code. An appeal will lie under certain conditions to a court of appeal, the constitution of which varies somewhat in the different provinces.[216] It will be noted that the right to appeal to the Supreme Court of Canada in case of a dissent, is not made to depend on the granting of leave by the court of appeal.[217] The details of appeal procedure have been considerably amended[218] since the adoption of the Code, but the underlying principles of the appeal system remain the same. It will be readily appreciated that under such a system, there is little opportunity for a case to be long delayed by a large number of appeals. The underlying principles of the Canadian appeal system are another important contribution of the English Commissioners.

Brief mention should also be made of another new provision introduced by the Code, which is closely akin to the subject of

[211] "Every proprietor, publisher, editor or other person charged with the publication in a newspaper of any defamatory libel, shall be dealt with, indicted, tried and punished in the province in which he resides, or in which such newspaper is printed." S. 640 (2) (now 888).
[212] Report, p. 37.
[213] See Tachereau, H. E., *op. cit.*, Vol. II., pp. 360-85.
[214] Report, p. 38.
[215] See generally Part XIX. of present Code, ss. 1012-25.
[216] See present Code, s. 2 (7).
[217] *Id.*, s. 1023. Cf. s. 1025.
[218] See Tremeear, W. J., *op. cit.*, pp. 1361-1408.

appeals. It is provided that upon any application for the royal mercy by a person convicted of an indictable offence, the Minister of Justice, if he is in doubt as to the propriety of the conviction, may order a new trial.[219] This provision is also taken from the English draft code.[220] The English Commissioners point out that the Secretary of State (to whom they proposed that this function be given) is a better judge of the existence of circumstances under which there should be a new trial in such cases than a Court of justice can be. He is fettered by no rule, and his opinion does not form a precedent for subsequent cases. Therefore a new trial in such cases should be granted on his undivided responsibility.[221]

(*d*) *Presumptions:* The Code abolishes the common law presumption that a married woman who commits an offence in the presence of her husband commits it under his compulsion.[222] Of course it is still open to the wife to show actual compulsion in cases in which compulsion is a defence,[223] but the burden is now upon her to prove it, instead of on the Crown to disprove it. Referring to this change Sir John Thompson said :

> "The presumption under the common law is a strained one. In many cases the wife commits an act of violence in spite of her husband, but the common law presumes that she acts under compulsion if she does that in his presence. We now leave that to be a matter of evidence, to be proved whether she acted under the compulsion of her husband or in spite of her husband".[224]

The abolition of this presumption was recommended by the English Commissioners.[225] The presumption continued to exist in England, although its expediency was questioned by English judges,[226] until 1926, when it was abolished by statute[226a].

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[219] S. 748. The present section, 1022, provides two other choices for the Minister. He may (1) refer the whole case to the court of appeal, or (2) refer any point arising on the petition to the court of appeal for an opinion.

[220] S. 545.

[221] Report, p. 39.

[222] S. 13 (now 21).

[223] See Code, s. 12 (now 20).

[224] Debates of House of Commons, 1892, Vol. II., 2711.

[225] Report, p. 18 and draft code s. 23.

[226] E. g. Alverstone, L. C. J. in *R.* v. *Court* (1912) 7 Cr. App. R. 127, said he was not certain that this rule of law was beneficial in the administration of justice, and that it certainly ought not to be extended. In that case it was unsuccessfully contended that the accused woman should have the benefit of the presumption as to the man with whom she was living as his wife, or at least that the jury should have been invited to acquit, if they thought that she was acting under his influence.

For a brief account of the limits of the presumption at common law, see 38 *Canada Law Journal* (1902) 225, 242.

[226a]. Criminal Justice Act, 1925, 15-16 Geo. V. (Imp.) C. 86, S. 47.

In retrospect of the changes in the law introduced by the Code, it is apparent that they have freed Canadian criminal law from many of the technical accretions of the common law, and that their value in conducing to the efficient administration of justice can hardly be overestimated. The Canadian people have thereby been spared from some of the problems of cumbersome and inefficient administration of the criminal law with which many American communities are faced. A most significant fact concerning all these changes is that they were every one proposed by the English Commissioners as the result of their extensive study in 1879, based on similar studies by earlier commissions. It would appear to be a splendid example of the benefits which can be derived from an intensive study of the criminal law as a whole by a group of experts having a conscious purpose of improvement. A striking contrast will be seen in the manner in which the Canadian Code has been amended during the forty years since its adoption.

To be continued.

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