That is, perhaps, the law under the English cases, but under the Code a different rule prevails here; the Supreme Court has so held.

In *Rex* v. *McCarthy*[43] the Supreme Court held that the distinction is not maintainable between that which would render a man liable for civil damages for negligence and that which would render him criminally liable.

The criminal character of an offence has an important relation to civil actions on insurance policies.

In *Yorkshire* v. *O'Hearn*,[44] the Court of Appeal held, that where a person had insured himself against public liability and had by an act which amounted to criminal negligence, caused injury to some person, he has, by that criminal act, lost his right of indemnity against the insurance company. The principle upon which this decision rests, is that it would be contrary to public policy to permit any person to enter into a contract of indemnity against his own criminal act.

In *Sowards* v. *London Guarantee*,[45] Ferguson, J., delivering the judgment of the Court of Appeal, said: "The case of *O'Hearn* v. *Yorkshire* is authority that the plaintiff cannot get indemnity for loss occasioned by his own criminal or illegal act," but here the act was that of the plaintiff's son and the defendant was held liable.

On appeal to the S. C., Canada, this case was reversed on another ground.

T. N. PHELAN.

Toronto.

JUDICIAL COMMITTEE DIFFERENCES.

In the *Board of Commerce case*,[1] Lord Haldane said:

"It is one thing to construe the words 'the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters,' as enabling the Dominion Parliament to exercise exclusive legislative power *where the subject matter is one which by its very nature belongs to the domain of criminal jurisdiction.* A general law, to take an example, making incest a crime, belongs to this class. It is quite another thing first to attempt to interfere with a class of subjects committed exclusively to the Provincial Legislature, and then to justify this by enacting ancillary

[43] 62 S. C. R. 40.
[44] 20 O. W. N. 275.
[45] 22 O. W. N. 513.
[1] [1922] 1 A. C. 191.

provisions designated as a new phase of Dominion criminal law which require a title to so interfere as basis of their application."

This paragraph called forth from the late lamented Chief Justice of Ontario, Sir William Meredith, the following criticism in *Attorney-General* v. *Wholesale Grocers*[2]:

"I am unable to reconcile the views expressed in the Board of Commerce case with what was decided in the Lord's Day Act case, [1903] A. C., 524, for in the latter case I find no warrant for the view that it is only "where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence that the Parliament of Canada can legislate.

"The proper observance of the Lord's Day Act and the enforcement of its penalties is not a subject matter which in its very nature belongs to criminal jurisprudence.

"The inconvenience resulting from this limitation is obvious when one considers the large number of subject matters which have been dealt with by the Parliament of Canada, which cannot be said to belong in their very nature to criminal jurisprudence."

It is interesting to observe in passing that the late Mr. Justice Street in *Reg.* v. *Wason*,[3] an analogous case, in a dissenting judgment, had anticipated the reasoning of Lord Haldane, when dealing with an Act of a Provincial Legislature.

"There are good reasons for holding that the provincial legislatures could not, by the mere act of passing a statute forbidding the doing of some thing already an offence, but affecting property and civil rights in the Province, confer upon themselves jurisdiction to inflict a new punishment for an offence, and justify it on the ground that they were merely enforcing their own statute. *The foundation for the jurisdiction would be defective because of its dealing with matters of criminal law.*

"I do not mean to say that this is the only test to be applied, but it clears the ground of the initial difficulty and leaves it open to us to consider the real character of the legislation which is attacked, that legislation being within the letter of the powers of the legislature under the Constitutional Act. Is it an Act constituting a new crime for the purpose of punishing that crime in the interest of public morality? Or is it an Act for the regulation of the dealings and rights of cheese makers and their patrons, with punishments imposed for the protection of the former? If it is found to come under the former head, I think it is bad as dealing with criminal

[2] (1923) 53 O. L. R. 627, at p. 636; 2 D. L. R. 617.
[3] (1889) 17 O. R. 58.

law; if under the latter, I think it is good as an exercise of the rights conferred on the province by the 92nd sec. of the 'British North America Act.' An examination of the Act satisfies me that the latter is its true object, intention, and character."

In the latest case dealing with criminal law decided in the Privy Council, *Attorney-General for Ontario* v. *Reciprocal Insurers*,[4] Mr. Justice Duff says:

"But, on behalf of the Dominion, it is argued that, although such be the true character of the legislation the jurisdiction of Parliament, in relation to the criminal law, is unlimited, in the sense that in executing its powers over that subject matter, the Dominion has authority to declare any act a crime, either in itself or by reference to the manner or conditions in which the act is done, and consequently that Section 508 C, being by its terms limited to the creation of criminal offences, falls within the jurisdiction of the Dominion.

"The power which this argument attributes to the Dominion is, of course, a far-reaching one. Indeed, the claim now advanced is nothing less than this, that the Parliament of Canada can assume exclusive control over the exercise of any class of civil rights within the provinces, in respect of which exclusive jurisdiction is given to the provinces under Section 92, by the device of declaring those persons to be guilty of a criminal offence, who in the exercise of such rights do not observe the conditions imposed by the Dominion."

He then refers to the *Board of Commerce case*,[5] and proceeds:

"Their Lordships, by their judgment, laid it down that it was not competent to the Dominion Parliament to interfere with a class of subject committed exclusively to the provincial legislatures and then to justify this by enacting ancillary provisions designated as new phases of Dominion criminal law, which require a title to so interfere as the basis of their application. Indeed, on any other hypothesis, the greater part of the judgment in *Russell* v. *The Queen* (1882, 7 A. C., 829), would be quite beside the question then before the Board, a remark which would equally apply to the elaborate judgment delivered by Lord Watson on the Local Option Reference, 1896, A. C., 348, and to the lengthy arguments to which the Board listened on the hearing of that appeal.

"Their Lordships think it undesirable to attempt to define, however generally, the limits of Dominion jurisdiction under Item 27 of Section 91; but they think it proper to observe, that what has been said above does not involve any denial of the authority of Parliament

[4] [1924] A. C. 328.
[5] [1922] 1 A. C. 191.

to create offences merely because the legislation deals with matters which in another aspect may fall under one or more of the subdivisions of the jurisdiction entrusted to the provinces."

It would appear to be a fair conclusion from the concluding words of this judgment that the Judicial Committee is not at present committed to the assertion that it is only where the subject matter is one which in its very nature belongs to the domain of criminal jurisprudence that the Parliament of Canada can legislate.

In the case to which the late Chief Justice Meredith refers, *Attorney-General for Ontario* v. *Hamilton Street R. W. Co.*,[6] the Privy Council said:

"The reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed according to their natural and ordinary signification. Those words seem to their Lordships to require, and, indeed, to admit of no plainer exposition than the language itself affords. Section 91, sub-section 27, of the British North America Act, 1867, reserves for the exclusive legislative authority of the Parliament of Canada 'the criminal law, except the constitution of courts of criminal jurisdiction.' It is therefore the criminal law in its widest sense that is reserved, and it is impossible, notwithstanding the very protracted argument to which their Lordships have listened, to doubt that an infraction of the Act, which in its original form without the amendment afterwards introduced was in operation at the time of Confederation, is an offence against the criminal law. The fact that from the criminal law generally there is one exception, namely, 'the constitution of Courts of criminal jurisdiction,' renders it more clear, that with that exception . . . the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion."

While therefore it has been laid down by the highest authority that it is "criminal law in its widest sense" that is committed to the legislative authority of the Dominion, there remain some pertinent questions, some needing exposition of that expression itself, and others arising from the conflicting powers of the Provincial and Federal jurisdictions.

It may be asked (1) what is to determine what is the "widest sense" of the words "Criminal law"? Is the interest of public morality its essential ingredient? (2) Does that expression mean that which was criminal in England in 1792, (c.f. *Riel* v. *The Queen*[7])

[6] [1903] A. C. 524.
[7] 1885, L. R. 10 A. C. 675.

or in England and in any Province of Canada in 1867, (c.f. *Reg* v. *Shaw*.[8] *Ouimet* v. *Bazan*.[9] *ex p. Green*,[10]) or does it include the power to create new crimes, (c.f. *Attorney-General* v. *Wholesale Grocers*,[11] *Beaulieu* v. *La Cite de Montreal*,[12] *Huson* v. *South Norwich*,[13] *McQueen* v. *Mayor of Fredericton*,[14] *Rex* v. *Lee*[15]). (3) If it does include this power, is the provincial power to impose penalties for infringement of acts apparently within provincial jurisdiction ousted thereby or are "crimes" limited so as not to include such infringements. (4) Does it allow the Legislature of a Province to declare that an act, which, by the general law, is a crime triable and punishable as a crime with the ordinary safeguards of the constitution affecting procedure as to crime, to be in another aspect something other than or less than a crime, and so triable and punishable by magistrates, as if not a crime, because the purpose and object of the act is to benefit some particular locality or group (e.g., the College of Physicians and Surgeons, see *Re Stinson*;[16] Cheese Makers, *Reg* v. *Wason* (*ante*), or to effect some provincial object (e.g., *Rex* v. *Shaw* (*ante*), and *Quong Wing* v. *The King*[17]).

These offer a wide field of investigation. There is, however, a general principle to be borne in mind, as stated in *Hodge* v. *The Queen*,[18] namely, that

"subjects which in one aspect and for one purpose fall within section 92 of the B. N. A. Act, may in another aspect and for another purpose fall within section 91."

One test which has been suggested is that so long as the substantive matter dealt with is approached from the local or private standpoint, even in a wide provincial sense; in other words, so long as the substantive enactment, considered wholly apart from the sanction attached, is within provincial competence, it is within the power vested in the provinces.

Toronto. FRANK E. HODGINS.

[8] 1891, 7 M. R. 578.
[9] 46 S. C. R. 502.
[10] 35 N. B. 137.
[11] 53 O. L. R. at p. 636.
[12] 1907, R. J. Q. 32 S. C. 97.
[13] 1895, 24 S. C. R. 145.
[14] 1879, 3 B. & P. 139, 160.
[15] 1911, 23 O. L. R. 490.
[16] 1910, 22 O. L. R. 627.
[17] 1914, 49 S. C. R. 440.
[18] (1883), L. R. 9 A. C. 117 at p. 130.