J udges' Chambers,
Supreme Court,
Brisbane, 29th October, 1897.

S tr.,

In pursuance of the undertaking referred to in my letter of 1st June, 1898, enclosing a Digest of the Statutory Criminal Law of Queensland which it is within the competence of the Parliament of Queensland to repeal or amend, I have now the honour to transmit herewith a Draft of a Code dealing with the whole subject of the Criminal Law of Queensland within the same limits.

For the reasons then stated the Draft Code does not deal with the law embodied in Imperial Statutes which are in force throughout Her Majesty's Dominions irrespective of local legislation, nor with such provisions of the English Criminal Law in force in 1828, whether Statutory Law or Common Law, as are manifestly obsolete or inapplicable to Australia—such as the Acts called the Statutes of P ommern or Statutes relating to Divine Worship, the Church of England, and the Church of Rome, and the law relating to blasphemy and the offences called Ferro-stalking and Begging; but an attempt has been made to cover the whole ground of what may be called the Living Criminal Law, including Procedure, with the exceptions just stated, and, with the further exceptions of (1) offences against Statutes which may be regarded as in the nature of police regulations, having no analogy with or relation to indictable offences; (2) procedure before justices, whether for the purpose of summary conviction or committal for trial, which is dealt with in "The Justices Act of 1888"; and (3) a few indictable offences which may be regarded as being of a temporary or special nature, and not therefore proper to be embodied in a permanent Code. (a) I have endeavoured to include all the rules of the unwritten Common Law which are relevant to the question of criminal responsibility and the administration of justice in Courts of criminal jurisdiction, as well as all offences at Common Law which are not such as ought manifestly to be abolished, the intention being that upon the enactment of the Code it should also be enacted that no prosecution shall thereafter be commenced as for an indictable offence except under the provisions of the Code or some other Statute in force in Queensland. In many instances it has been necessary to depart from existing rules for the purpose of avoiding admitted anomalies or of simplifying the law. The reasons for making such departures and for adopting the suggested rules will be found either in this letter, or, when the departures are in matter of detail, in the form of Notes to the Draft Code itself.

Before explaining the principles which I have followed in the preparation of the Draft Code, it may be convenient to say a few words on the general subject of codification of the law, and as to the materials and authorities to which I have had recourse.

(a) The statutory provisions included in the Digest which have been exploded since its publication, and which are not proposed to be repealed upon the enactment of the Code, are the following:

37 Vic. No. 3, ss. 3, 4 (relating to proceedings of a mixed civil and criminal nature with regard to cattle suspected to be stolen). (Art. 647)
37 Vic. No. 3, ss. 3, 4 (relating to giving false answers to F ishing M aster, which, if it is a punishable). (Art. 647)
39 Vic. No. 9 (prohibiting the keeping of pigs in the vicinity of railways). (Art. 647)
39 Vic. No. 9 (punishing the keeping of pigs in the vicinity of railways). (Art. 647)
40 Vic. No. 9, s. 4 (relating to the keeping of pigs in the vicinity of railways). (Art. 647)
40 Vic. No. 9, s. 4 (relating to the keeping of pigs in the vicinity of railways). (Art. 647)
40 Vic. No. 9, s. 4 (relating to the keeping of pigs in the vicinity of railways). (Art. 647)
40 Vic. No. 9, s. 4 (relating to the keeping of pigs in the vicinity of railways). (Art. 647)
40 Vic. No. 9, s. 4 (relating to the keeping of pigs in the vicinity of railways). (Art. 647)
40 Vic. No. 9, s. 4 (relating to the keeping of pigs in the vicinity of railways). (Art. 647)
40 Vic. No. 9, s. 4 (relating to the keeping of pigs in the vicinity of railways). (Art. 647)
IV.

It must seem strange to the ordinary mind that in the present stage of civilization a great branch of the law, by which everyone is bound, and which is understood to be definitely known and settled, should not be reduced to writing in such a form that any intelligent person able to read can ascertain what it is. Yet it is the fact, as I pointed out in my letter of 1st June, 1880, that the written Criminal Law of Queensland (apart from Imperial Statutes of general application) is scattered through nearly two hundred and fifty Statutes, while the unwritten portion of the Criminal Law, which forms a very large part of it, is only to be found in the books of writers on the subject of the Criminal Law of England, or in the decisions of Courts of criminal jurisdiction.

The desirability, indeed, of a collected and explicit statement of the Criminal Law seems to require no argument.

All the civilized nations of the world, I believe, except some of the English-speaking peoples, have reduced their Criminal Law to the form of a Code. The exceptions include the United Kingdom and the Australian Colonies (but not New Zealand). Most, if not all, of the States of the United States of North America have enacted Criminal Codes.

In 1878 Lord Blackburn, Mr. Justice Barry (of Ireland), Mr. Justice Lush, and Sir James Fitzjames Stephen, were appointed by Royal Commission to be Commissioners to report on the provisions of a Draft Code of Criminal Law which had then lately been prepared in England. They submitted as an Appendix to their Report a Draft Code settled by them, which, with some modifications, was introduced into the House of Commons as a Bill in the session of 1880, but did not become law. I have freely drawn upon the labours of these distinguished lawyers, especially with respect to the statement of rules of the Common Law and the definition of Common Law offences. It would, indeed, be impossible for anyone undertaking the task of drafting a Code of English Criminal Law to do otherwise. Their work did not, however, escape severe criticism, especially from Sir A. Cockburn, then Lord Chief Justice of England, who pointed out some serious defects in the Draft Code as prepared by the Commissioners. *(a) It would be impracticable, without undue prolixity, to refer to all the points discussed in their Report, or in Sir A. Cockburn's letter. I venture, however, to submit the following extracts from the Report as giving a general idea of the nature of the work of codification in general, and of the work of codifying the Criminal Law of England or Queensland in particular:—

"Before proceeding to observe on the provisions of the Draft Code, we deem it expedient to make an attempt to remove certain misconceptions relating to codification which we have reason to believe affect the judgments formed by many persons upon the possibility and the utility of the undertaking. These misconceptions appear to us to originate in a wrong estimate of what can be and is proposed to be effected by codification.

"It is assumed that the object of the process is to reduce to writing the whole of the law upon a given subject, in such a manner that when the Code becomes law every legal question which can arise upon the subject with which it deals will be provided for by its express language. When any particular attempt at codification is judged by this standard, it is easy to show that the standard is not attained.

"It is also common to argue that even if such a standard were obtained, the result would not be beneficial, as it would deprive the law of its 'elasticity'; by which is understood the power which the Courts of Justice are said to possess of adjusting the law to changing circumstances by their decisions in particular cases. It is said that the law of this country is in a state of continual development; that judicial decisions make it more and more precise and definite by settling questions previously undetermined; and that the result is to adjust the law to the existing

*(a) Letter from the Lord Chief Justice of England to the Attorney-General, 15th June, 1878. Ordered by the House of Commons to be printed, 26th June, 1878.
habit and wants of the country. To this process, it is said that codification, so far as it goes, would put an end, and that the result would be to substitute a fixed inclusive system for one which possesses the power of adjustment to circumstances."

"In the first place it must be observed that codification merely means the reduction of the existing law to an orderly written system freed from the needless technicalities, obscurities, and other defects, which the experience of its administration has disclosed. The process must be gradual. Not only must particular branches of the law be dealt with separately, but each separate measure intended to codify any particular branch must of necessity be more or less incomplete. No one great department of law is absolutely unconnected with any other. For instance, bigamy is a crime, but in order to know whether a person has committed bigamy it is necessary to know whether his first marriage was valid. The definition of theft, again, involves a knowledge of the law relating to property, and this connects itself with the law of contract and many other subjects."

"It is, however, easy to exaggerate the extent of this incompleteness. Practically, the great leading branches of the law are to a great extent distinct from each other, and there is probably no branch which is so nearly complete in itself as the Criminal Law. . . . A very large and important part of the Criminal Law of this country is already reduced to writing in Statutes, and in particular that portion dealt with by the Criminal Law Consolidation Acts of 1861 (a). And there is no distinction in the nature of the subject between the parts of the Criminal Law which are written and the parts which are not written. High treason is defined by Statute, and so is bribery. Why should it be impossible to define murder or theft?"

"The unwritten portion of the Criminal Law includes the three following parts:—(1) Principles relating to matters of excuse and justification for acts which are privy facto criminal; (2) the definitions of murder, manslaughter, assault, theft, forgery, perjury, libel, and some other offences of less frequent occurrence and importance; and (3) certain parts of the law relating to procedure. To do for these parts of the Criminal Law what has already been done for the rest of it is no doubt a matter requiring labour and care; but when as much of the work has been already done, it seems unreasonable to doubt, either that the remaining part of the Criminal Law can be reduced to writing, or that when it is written down and made to form one body with the parts already written the whole will [not] be improved."

With respect to the objection of the want of "elasticity" of a Code the Commissioners say—

"In order to appreciate the objection it is necessary to consider the nature of this so-called discretion which is attributed to the judges.

"It seems to be assumed that when a judge is called on to deal with a new combination of circumstances, he is at liberty to decide according to his own views of justice and expediency; whereas, on the contrary, he is bound to decide in accordance with principles already established, which he can neither disregard nor alter, whether they are to be found in previous judicial decisions or in books of recognised authority. The consequences of this are, first, that the elasticity of the Common Law is much smaller than it is often supposed to be; and, secondly, that, so far as a Code represents the effect of decided cases and established principles, it takes from the judges nothing which they possess at present."

"In fact the elasticity so often spoken of as a valuable quality would, if it existed, be only another name for uncertainty. The great richness of the law of England in principles and rules, embodied in judicial decisions, no doubt involves the consequence that a Code adequately representing it must be elaborate and
detailed; but such a Code would not (except, perhaps, in the few cases in which the law is obscure) limit any discretion now possessed by the judges. It would simply change the form of the rules by which they are bound.

"The truth is that the expression 'elasticity' is altogether misused when it is applied to English law. The great characteristic of the law of this country, as in all events of its Criminal Law, is that it is extremely detailed and explicit, and leaves hardly any discretion to the judges."

It was proposed by the Commissioners' Draft Code that for the future all offences should be prosecuted either under the Code or under some other Statute, and not at Common Law. "The result of this provision," they point out, "would be to put an end to a power attributed to the judges, in virtue of which they have (it has been said) declared acts to be offences at Common Law, although no such declaration was ever made before. And it is, indeed, the withdrawal of this supposed power of the judge to which the argument of want of elasticity is mainly addressed."

After giving instances of the operation of this doctrine, beginning with the Court of Star Chamber, they add—

"In bygone ages when legislation was scanty and rare, the powers referred to may have been useful and even necessary; but that is not the case at the present day. Parliament is regular in its sittings and active in its labours; and if the protection of society requires the enactment of additional penal laws Parliament will soon supply them. If Parliament is not disposed to provide punishment for acts which are upon any ground objectionable or dangerous, the presumption is that they belong to that class of misconduct against which the moral feeling and good sense of the community are the best protection. Besides, there is every reason to believe that the Criminal Law is, and for a considerable time has been, sufficiently developed to provide all the protection for the public peace and for the property and persons of individuals, which they are likely to require under almost any circumstances which can be imagined; and this is an additional reason why its further development ought, in our opinion, to be left in the hands of Parliament.

If it should turn out that we have overlooked some Common Law offences, we think it better to incur the risk of giving a temporary immunity to the offender than to leave anyone liable to a prosecution for an act or omission which is not declared to be an offence by the Draft Code itself or some other Act of Parliament."

It may be added that the work of amending the Criminal Law would be greatly facilitated by its codification. It is manifestly much easier to deal with a law completely and definitely stated than with laws the provisions of which have to be collected from a vast number of separate documents. In the latter case the actual effect of a new statutory provision may be very different from that intended.

Sir A. Cockburn, in his letter already mentioned, thus described the work of codification:—"So great and difficult a work as that of stating the Criminal Law in all its voluminous details, with a due regard to arrangement and classification, in language carefully selected, avoiding on the one hand the cumbersome, prolix, inartificial, and bewildering phraseology of our Statutes; and on the other taking care that the terms used shall be sufficiently comprehensive to embrace every case which is intended to come within it."

I accept this language as describing the nature of the task which I have endeavoured to discharge, while fully conscious that it is in the highest degree improbable that the labour of any one man or of any number of men should succeed in a complete and perfect performance of it.

The Lord Chief Justice, however, went on to say that while he could not think that the Commissioners had presented such a Code "we have to thank them for having collected abundant materials for a complete and perfect Code."
I am therefore encouraged to think that the task, though difficult, is no more impossible in Queensland than in other civilized countries. The manner of its performance must be judged by the Draft itself.

The Commissioners in their Draft Code enumerated a considerable number of the circumstances which may afford a defence to a criminal charge (relating principally, however, to offences against the person), but did not attempt any exhaustive statement of the law in this respect. They proposed to formally enact that all rules and principles of the Common Law which render any circumstances or justification or excuse for an act or omission or a defence to a charge should remain in force except so far as they were expressly altered by the Code or inconsistent with it. To this provision Sir A. Cockburn took exception as being "inconsistent with every idea of codification of the law." For, he said, "if it is worth while to codify at all, whatever forms a material part of the law should find its place in the Code." In the Draft now submitted I have attempted to state specifically all the conditions which can operate at Common Law as justification or excuse for acts prima facie criminal, but have not formally excluded other possible Common Law defences. It is, however, I think, only with reference to assaults and defamation that any possible Common Law defence could be suggested under circumstances not enumerated in the Code. And I venture to think that the provisions of the Code might with safety, and if with safety certainly with advantage, be made exclusive with respect to these offences.

The Bill of 1889 (like the Draft Code on which it was founded) was also very far from covering the whole ground of the statutory Criminal Law. It entirely omitted offences punishable on summary conviction, many of which are intimately associated in the Statute-book with indictable offences. It also omitted by far the greater number of the penal provisions incidentally contained in Statutes dealing with other subjects than Criminal Law, although these provisions form a very considerable part of the actual Criminal Law. I have, however, thought, for reasons sufficiently indicated in my letter of 1st June, 1896, that it is desirable, as far as possible, to cover the whole ground with the exceptions already stated.

In 1893 the Parliament of New Zealand adopted the Draft Bill of 1889, with some minor alterations, which, however, did not meet the criticisms of Sir A. Cockburn.

In 1888 the Parliament of Italy enacted a Penal Code, the result of labours initiated in the year 1882 and continued by a series of Parliamentary Committees and Royal Commissions under the guidance of eminent lawyers. I have derived very great assistance from this Code, which is, I believe, considered to be, in many respects, the most complete and perfect Penal Code in existence. I have also derived much help from the masterly Ministerial explanation (relazioni) of Signor Zanardelli, who had charge of this Code during its passage through Parliament in 1888. I have also had frequent recourse to the Penal Code of the State of New York.

In the result I have embodied in the Code a good many provisions which are not to be found in the Bill of 1890, but which I believe to be either correct statements of the Common Law or propositions which will commend themselves as rules that, if they are not, ought to be, recognised as the law. I have also ventured in a few instances (to which special attention is in each case called in the Notes) to suggest the adoption of principles which, perhaps, are not at present recognised by our law. When a statutory provision is plainly an instance only of a general principle, I have felt justified in generalising the provision so as to give effect to the principle.

The law of evidence is a distinct branch of the law, affecting civil as well as criminal proceedings, and a Criminal Code cannot properly be expected to embody it. When, however, special exceptions to the general law of evidence have been
established with regard to offences in general, or to particular offences, it appeared not improper, and certainly convenient, to embody them in the Code, and I have accordingly done so.

I have throughout the Code intentionally avoided the use of the terms "malice" and "maliciously," which have come to acquire a technical meaning quite different from that which they bear in ordinary language, and of which the use is, I think, as unnecessary as under these circumstances it is misleading. I will refer later to the use of the term "malice" in connection with homicide. When used with respect to injuries to the person or property it means no more than that the offender did the act in question voluntarily (that is, not accidentally), and knowing what he was doing. The general rules of criminal responsibility set out in Section 25 render it unnecessary to express these elements in the definition of an offence. In the case of injuries to the person, unless an intention to cause a specific result is expressly made an element of the offence, actual knowledge of the probable effect of the act is immaterial. With regard, however, to property, an act done not accidentally, but without any intention to cause injury, is ordinarily not punishable as an offence. The existence of the element of intention to do injury in this case is better expressed by the word "wilfully," which has accordingly been used in that connection for that purpose, but the use of which elsewhere in its signification of "not accidentally" is, in view of the rules already mentioned, superfluous. In some cases, when the nature of an offence is such as to involve the element of deliberation, the word "wilfully" (used in the Act 37 Geo. 3, c. 70, relating to inciting to mutiny), has been adopted to express that idea.

**DIVISION OF CODE.**

The Draft Code is divided into Eight Parts—

I. Introductory, including Interpretation, Application, and General Principles;

II. Offences against Public Order;

III. Offences against the Administration of Law and Justice, and against Public Authority;

IV. Acts Injurious to the Public in General;

V. Offences against the Person, and Conjugal and Parental Rights and Duties, and the Reputation of Individuals;

VI. Offences relating to Property and Contracts (divided into four Divisions—namely, Division I., Stealing and like Offences; Division II., Injuries to Property; Division III., Forgery and like Offences; Division IV., Offences connected with Trade and Breach of Contract);

VII. Preparation to Commit Offences, Conspiracy, and Accessories after the Fact; and

VIII. Procedure.

Many subjects might, perhaps, without impropriety be ranged under more than one of these heads. In cases of doubt, an offence has been placed under the heading which appeared, on weighing the arguments for and against any particular collocation, to offer least objection and be likely to afford most convenience in the practical use of the Code.

**PART I.—INTRODUCTORY.**

**Definitions.**—A Code ought, if possible, to be so framed as to require no definitions of terms in common use in ordinary speech or writing. It certainly ought to be so framed that no term is used in a non-natural sense. For the purpose.
however, of avoiding prolixity, and of embodying the effect of decisions which have attached a definite meaning in the Criminal Law to certain words in common use, it seemed desirable to make a sparing use of the machinery of interpretation clauses. When those rules of interpretation relate exclusively to special parts of the Code, they are placed in the appropriate part. Some general definitions of words which are used in several parts of the Code are placed at the beginning.

Division of Offences.—At present the principal division of offences is into felonies, misdemeanours, and simple offences (a term introduced by "The Justices Act of 1896," and meaning offences punishable on summary conviction). High treason and piracy, however, apparently form additional classes, although in one instance, at least, piracy is spoken of by the Legislature as felony (24 Vic. No. 13, s. 42). The English Commissioners proposed to abolish the distinction between felonies and misdemeanours, and to call all indictable offences by the name of crimes. But there is, I think, a general consensus or sentiment that grave offences are not all of the same degree of gravity, and that a real distinction in kind does exist between them; and it seems desirable to recognize this fact in a Code. The question then arises—What terms should be used to denote the different classes?

The term "felony" has for many years ceased to have any definite meaning. At one time all felonies (with the exception of what was called simple larceny) were punishable with death, and the term was then practically synonymous with "capital offence." The enactment, indeed, by the Legislature, that a particular act should be a felony, of itself important that the offender was liable to the punishment of death. But, since the abolition of capital punishment except in a few cases, the term "felony" merely imports that the offender may be arrested without warrant, that a person charged with the offence is entitled on his trial to additional peremptory challenges, and that a conviction for the offence carries with it certain statutory disqualifications. The retention of terms which have ceased to express any definite meaning is obviously undesirable. On the other hand, it is important that it should be known with respect to an offence whether it involves liability to arrest without warrant, and in practice it is convenient that the existence of that liability should be implied by the designation of the offence itself.

The class of "felonies" is not, however, by any means coextensive with that of offences involving a high degree of guilt. For instance, perjury is not felony, nor are attempts to commit rape or some other very grave offences, although the offenders are liable to long terms of penal servitude—in one case fifteen years.

It is proposed, therefore, to divide offences (other than simple offences) into crimes and misdemeanours—two well-known terms conveying with sufficient clearness the idea of greater or lesser heinousness—to call the more serious offences crimes and the less serious ones misdemeanours, and to provide that a crime involves, unless otherwise stated, the consequence of liability to arrest without warrant. In cases where the crime, although deserving heavy punishment, is of such a nature that this consequence ought not to follow, the law is so stated. And, conversely, when a misdemeanour or simple offence ought to involve that consequence, it is said to be so provided. There seems no reason why treason and piracy should continue to form distinct classes. They are therefore declared to be crimes.

Application of Criminal Law.—In consequence, perhaps, of the insular position of England, the Common Law appears to contain no provision as to the punishment of an offender in a case where several acts or events are collectively necessary to constitute an offence, and where some only of those acts or events occur within the jurisdiction, while the rest occurring out of the jurisdiction; such, for instance, as the case of a man who, standing in Queensland territory, shoots a man standing in New South Wales or vice versa, or a man who sends poison from Queensland to be administered to a man in Victoria or vice versa, or a man who by a false pretence made in Queensland obtains property in New South Wales. This subject is to some extent dealt with in the Italian Code, and the North American States have asserted
their jurisdiction to deal with the case of criminal acts procured to be done within their jurisdiction by persons who at the time of the act are out of, but afterwards come within, the jurisdiction. Persons who do such acts certainly ought to be punished.

Chapter III. deals with this subject, and asserts the right of Queensland tribunals to punish a man who has actually done acts which, if they were all done in Queensland, would constitute an offence, but has only done some of them within Queensland, or who has, while out of Queensland, procured the commission of another offence in Queensland, and afterwards comes within the jurisdiction, as well as a man who, while in Queensland, procures the commission of an offence elsewhere.

Punishment.—The existing Statutes in almost every case fix a maximum and minimum term for the punishment of penal servitude. But, as in nearly every instance the Court is empowered to award, as an alternative, imprisonment with or without hard labour, and as no minimum term is fixed for this punishment, and as, moreover, under the existing prison laws, there is no practical difference between penal servitude and imprisonment with hard labour, the provisions as to minimum punishment are nugatory.

The punishment for misdemeanours at Common Law is fine or imprisonment (without hard labour unless prescribed by Statute) at the discretion of the Court.

It is proposed to discontinue the use of the expression "penal servitude," and to prescribe the maximum punishment only in all cases, which will much contribute to brevity, and will conform more accurately to the actual state of the facts. The other existing statutory provisions as to modification of the form of punishment are collected in the Chapter (IV.) dealing with this subject.

Criminal Responsibility.—This most important and difficult branch of the law is dealt with in Chapter V. I have appended to several of the sections Notes to which I invite special attention. No part of the Draft Code has occasioned me more anxiety, but I may add that I regard no part of the work with more satisfaction.

PART II.—OFFENCES AGAINST PUBLIC ORDER.

Offences against the Executive and Legislative Power.—I have included in this Part various provisions as to misconduct which in the United Kingdom is treated as a breach of the privileges of Parliament and punished accordingly. The reasons which exist for not regarding it as a breach of the Criminal Law are, however, not applicable to Queensland. I have no doubt that much of this misconduct is a misdemeanour at Common Law, although never in practice punished as an indictable offence.

Piracy.—It is not within the province of the Legislature of Queensland to deal with the offence of Piracy by the Law of Nations. As, however, the Statute of New South Wales, 2 Vic. No. 10, the provisions of which are incorporated in the Draft, adopts an Imperial Act which cannot be interpreted without a definition of Piracy, it seemed necessary to include that definition in the Code.

PART III.—OFFENCES AGAINST THE ADMINISTRATION OF LAW AND JUSTICE AND AGAINST PUBLIC AUTHORITY.

Offences relating to the Coin.—On a balance of arguments it appeared desirable to place the law as to these offences under this heading, in analogy to the earlier English laws which regarded them as a form of treason, rather than under the heading of "Forcery," although they involve the act of counterfeiting. So long as the right to make coin is regarded as a prerogative right of the State, offences against that right, although prejudicial to individuals, are undoubtedly offences against Public Authority.
XI.

PART IV.—ACTS INJURIOUS TO THE PUBLIC IN GENERAL.

I have added, in the form of Notes to the several sections, some observations which appeared necessary to elucidate the provisions contained in this Part.

PART V.—OFFENCES AGAINST THE PERSON, AND CONSTITUTIONAL AND PARENTAL RIGHTS AND DUTIES, AND THE REPUTATION OF INDIVIDUALS.

Assaults and Personal Violence.—In dealing with this subject I have followed the plan adopted in the Defamation Law of 1889—first defining an assault; then declaring that an assault is unlawful and an offence, unless it is authorised or justified or excused by law; and then setting out the various circumstances which affect justification or excuse. The rules stated are for the most part founded on the Draft Code of 1873, and are, I believe, except when otherwise stated, correct statements of the Common Law.

With respect, however, to provocation as an excuse for an assault, I have ventured to submit a rule (s. 275, 276) which is not to be found in the Draft Code of 1873, but, so far as I know, in a concrete form in any English book. At Common Law an assault is regarded as an offence committed not against the individual person assaulted but “against the peace of Our Lady the Queen, Her Crown and Dignity.” It is not, therefore, excused by anything short of the necessity for self-defence against actual violence, or some other positive conditions justifying the application of force. Provocation may, however, operate as a partial, if not in all cases as a formal, answer to a civil action for assault. There is no doubt that in actual life some such rule as that stated in s. 276 is assumed to exist, although it is probably not recognised by law. The subject of provocation as reducing the guilt of homicide committed under its influence from murder to manslaughter is covered by authority, but I apprehend that it is of at least equal importance as applied to other cases of personal violence.

Murder.—Murder under the existing law is said to consist in unlawfully causing the death of a person “with malice aforethought.” In the absence of malice aforethought the offence is manslaughter.

The history of the interpretation of this phrase is too long to be set out at length, but the result is that “malice aforethought” does not necessarily imply either ill-will or premeditation. It does not even necessarily involve an intention to cause death, but it includes all the following states of mind—

(1) An intention to kill the person killed or some other person;
(2) An intention to do grievous bodily harm to the person killed or some other person;
(3) Knowledge that the act or omission which causes death is likely to cause death or grievous bodily harm to some person, with or without an intention or wish to cause that result;
(4) An intention to commit any felony;
(5) An intention to oppose by force an officer of justice in the execution of his duty.

It is manifest, however, that the term “malice aforethought” does not in the common language of to-day convey any such ideas. The question whether homicide committed by a man under any of the circumstances above stated should be punishable with death is an entirely different one from that of the definition of the offence which is to be visited with that penalty. It may be remarked that when all felonies were punishable with death there was no apparent anomaly in holding that a man who in attempting to commit a capital offence committed homicide was actuated by malice aforethought, and consequently guilty of murder. But now that felonies are
for the most part not punishable with death, and are in many instances treated as
offences of a comparatively trivial nature, the rule, as an arbitrary and fixed rule
applied to all kinds of felony, that homicide committed in the attempted commission
of a felony is to be deemed to have been committed with "malice aforethought," is
revolting to common sense.

In the jurisprudence of many countries a distinction is made between different
kinds of murder according to their heinousness. Thus we hear of murder in the
"first" and "second" degree, and of murder "with extenuating circumstances." It
has occurred to me that the simplest distinction, and that which best indicates the
different views actually taken by the ordinary mind of different cases of homicide, is
between wilful murder—that is to say, intentional killing, and murder—that is to
say, killing, which, though unintentional, is done under such circumstances as to
warrant the infliction of the last penalty. I have accordingly framed the Chapter
on Homicides (Ch. XXVIII.) on this basis, and have suggested (s. 677) that in the
case of murder, not being wilful murder, sentence of death may (as in other capital
cases except treason and wilful murder) be recorded instead of being actually passed.

The definition of murder has been so framed as to exclude the test of a
"felonious" intention, or (under the proposed nomenclature) intention to commit a
crime, and to substitute the test of an intention to endanger human life, or a reckless
endangering of human life in the prosecution of an unlawful purpose.

In other respects this Chapter embodies, I believe, the existing Common Law,
with the possible exception of Section 321, which supplies a manifest omission, if it
is not already part of the law.

Defamation.—I have adopted the Defamation Law of 1889 in its entirety,
with a few verbal alterations, one of which (in s. 375) is designed to cover the case
of defamation in the case of blind persons or deaf mutes, or by signalling by
heliograph or otherwise. Another, in s. 383 (5), removes a possible doubt as to the
construction of the existing Statute.

PART VI.—OFFENCES RELATING TO PROPERTY AND CONTRACTS.

Stealing.—The existing law of larceny is extremely complicated, and can
hardly be understood without a careful study of the history of its development. At
Common Law moveable things only could be stolen, and only some moveable things,
not including things growing out of the earth, or deeds relating to realty, or some
animals.

It was necessary that the thing should be fraudulently taken from
the possession of the owner. Consequently a man who converted a thing entrusted
to him for carriage or safe keeping was not guilty of stealing. So a clerk who
embezzled money received by him for his employer was not guilty of stealing, because
his employer had never had possession of it. A great number of other cases of
fraudulent conversion of property were in like manner not held to be larceny.
For instance, in the case of lost property fraudulently converted by the finder, his
liability to the Criminal Law depends upon his believing at the moment of the finding,
and not at the time of the fraudulent conversion, that the owner can be found.
Upon this Common Law an elaborate system has been built up by successive
Statutes, most of which is now contained in the Larceny Act, 29 Vic. No. 6, and
some subsequent Statutes, but much of the law is still unwritten.

The existing law on the subject has been said by a distinguished authority to
be made up of two principal parts: First, a large number of enactments providing
intricate and jealously limited exceptions to the original Common Law principles,
which exceptions have nearly, but not quite, blotted out every one of the rules; and
secondly, statutory provisions punishing special aggravations of the offence of
stealing (6).

In the Draft I have followed for the most part the proposals of the Commissioners of 1878, defining the offence of stealing (or, as they called it, theft) in such a manner as to include all cases of fraudulent conversion of movable property, and then prescribing the different punishments to be awarded in different cases. (a)

In some particulars, however, I have departed from their draft, especially with respect to the case of the fraudulent conversion of funds held under direction or received by agents for sale. The Draft Code of 1870, after defining theft in such a way as not to include this misconduct, went on to declare that it should be deemed to be theft. I have preferred to declare that property held under such circumstances shall be deemed to be the property of the person beneficially entitled to it. A fraudulent conversion of the property then falls within the general definition of stealing.

Injuries to Property.—In this Division of Part VI. (which deals entirely with Statute law), I have, while not departing substantially from the existing law, endeavoured to simplify it by adopting the analogy of the provisions relating to stealing. The existing Statute (21 Vic. No. 5) attempts to enumerate every kind of injury to property which is to be treated as an offence, and then adds general provisions including all injuries not enumerated (ss. 53, 54, 55). It is proposed to declare that all willful and unlawful injury to property shall be an offence which, unless otherwise stated, is a misdemeanour, then to provide for the infliction of severer punishment in serious cases, and then to empower justices, as in the case of stealing, to deal summarily with trivial cases.

Forgery.—As I anticipated in my letter of 1st June, 1896, it has been found practicable to reduce this branch of the law to a comparatively small compass. All, indeed, that is necessary is to define the offence and to declare the punishment to be awarded according to the gravity of the particular case.

Offences relating to Trade and Breach of Contract.—The provisions of this Division do not differ from those of the existing law except in the case of Section 557, relating to the intimidation of workmen and employers, which has been modified so as to bring it into conformity with the modern law legalising Trade Unions.

PART VII.—PREPARATION TO COMMIT OFFENCES: CONSPIRACY: ACCESSORIES AFTER THE FACT.

This Part contains principally statements of unwritten law. I believe they are accurate statements of the existing law of Queensland, with the exception of the definition of an unlawful conspiracy to prevent or obstruct the free exercise of a lawful trade or calling, in which the existing law is qualified by the limitation (in accordance with the English law of 1875) of the object of the conspiracy to acts which would be themselves offences if committed by an individual.

PART VIII.—PROCEDURE.

Arrest.—The rules of law as to arrest appear properly to find place in this Part. They are substantially in the language of the Commissioners of 1878, although in their Draft they placed them under the general heading of matters of justification or excuse.

Effect of Indictment (Chapter LXXI).—The existing arbitrary and incomplete rules, which allow in some cases the conviction of a person for an offence different from that charged in the indictment, have been generalised on the basis of the

(a) The result is to make the law of stealing substantially in accord with the classic Roman and the modern civilian law.
XIV.

principle that the greater includes the less, so that when a man is charged with committing any offence he may be convicted of any offence which consists in doing some act which he must necessarily have done if he committed the offence charged.

Practice.—I have endeavoured to embody in the Draft a complete statement of the existing written and unwritten rules respecting procedure after committal, and have added some rules which dispose of difficulties that not unfrequently arise and have not been authoritatively settled.

PRINTING OF CODE.

In accordance with the intention expressed in my letter of 1st June, 1896, the pages are arranged in two columns, the proposed provisions of the Code being printed in the right-hand column, and the sources from which they are derived, or other analogous provisions, being stated or referred to in the left-hand column. When the source is Statute Law, the corresponding provisions of the Statute are reprinted from my Digest of 1896. In other cases the sources or analogous provisions are indicated by a reference to the section of the Draft Bill of 1880 or other authority to which I have had recourse, with such Notes as appeared to be desirable to elucidate any particular provision. When, however, the proposed provision is undoubted Common Law, I have not thought it necessary to do more than say so.

It will be observed that in many cases a rule of justification or excuse is introduced by the words "it is lawful." It must not be forgotten in considering the provisions of the Code that the adoption of a rule thus stated will declare the law as to civil rights as well as with regard to criminal proceedings. If, therefore, the rule is a new one, the right of action as for a wrong will be pro tanto modified.

A table is added of the statutory provisions which would be superseded by the adoption of the Code, with references to the corresponding sections of the Digest, and of the Code, if any.

I hope—to refer once more to my previous letter—that a perusal of the Draft will satisfy the Government and the Legislature that the enactment of a Code of Criminal Law is both desirable and feasible.

I have only to add that the Draft is not drawn in the form of a Bill with enacting and repealing clauses, but is intended to be embodied as a Schedule in a Bill which would establish the Code as from a prescribed future day, repeal all the existing Statutes embodied in it or not intended to be continued in operation, and contain other necessary provisions as to the exclusive operation of the Code, and as to the construction of Statutes affected by the change in nomenclature and other alterations in the law affected by the Code.

I hope to be able to forward a Draft of the necessary Bill very shortly.

I have the honour to be,

Sir,

Your most obedient humble Servant,

S. W. GRIFFITH.

The Honourable The Attorney-General.