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COMMENTARIES
ON THE
INDIAN PENAL CODE

(ACT XIV. OF 1860.)

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PREFACE.

I do not imagine that the appearance of a new Commentary on the Penal Code will, in itself, be considered to require an apology. A very long time will elapse before the meaning of the Code, even in its simpler parts, is placed beyond doubt, and any number of Commentaries will be of service, so long as they supply materials for the solution of such doubts. But in order to enable the reader to judge how far a commentary is likely to assist him, it is well that he should know the system upon which the Commentator has proceeded.

I have started with the opinion, that the system of criminal justice administered in the British Isles, is, on the whole, the wisest that has ever been framed by the human intellect. That system no doubt originally possessed, and even still retains many subtleties and technicalities, which are unworthy of imitation, though even these are rather to be found in details of practice, than in its general principles. Many of these defects disappear in Scotch law, which, for liberality and common sense, bears a very advantageous comparison with that of England. But, taking it all in all, there is no part of the world in which justice and mercy are more skilfully united than they are in the Criminal Jurisprudence of Great Britain. We know that the principal framers of this

Code were well acquainted with that system, and had it constantly in their view. We may safely assume then that they intended to reproduce the doctrines of English law, where the language used adequately conveys those doctrines, and that where they intended to make a difference, that difference has been expressed. I have acted upon this assumption throughout. Where the language of the Code seemed identical with a principle known to English law, I have shown how that principle has been worked out and applied. On the other hand, where the language showed a variance from those principles, I have endeavoured to point out how that variance would operate in practice. In this way I have attempted to utilise the existing body of English law, so as to supply precedents and explanations which may be of service, until authoritative constructions are put upon the wording of each Section. I am well aware that English decisions will no longer be of the same binding authority, even in the Supreme Courts, as they have hitherto been; but they will be entitled to respectful consideration, so far as the subject matter is the same, as being the opinions of men deeply versed in general law, and as being sanctioned by the experience of generations. It may often happen that the opinion of an English Jurist is not the same, at which another person of equal ability would arrive, from his own unaided reflection. But an Indian Judge can be in no worse position for a right decision, from having that opinion laid before him. In sailing over an unknown sea, even an imperfect chart is better than none. Nor can there be

any better mode of securing uniformity of practice, than by a constant reference, as far as practicable, to a known system of well-tried law.

In some cases I have referred to English Civil law, where acts have been made criminal, which have hitherto been only the subject of actions for damages. I may instance as examples, the clauses relating to fraudulent transfers of property, criminal negligence, breach of written contract, and oral defamation. In these cases I have endeavoured to point out the construction which would, in my opinion, be put upon them by an English Judge. It may be that the Indian Legislature meant something perfectly different, but till we have the decision of the Indian Bench upon the point, those rulings are, at the least, deserving of attention. It ought to be remembered too, that in deciding a doubtful point of criminal law, the rule is to tend to the side of mercy.

The Penal Code itself contains a new feature, in the shape of Illustrations. Of these Messrs. Morgan and Macpherson say, (p. 13)

“The illustrations of the Code are cases decided by the Legislature, decided contemporaneously with the enactment of the law, and they are authentic declarations of the scope and purpose of the law.”

“The function of the Illustrations is as their name indicates, to illustrate. They are not intended to supply any omission in the written law, or to put a strain on it. They make nothing law which would not be law without them. They illustrate the law, and as they do this with full Legislative Authority they have all the force of law; but the whole law, so illustrated by them, must be considered to be contained in the definitions and enacting clauses of the Code.”

In the great majority of cases the matters illustrated are so intelligible that the illustration might have been safely omitted. In many other cases,

where there is a real difficulty, no illustration is afforded. For instance it would have been pleasant to have had a decided case to tell us, what was an illegal omission to give information of an intended crime, under s. 120, or what was a fraudulent transfer of property under ss. 206 and 422. In many cases however illustrations are given, which are not a necessary deduction from the definition in the enacting part, and wherever this is the case, it obviously follows, that the illustration is the law which must be taken as the guiding rule. For instance, the important distinction between the English and Indian law of cheating is, that under the former system the pretence must relate to an existing fact, under the latter it may refer to an intention as to a future fact. This distinction is certainly not deducible by *necessary* inference from s. 415, and only for illustrations (f) and (g) most lawyers would probably be disposed to maintain the rule laid down in England. These illustrations, then, practically constitute so much of the law upon the point as is new.

Again, there are other cases in which the enacting words have a very wide meaning, which the illustrations seen carefully intended to confine. For instance, ss. 309 and 511, which relate to attempts to commit an offence, speak in the most general way of *any act* done towards the commission of the offence, whereas the illustrations point exclusively to illegal acts. If these illustrations are to be taken as limiting the acts which constitute an attempt to illegal acts, then it is plain that they

amount by implication to a new definition of the offence. If they do not, they are worse than useless ; they are perplexing.

I had originally intended to frame a complete body of indictments under every Section of the code, but I found this would swell the work beyond the limits I had proposed to myself. I have therefore selected the Sections most likely to be in common use, and drawn up specimen forms, rather more specific in their statements than seems to be required by the Criminal Procedure Code, and somewhat less specific than is customary in the Supreme Court. I believe however that they are sufficiently full to bear the test of a demurrer in the latter Court, and I am certain that they are not too minute in details for use in the Mofussil.

J. D. M.

MADRAS, *April* 1861.

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ACT No. XLV of 1860.

PASSED BY THE LEGISLATIVE COUNCIL OF INDIA.

*(Received the assent of the Governor-General on the
6th October 1860.)*

THE INDIAN PENAL CODE.

CHAPTER I.

Preamble.

WHEREAS it is expedient to provide a General Penal Code for British India ; It is enacted as follows :—

1. This Act shall be called THE INDIAN PENAL CODE, and shall take effect on and from the 1st day of May 1861 throughout the whole of the Territories which are or may become vested in Her Majesty by the Statute 21 and 22 Victoria Chapter 106, entitled “An Act for the better Government of India,” except the Settlement of Prince of Wales’ Island, Singapore, and Malacca.

2. Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within the said Territories on or after the said 1st day of May 1861.

3. Any person liable, by any law passed by the Governor-General of India in Council, to be tried for an offence committed beyond the limits of the said Territories, shall be dealt with

according to the provisions of this Code for any act committed beyond the said Territories, in the same manner as if such act had been committed within the said Territories.

4. Every servant of the Queen shall be subject to punishment under this Code for every act or omission contrary to the provisions thereof, of which he, whilst in such service, shall be guilty on or after the said 1st day of May 1861, within the dominions of any Prince or State in alliance with the Queen, by virtue of any treaty or engagement heretofore entered into with the East India Company, or which may have been or may hereafter be made in the name of the Queen by any Government of India.

Punishment of offences committed by a servant of the Queen within a Foreign allied State.

The object of this Chapter is to substitute the Penal Code for the existing Criminal law of India. Where the offence is charged to have been committed within the territories vested in Her Majesty, the party is to be liable under the Code *and not otherwise*. This is explicit enough. With regard to offences committed beyond those territories the Code is less clear. Section 3 enacts that where a person might, by virtue of any Act of the Legislative Council of Calcutta, be tried in British India for an offence committed out of British India, he is to be dealt with according to this Code. Section 4 contains a similar provision as to servants of the Queen who commit offences within the dominions of allied princes. But neither of these Sections covers an equally important class of cases, that, namely, of persons who are not servants of the Queen, and who are triable in British India, not by virtue of any Act of the Legislative Council, but under Act of Parliament. These would seem to be still left under the old law, which would in general be the English Criminal Law. On the other hand by Section 40 of Chapter II. the word "offence" is made to denote "a thing made punishable by this Code," as if no other law was under any circumstances to be referred to. It seems difficult to understand why the restrictive words "by virtue of any Act of the Legislative Council of Calcutta" were introduced.

I shall now point out the law which governs the trial of offences committed beyond the limits of British India.

Section 4 constitutes one class of cases. Upon this it is necessary only to refer to Section 14 of Chapter II, which defines the words "Servant of the Queen."

Act 1 of 1849 provides that

“All subjects of the British Government, and also all persons in the Civil or Military service of the said Government, while actually in such service, and for six months afterwards, and also all persons who shall have dwelt for six months within the British territories under the Government of the East India Company, subject to the laws of the said territories, who shall be apprehended within the said territories, or delivered into the custody of a Magistrate within the said territories, shall be amenable to law for all offences committed by them within the territories of any foreign Prince or State; and may be bailed or committed for trial, on the like evidence as would warrant their being held to bail or committed for the same offence, if it had been committed within the British territories.” (See also 26 Geo. III. c. 57. s. 29.)

Act 7 of 1854 provides for the apprehension and delivery up to justice of all persons, whether subjects of the British or of any foreign Government, who shall take refuge or be found in any part of British India, and be charged with having been guilty of heinous offences in any part of the dominions of Her Majesty, or in the territories of any foreign Prince or State. Where the person is triable under Act 1 of 1849 the Courts in India may be directed by the Government to deal with the case. (s. 14.) Where there is no jurisdiction under that Act, he is then to be delivered over to the authority, whether British or foreign, at whose requisition he has been apprehended. (s. 14.) This Act only applies where the person is charged with heinous offences as defined in ss. 21, 22, or with offences made the subject of an extradition treaty. (s. 23.) Nor can independent action be taken by any Indian Magistrate of his own accord. He must be put in motion by an express requisition from the proper authority, and that requisition must be sanctioned by the order of a Secretary to Government. (ss. 1, 2.)

Stat. 18 & 19, Vict. c. 91, s. 21, provides that

“If any person being a British subject, charged with having committed any crime or offence on board any British Ship on the high Seas, or in any foreign port or harbour, or if any person not being a British subject, charged with having committed any crime or offence on board any British Ship on the high Seas, is found within the jurisdiction of any Court of Justice in Her Majesty's dominions which would have had cognisance of such crime or offence, if committed within the limits of its ordinary jurisdiction, such Court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits.”

The first question upon this Act is as to the meaning of the words “British Subject.” These words have got two perfectly distinct meanings. One is a person who owes allegiance to the British Crown, by birth or naturalisation. (Reg. v. Manning, 2 C. & K. 900.) The other is the legitimate offspring of an English father or mother. The latter is the sense in which the words are used where the exclusive jurisdiction of the Supreme Courts in India is concerned. The former I conceive to be the meaning in the Statute quoted. It will be observed that the Act is an amendment of the Merchant Shipping Act, which applies generally to every part of the British dominions.

It seems clear that the word British when qualifying *subject* must mean the same thing as it does when qualifying *ship*, and in either case must be taken simply as opposed to foreign. Accordingly upon the construction of another Criminal Statute, 9 Geo. iv c. 31, s. 7, the words His Majesty's subject, and British subject, were treated by the Court as synonymous terms, in dealing with a native of Malta. (*Reg. v. Azzopardi*, 1 C. & K. 205-207. See too *Reg. v. Manning* 2 C. & K. 900). The restricted meaning of the term would become important for the first time when the question arose, what Court in India was to try the prisoner? For instance, suppose an English sailor and a Malabar cooly returning from the West Indies join in robbing a passenger on board the ship while it is in a foreign port and are arrested when they reach India, both would be amenable to the jurisdiction of the Indian Courts as being in the general sense British subjects. But the Englishman, as being a British subject in the restricted sense, could only be tried before the Supreme Court, while the cooly might be tried by any Court in the Mofussil within whose jurisdiction he was found, provided it was capable of taking cognisance of theft.

A prisoner is "found within the jurisdiction" under the meaning of this Statute, when he is actually present there, whether he came voluntarily, or was brought by force, and even the fact of his having been illegally put on board the ship where he committed the crime, makes no difference in the criminality of the act, or the jurisdiction of the Court to try it. (*Reg. v. Lopez*, 27 L. J. M. C. 48.)

The Supreme Courts in India have always had an Admiralty jurisdiction by virtue of their respective Charters, and under 53 Geo. III. c. 155, s. 110, which, after reciting a doubt whether the Admiralty jurisdiction extended to any persons but those who were amenable to their ordinary jurisdiction, enacted,

"That it shall and may be lawful for His Majesty's Courts at Calcutta, Madras and Bombay, exercising Admiralty jurisdiction, to take cognisance of all crimes perpetrated on the high seas by any person or persons whatsoever, in as full and ample a manner, as any other Court of Admiralty jurisdiction."

Till lately the Mofussil Courts have had no similar jurisdiction. Now by the combined effect of 12 & 13 Vict. c. 9 and 23 & 24 Vict. c. 88 it is enacted that if any person in British India shall be charged with the commission of any treason, piracy, felony, robbery, murder, conspiracy or other offence, of what nature soever, committed upon the sea, or in any haven, river, creek or place where the Admiral has power, authority or jurisdiction, then all magistrates, &c. in British India shall have the same jurisdiction as they would have had, if the offence had been committed within the limits of their local jurisdiction. But where the person accused has the privilege of being tried by the Supreme Court alone, the privilege is preserved to him.

Admiralty jurisdiction is entirely confined to the water. No

crime committed on land comes within its cognisance. It applies in the following instances.

1. To all Subjects of the Queen who commit any offence upon the high Seas, or in any port, creek or river, of a tidal character, which may be considered as merely an extension of the Sea. Where an English Sailor was charged with stealing tea out of a vessel which lay in the river at Wampu in China, twenty or thirty miles from the Sea, it was held that the Central Criminal Court in London, which exercises Admiralty functions, had jurisdiction over the offence, though no evidence was offered to show whether the tide flowed where the vessel lay; "the place being one where great ships go." (*R. v. Allen* 1 Mood. C. C. 494, *Reg. v. Bruce*. 2 Leach, 1098.)

2. To all persons, whether Subjects or foreigners, who commit any offence upon the high Seas, on board a British ship, or a Ship lawfully in British possession, as for instance a prize of war. (*Reg. v. Serva*. 2 C. & K. 53. 1 Phill. Int. L. : 377.)

3. Where the offence is committed by a foreigner upon a British Subject in a foreign port or harbour, the Admiralty have no jurisdiction; unless perhaps in cases where the crime took place on a British ship of war, for every ship of war is considered as national territory, wherever it goes. (1 Phill. Int. L. 366.) But a merchant vessel within three miles of a foreign shore becomes subject to foreign jurisdiction. (*Ibid.* 373.) It will be observed that 18 & 19 Vict. c. 91, s. 21 gives no jurisdiction over foreigners where the offence has been committed in a foreign harbour.

4. All cases of piracy, by whomsoever and wherever committed, are within Admiralty jurisdiction, for pirates are common enemies, and may be tried wherever they are found. (1 Phill. Int. L. 379.)

"Piracy is an assault upon vessels navigated on the high Seas, committed *Animo furandi*, whether the robbery or depredation be effected or not, and whether or not it be accompanied by murder or personal violence." (*Ibid.*)

And where the ships were not seized upon the high Seas, but were carried away and navigated by the very persons who originally seized them, Dr. Lushington laid it down, that the possession at Sea was a piratical possession, and the carrying away the Ships on the high Seas were piratical acts. (*Case of the Magellan Pirates*. 1 Phill. Int. L. 391.) So also it is piracy, where persons who have lawfully entered a ship, as passengers, crew or otherwise, afterwards feloniously carry and sail away with the ship itself, or take away any merchandise, or goods, tackle, apparel or furniture out of it, thereby putting the Master of such ship and his company in fear. (per Sir Leoline Jenkins. 1 Phill. Int. L. 384.)

It will be seen that the Acts and Statutes just referred to govern two distinct cases; first, crimes committed on land, out of British territories; secondly, crimes committed on the Seas all over the world. But there is a third case which may arise; viz., where a crime is committed inland, within the territories, but in a place where no Court has jurisdiction. In such a case the criminal may escape altogether. In a recent case, some Burmese, native subjects of the Crown, were indicted before the Supreme Court of Calcutta for a murder committed on some uninhabited islands in the Bay of Bengal. Under 9 Geo. iv. c. 74. s. 56, where a person has been wounded within the limits of the Charter, and has died without those limits, *or vice versa*,

“Every offence committed in respect of such case, may be dealt with by any of His Majesty’s Courts of Justice within the British territories under the Government of the East India Company, in the same manner in all respects as if such offence had been wholly committed within the jurisdiction of the Court within the jurisdiction of which such offender shall be apprehended or be in custody.”

After conviction, it was held by the Privy Council that the prisoners must be released, since the Supreme Court had no jurisdiction either over the place where, or over the persons by whom the crime was perpetrated. The object of the Statute was held to be

“Only to apply the law which had been lately enacted in England, as to an offence partly committed in one part and completed in another, to the East Indies, and not to make a new enactment rendering persons liable for a complete offence who would not have been liable before.” (*Nga Hoong v. the Queen*. 7 Moo. I. A. 72. 108.)

A fortiori: there is no jurisdiction, where the blow is inflicted by one foreigner upon another foreigner, on board a foreign vessel, though the death occurs, and the prisoner is in custody within the jurisdiction. (*Reg v. Lewis*, 26 L. J. M. C. 104.)

5. Nothing in this Act is intended to repeal, vary, suspend, or affect any of the provisions of the Statute 3 and 4 William IV Chapter 85, or of any Act of Parliament passed after that Statute in any wise affecting the East India Company, or the said Territories, or the inhabitants thereof, or any of the provisions of any Act for punishing mutiny and desertion of Officers and Soldiers in the service of Her Majesty or of the East India Company, or of any Act for the Government of the Indian Navy, or of any special or local law.

Certain laws not to be affected by this Act.

It may be useful to append a list of some of the principal Acts which

will still remain in force under this Section. The list does not profess to be exhaustive.

- ABKAREE, Bengal Act 21 of 1856. 23 of 1860.
 " Madras " 19 of 1852.
 ARMY AND AMMUNITION, " 31 of 1860.
 ARMY, tampering with, " 14 of 1849.
 " Mutiny in Native, " 25 of 1857.
 " Mutiny and desertion in European, serving in India. 20 & 21
 Vict. c. 66, Act 11 of 1856.
 " Mutiny and desertion. Her Majesty's Forces. 23 Vict. c. 9
 (a new Act is passed each year.)
 ARTICLES OF WAR, for Native troops, Acts amending, Act 36 of 1850 ;
 3 of 1854 ; 10 of 1856 ; 32 of 1857.
 BOATS, Act 4 of 1842.
 BREACHES OF CONTRACT, by artificers. Act 13 of 1859.
 CATTLE KILLING, Bengal, Act 4 of 1856.
 COIN, 16 & 17 Vict. c. 48.
 CONSERVANCY OF TOWNS, Act 14 of 1856.
 COURTS MARTIAL, 7 Vict. c. 18.
 CRIMPING, Act 24 of 1852.
 ESCAPE FROM GAOL, Act 17 of 1860.
 INCOME TAX, Act 32 of 1860.
 INDIA, Government of, 21 & 22 Vict. c. 106.
 " " 22 & 23 Vict. c. 41.
 INSOLVENCY, 11 Vict. c. 21.
 LOTTERY, Act 5 of 1844.
 MALABAR, Moplah outrages, Act 20 of 1859.
 " offensive weapons in, Act 24 of 1854.
 MARINES, Royal, 23 Vict. c. 10.
 MARRIAGES in India, 14 & 15 Vict. c. 40.
 MERCHANT SHIPPING, 17 & 18 Vict. c. 104.
 " 18 & 19 Vict. c. 91.
 NAVY, Royal, 23 & 24 Vict. c. 123.
 " tampering with, Act 14 of 1849.
 " Indian, desertion from, Act 3 of 1855.
 PASSENGERS, in Ships, 15 & 16 Vict. c. 44.
 " " 16 & 17 Vict. c. 84.
 " " Acts 1 of 1857 ; 21 of 1858 ; 2 of 1860.
 PETTY OFFENCES, Madras, Acts 21 of 1839 ; 3 of 1842.
 " Madras and Bombay, Act 1 of 1853.
 POLICE, Towns, Act 13 of 1856.
 " Madras, Act 24 of 1859.
 " Bengal.
 PORTS, Act 22 of 1855.
 POST OFFICE, Act 17 of 1854.
 RAILWAY, Act 18 of 1854.
 STAMPS, Act 36 of 1860.
 STATE offences, Act 11 of 1857.
 " prisoners, " 3 of 1858.
 TELEGRAPH, Act 34 of 1854.

The words "special" and "local law" are defined by ss. 41, 42 of Chap. II.

CHAPTER II.

GENERAL EXPLANATIONS.

6. Throughout this Code every definition of an offence, every penal provision, and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the Chapter entitled "General Exceptions," though those exceptions are not repeated in such definition, penal provision, or illustration.

Definitions in the Code to be understood subject to exceptions.

Illustrations.

(a) The Sections, in this Code, which contain definitions of offences, do not express that a child under seven years of age cannot commit such offences; but the definitions are to be understood subject to the general exception which provides that nothing shall be an offence which is done by a child under seven years of age.

(b) A, a Police Officer, without warrant, apprehends Z, who has committed murder. Here A is not guilty of the offence of wrongful confinement; for he was bound by law to apprehend Z, and therefore the case falls within the general exception which provides that "nothing is an offence which is done by a person who is bound by law to do it."

Expression once explained is used in the same sense throughout the Code.

7. Every expression which is explained in any part of this Code, is used in every part of this Code in conformity with the explanation.

Gender.

8. The pronoun "he" and its derivatives are used of any person, whether male or female.

Number.

9. Unless the contrary appears from the context, words importing the singular number include the plural number, and words importing the plural number include the singular number.

10. The word "man" denotes a male human being of any age: the word "woman" denotes a female human being of any age.

"Man."
"Woman."

11. The word "person" includes any Company or Association or body of persons, whether incorporated or not.

12. The word "public" includes any class of the public or any community.

13. The word "Queen" denotes the Sovereign for the time being of the United Kingdom of Great Britain and Ireland.

14. The words "servant of the Queen" denote all officers or servants continued, appointed, or employed in India by or under the authority of the said Statute 21 and 22 Victoria Chapter 106, entitled "An Act for the better Government of India," or by or under the authority of the Government of India or any Government.

15. The words "British India" denote the Territories which are or may become vested in Her Majesty by the said Statute 21 and 22 Victoria, Chapter 106, entitled "An Act for the better Government of India," except the Settlement of Prince of Wales' Island, Singapore, and Malacca.

16. The words "Government of India" denote the Governor-General of India in Council, or, during the absence of the Governor-General of India from his Council, the President in Council, or the Governor-General of India alone as regards the powers which may be lawfully exercised by them or him respectively.

17. The word "Government" denotes the person or persons authorized by law to administer executive Government in any part of British India.

18. The word "Presidency" denotes the Territories subject to the Government of a Presidency.

"Presidency."

19. The word "Judge" denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give, in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment.

"Judge."

Illustrations.

(a) A Collector exercising jurisdiction in a suit under Act X of 1859, is a Judge.

(b) A Magistrate exercising jurisdiction in respect of a charge on which he has power to sentence to fine or imprisonment, with or without appeal, is a Judge.

(c) A Member of a Panchayet which has power, under Regulation VII. 1816 of the Madras Code, to try and determine suits, is a Judge.

(d) A Magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another Court, is not a Judge.

20. The words "Court of Justice" denote a Judge who is empowered by law to act judicially alone, or a body of Judges which is empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially.

"Court of Justice."

Illustration.

A Panchayet acting under Regulation VII. 1816 of the Madras Code, having power to try and determine suits, is a Court of Justice.

21. The words "public servant" denote a person falling under any of the descriptions hereinafter following, namely:—

"Public Servant."

First. Every covenanted servant of the Queen ;

Second. Every Commissioned Officer in the Mi-

litary or Naval Forces of the Queen while serving under the Government of India, or any Government ;

Third. Every Judge ;

Fourth. Every Officer of a Court of Justice whose duty it is, as such Officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person specially authorized by a Court of Justice to perform any of such duties ;

Fifth. Every Juryman, assessor, or member of a Panchayet assisting a Court of Justice or public servant ;

Sixth. Every Arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court of Justice, or by any other competent public authority ;

Seventh. Every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

Eighth. Every Officer of Government whose duty it is, as such Officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety, or convenience ;

Ninth. Every Officer whose duty it is, as such Officer, to take, receive, keep, or expend any property on behalf of Government, or to make any survey, assessment, or contract on behalf of Government, or to execute any revenue process, or to investigate, or to report, on any matter affecting the pecuniary interests of Government, or to make, authenticate, or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of the pecuniary interests

of Government, and every Officer in the service or pay of Government, or remunerated by fees or commission for the performance of any public duty ;

Tenth. Every Officer whose duty it is, as such Officer, to take, receive, keep, or expend any property, to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town, or district, or to make, authenticate, or keep any document for the ascertaining of the rights of the people of any village, town, or district.

Illustration.

A Municipal Commissioner is a public servant.

Explanation 1. Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2. Wherever the words "public servant" occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

22. The words "moveable property" are intended to include corporeal property of every description, except land and things attached to the earth, or permanently fastened to any thing which is attached to the earth.

"Moveable property."

23. "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.

"Wrongful gain."

"Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

"Wrongful loss."

A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of

"Wrongful gain" includes wrongful retention of property.

“Wrongful loss” includes the being wrongfully kept out of property. any property, as well as when such person is wrongfully deprived of property.

24. Whoever does any thing with the intention of causing wrongful gain to one person, or wrongful loss to another person, is “Dishonestly.” said to do that thing “dishonestly.”

25. A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise. “Fraudulently.”

26. A person is said to have “reason to believe” a thing, if he has sufficient cause to believe that thing, but not otherwise. “Reason to believe.”

27. When property is in the possession of a person’s wife, clerk, or servant, on account of that person, it is in that person’s possession within the meaning of this Code. Property in possession of wife, clerk, or servant.

Explanation.—A person employed temporarily or on a particular occasion in the capacity of a clerk or servant, is a clerk or servant within the meaning of this Section.

28. A person is said to “counterfeit,” who causes one thing to resemble another thing, intending by means of that resemblance to practice deception, or knowing it to be likely that deception will thereby be practised. “Counterfeit.”

Explanation.—It is not essential to counterfeiting that the imitation should be exact.

29. The word “document” denotes any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, as evidence of that matter. “Document.”

Explanation 1. It is immaterial by what means, or upon what substance the letters, figures, or marks are formed, or whether the evidence is intended for, or may be used in, a Court of Justice, or not.

Illustrations.

A writing expressing the terms of a contract, which may be used as evidence of the contract, is a document.

A Check upon a Banker is a document.

A Power of Attorney is a document.

A Map or Plan which is intended to be used, or which may be used as evidence, is a document.

A writing containing directions or instructions is a document.

Explanation 2. Whatever is expressed by means of letters, figures, or marks as explained by mercantile or other usage, shall be deemed to be expressed by such letters, figures, or marks within the meaning of this Section, although the same may not be actually expressed.

Illustration.

A writes his name on the back of a Bill of Exchange payable to his order. The meaning of the endorsement, as explained by mercantile usage, is that the Bill is to be paid to the holder. The endorsement is a document, and must be construed in the same manner as if the words "pay to the holder," or words to that effect, had been written over the signature.

30. The words "valuable security" denote a document which is, or purports to be, a document whereby any legal right is created, extended, transferred, restricted, extinguished, or released, or whereby any person acknowledges that he lies under legal liability, or has not a certain legal right.

"Valuable security."

Illustration.

A writes his name on the back of a Bill of Exchange. As the effect of this endorsement is to transfer the right to the Bill to any person who may become the lawful holder of it, the endorsement is a "valuable security."

"A Will" 31. The words "a will" denote any testamentary document.

32. In every part of this Code, except where a

Words referring to acts include illegal omissions.

contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.

“ Act.”
“ Omission.”

33. The word “ act ” denotes as well a series of acts as a single act : the word “ omission ” denotes as well a series of omissions as a single omission.

Each of several persons liable for an act done by all in like manner as if done by him alone.

34. When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act were done by him alone.

35. Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

When such an act is criminal by reason of its being done with a criminal knowledge or intention.

36. Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence.

Effect caused partly by act and partly by omission.

Illustration.

A intentionally causes Z's death, partly by illegally omitting to give Z food, and partly by beating Z. A has committed murder.

37. When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

Co-operation by doing one of several acts constituting an offence.

Illustrations.

(a) A and B agree to murder Z by severally, and at different times, giving him small doses of poison. A and B administer the poison ac-

ording to the agreement with intent to murder Z. Z dies from the effects of the several doses of poison so administered to him. Here A and B intentionally co-operate in the commission of murder, and as each of them does an act by which the death is caused, they are both guilty of the offence though their acts are separate.

(b) A and B are joint Jailors, and as such have the charge of Z, a prisoner, alternately for six hours at a time. A and B, intending to cause Z's death, knowingly co-operate in causing that effect by illegally omitting, each during the time of his attendance, to furnish Z with food supplied to them for that purpose. Z dies of hunger. Both A and B are guilty of the murder of Z.

(c) A, a Jailor, has the charge of Z, a prisoner. A, intending to cause Z's death, illegally omits to supply Z with food; in consequence of which Z is much reduced in strength, but the starvation is not sufficient to cause his death. A is dismissed from his office, and B succeeds him. B, without collusion or co-operation with A, illegally omits to supply Z with food, knowing that he is likely thereby to cause Z's death. Z dies of hunger. B is guilty of murder; but as A did not co-operate with B, A is guilty only of an attempt to commit murder.

Several persons engaged in the commission of a criminal act may be guilty of different offences.

38. Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

Illustration.

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B, having ill-will towards Z, and intending to kill him, and not having been subject to the provocation, assists A in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty only of culpable homicide.

39. A person is said to cause an effect "voluntarily," when he causes it by means "Voluntarily." whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.

Illustration.

A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating a robbery, and thus causes the death of a person. Here, A may not have intended to cause death, and may even be sorry that death has been caused by his act: yet if he knew that he was likely to cause death, he has caused death voluntarily.

40. The word "offence" denotes a thing made punishable by this Code.

"Offence."

41. A "special law" is a law applicable to a particular subject.

42. A "local law" is a law applicable only to a particular part of British India.

43. The word "illegal" is applicable to every thing which is an offence, or which is prohibited by law, or which furnishes ground for a civil action : and a person is said to be "legally bound to do" whatever it is illegal in him to omit.

44. The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation, or property.

45. The word "life" denotes the life of a human being, unless the contrary appears from the context.

46. The word "death" denotes the death of a human being, unless the contrary appears from the context.

47. The word "animal" denotes any living creature, other than a human being.

48. The word "vessel" denotes any thing made for the conveyance by water of human beings, or of property.

49. Wherever the word "year" or the word "month" is used, it is to be understood that the year or the month is to be reckoned according to the British Calendar.

50. The word "Section" denotes one of those portions of a Chapter of this Code which are distinguished by prefixed numeral figures.

51. The word "oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorized by law to be made before a public servant, or to be used for the purpose of proof, whether in a Court of Justice or not.

52. Nothing is said to be done or believed in good faith, which is done or believed without due care and attention.

CHAPTER III.

OF PUNISHMENTS.

53. The punishments to which offenders are liable under the provisions of this Code are—

First,—Death ;

Secondly,—Transportation ;

Thirdly,—Penal servitude ;

Fourthly,—Imprisonment, which is of two descriptions, namely :

(1.) Rigorous, that is, with hard labor.

(2.) Simple.

Fifthly,—Forfeiture of property.

Sixthly,—Fine.

54. In every case in which sentence of death shall have been passed, the Government of India or the Government of the place within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for any other punishment provided by this Code.

Commutation of
sentence of death.

55. In every case in which sentence of transportation for life shall have been passed, the Government of India, or the Government of the place within which the offender shall have been sentenced may, without the consent of the offender, commute the punishment for imprisonment of either description for a term not exceeding fourteen years.

Commutation of sentence of transportation for life.

56. Whenever any person being a European or American is convicted of an offence punishable under this Code with transportation, the Court shall sentence the offender to penal servitude, instead of transportation, according to the provisions of Act XXIV of 1855.

Europeans and Americans to be sentenced to penal servitude instead of transportation.

57. In calculating fractions of terms of punishment, transportation for life shall be reckoned as equivalent to transportation for twenty years.

Fractions of terms of punishment.

58. In every case in which a sentence of transportation is passed, the offender, until he is transported, shall be dealt with in the same manner as if sentenced to rigorous imprisonment, and shall be held to have been undergoing his sentence of transportation during the term of his imprisonment.

Offenders sentenced to transportation how to be dealt with until transportation.

59. In every case in which an offender is punishable with imprisonment for a term of seven years or upwards, it shall be competent to the Court which sentences such offender, instead of awarding sentence of imprisonment, to sentence the offender to transportation for a term not less than seven years, and not exceeding the term for which by this Code such offender is liable to imprisonment.

In what cases transportation may be awarded instead of imprisonment.

60. In every case in which an offender is punish-

Sentence may be (in certain cases of imprisonment) wholly or partly rigorous or simple.

able with imprisonment which may be of either description, it shall be competent to the Court which sentences such offender to direct in the sentence that such imprisonment shall be wholly rigorous, or that such imprisonment shall be wholly simple, or that any part of such imprisonment shall be rigorous and the rest simple.

61. In every case in which a person is convicted of an offence for which he is liable to forfeiture of all his property, the offender shall be incapable of acquiring any property, except for the benefit of Government, until he shall have undergone the punishment awarded, or the punishment to which it shall have been commuted, or until he shall have been pardoned.

Sentence of forfeiture of property.

Illustration.

A being convicted of waging war against the Government of India is liable to forfeiture of all his property. After the sentence, and whilst the same is in force, A's father dies, leaving an estate which but for the forfeiture, would become the property of A. The estate becomes the property of Government.

The effect of this Section is to combine, for the benefit of the Crown, the English doctrines of forfeiture and escheat. Forfeiture only took place in reference to property vested in the criminal at the time.

"But the law of escheat pursued the matter still farther. For the blood of the tenant being utterly corrupted and extinguished, it followed, not only that all that he then had should escheat from him, but also that he should be incapable of inheriting anything for the future. This may farther illustrate the distinction between forfeiture and escheat. If therefore, a father were seized in fee, and the son committed treason and was attainted, and then the father died, here the land would escheat to the lord; because the son, by the corruption of his blood, was incapable to be heir, and there could be no other heir during his life; but nothing would be forfeited to the king, for the son never had any interest in the lands to forfeit." (1 Steph. Com. 418.)

Under the above Section the son would have taken the lands, but only for a second of time, in order to pass them on to the Crown.

It may be necessary to observe that a party who labours under forfeiture, stands in the way of the descent of property to others, just as if he were not subject to any such incapacity.

And therefore, according to English law, the attainder of an elder son would intercept the rights of a younger son. And of all other collateral relations, who could only take after him. If therefore he could not take for himself, and they could not take in consequence of

his blocking up the way, the estate necessarily escheated. (1 Steph. Com. 420.) But it may well be questioned whether this would be the case with Hindus, where the sons take, not after but along with the father, as his co-heirs. It is to be observed too, that forfeiture under the Code has not the effect of corrupting the blood, and extinguishing its power of transmitting inheritable rights. The moment the sentence has expired, the stream of inheritance flows on unimpeded. It is only the personal rights of the convict which are transferred to Government, by a sort of statutory conveyance, but I conceive that Government takes nothing which he could not have assigned away. And so it was by English law, that the attainder of the ancestor did not prevent the descent of an estate entailed upon his issue, because they claimed not from him, but by virtue of the previous gift to themselves as his children. (Williams, R. P., 49.)

In cases where the crime does not specifically carry with it a forfeiture, there may be an express declaration of forfeiture by the Court under the succeeding sentence. This declaration must I imagine form part of the sentence, and be made at the time it is announced.

62. Whenever any person is convicted of an offence punishable with death, the Court may adjudge that all his property, moveable and immoveable, shall be forfeited to Government; and whenever any person shall be convicted of any offence for which he shall be transported, or sentenced to imprisonment for a term of seven years or upwards, the Court may adjudge that the rents and profits of all his moveable and immoveable estate during the period of his transportation or imprisonment, shall be forfeited to Government, subject to such provision for his family and dependants as the Government may think fit to allow during such period.

63. Where no sum is expressed to which a fine may extend, the amount of fine to which the offender is liable is unlimited, but shall not be excessive.

64. In every case in which an offender is sentenced to a fine, it shall be competent to the Court which sentences such offender to direct by the sentence that, in default of payment of the fine, the

Forfeiture of property in respect of offenders punishable with death, transportation, or imprisonment.

Amount of fine.

Sentence of imprisonment in default of payment of fine.

offender shall suffer imprisonment for a certain term, which imprisonment shall be in excess of any other imprisonment to which he may have been sentenced, or to which he may be liable under a commutation of a sentence.

65. The term for which the Court directs the offender to be imprisoned in default of payment of a fine, shall not exceed one-fourth of the term of imprisonment which is the maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine.

Limit of term of imprisonment for default in payment of fine, when the offence is punishable with imprisonment as well as fine.

66. The imprisonment which the Court imposes in default of payment of a fine may be of any description to which the offender might have been sentenced for the offence.

Description of imprisonment for such default.

67. If the offence be punishable with fine only, the term for which the Court directs the offender to be imprisoned, in default of payment of fine, shall not exceed the following scale, that is to say, for any term not exceeding two months when the amount of the fine shall not exceed fifty Rupees, and for any term not exceeding four months when the amount shall not exceed one hundred Rupees, and for any term not exceeding six months in any other case.

Term of imprisonment for default in payment of fine, when the offence is punishable with fine only.

68. The imprisonment which is imposed in default of payment of a fine shall terminate whenever that fine is either paid or levied by process of law.

Such imprisonment to terminate upon payment of the fine.

69. If, before the expiration of the term of imprisonment fixed in default of payment, such a proportion of the fine be paid or levied that the term of imprisonment suffered in default of pay-

Termination of such imprisonment upon payment of proportional part of fine.

ment, is not less than proportional to the part of the fine still unpaid, the imprisonment shall terminate.

Illustration.

A is sentenced to a fine of one hundred Rupees, and to four months' imprisonment in default of payment. Here, if seventy-five Rupees of the fine be paid or levied before the expiration of one month of the imprisonment, A will be discharged as soon as the first month has expired. If seventy-five Rupees be paid or levied at the time of the expiration of the first month, or at any latter time while A continues in imprisonment, A will be immediately discharged. If fifty Rupees of the fine be paid or levied before the expiration of two months of the imprisonment, A will be discharged as soon as the two months are completed. If fifty Rupees be paid or levied at the time of the expiration of those two months, or at any latter time while A continues in imprisonment, A will be immediately discharged.

70. The fine, or any part thereof which remains unpaid, may be levied at any time within six years after the passing of the sentence, and if, under the sentence, the offender be liable to imprisonment for a longer period than six years, then at any time previous to the expiration of that period ; and the death of the offender does not discharge from the liability any property which would, after his death, be legally liable for his debts.

Fine may be levied within 6 years, or at any time during the term of imprisonment.

Death of offender not to discharge his property from liability.

71. Where any thing which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Limit of punishment of offence which is made up of several offences.

Illustration.

(a) A gives Z fifty strokes with a stick. Here A may have committed the offence of voluntarily causing hurt to Z by the whole beating, and also by each of the blows which make the whole beating up. If A were liable to punishment for every blow, he might be imprisoned for fifty years, one for each blow. But he is liable only to one punishment for the whole beating.

(b) But if, while A is beating Z, Y interferes, and A intentionally strikes Y, here, as the blow given to Y is no part of the act whereby A voluntarily causes hurt to Z, A is liable to one punishment for voluntarily causing hurt to Z, and to another for the blow given to Y.

72. In all cases in which judgment is given that a person is guilty of one of several offences specified in the judgment, but that it is doubtful of which of these offences he is guilty, the offender shall be punished for the offence for which the lowest punishment is provided, if the same punishment is not provided for all.

Punishment of a person found guilty of one of several offences, the judgment stating that it is doubtful of which.

This section points to a difficulty which has hitherto been without remedy. An indictment may contain several counts, each charging a distinct offence, only one of which could have been committed; for instance a simple assault, an assault with intent to wound, and an assault with intent to rape. In strict logic, no conviction ought to take place until the verdict can state which of the offences was perpetrated, and if it cannot be stated which of them, then it cannot be alleged with certainty that any one of them in particular was committed, and if so there ought to be an acquittal. Juries always get out of the difficulty by returning a general verdict of guilty, which they are told they may do, if they are of opinion that any offence charged in the indictment has been accomplished, and they cannot be asked to state which was effected. Now however a Judge will be authorised to find that the prisoner is guilty upon some one, but he is doubtful upon which of the counts, and the sentence will then be given as if he had been convicted on the least aggravated charge.

73. Whenever any person is convicted of an offence for which under this Code the Court has power to sentence him to rigorous imprisonment, the Court may, by its sentence, order that the offender shall be kept in solitary confinement for any portion or portions of the imprisonment to which he is sentenced, not exceeding three months in the whole, according to the following scale, that is to say—

Solitary confinement.

A time not exceeding one month if the term of imprisonment shall not exceed six months.

A time not exceeding two months if the term of imprisonment shall exceed six months and be less than a year.

A time not exceeding three months if the term of imprisonment shall exceed one year.

74. In executing a sentence of solitary confinement, such confinement shall in no case exceed fourteen days at a time, with intervals between the periods of solitary confinement of not less duration than such periods ; and when the imprisonment awarded shall exceed three months, the solitary confinement shall not exceed seven days in any one month of the whole imprisonment awarded, with intervals between the periods of solitary confinement of not less duration than such periods.

Limit of solitary confinement.

75. Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, shall be guilty of any offence punishable under either of those Chapters with imprisonment of either description for a term of three years or upwards, shall be subject for every such subsequent offence to transportation for life, or to double the amount of punishment to which he would otherwise have been liable for the same ; provided that he shall not in any case be liable to imprisonment for a term exceeding ten years.

Punishment of persons convicted, after a previous conviction, of an offence punishable with three years' imprisonment.

CHAPTER IV.

GENERAL EXCEPTIONS.

76. Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law, in good faith believes himself to be, bound by law to do it.

Act done by a person bound, or by mistake of fact believing himself bound by law.

Illustrations.

A, a soldier, fires on a mob by the order of his superior Officer,

in conformity with the commands of the law. A has committed no offence.

(4) A, an Officer of a Court of Justice, being ordered by that Court to arrest Y, and, after due inquiry, believing Z to be Y, arrests Z. A has committed no offence.

77. Nothing is an offence which is done by a Judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

Act of Judge when acting judicially.

The word "Judge" is defined by s. 19.

78. Nothing which is done in pursuance of, or which is warranted by the judgment or order of a Court of Justice, if done whilst such judgment or order remains in force, is an offence, notwithstanding the Court may have had no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

Act done pursuant to the judgment or order of a Court of Justice.

The phrase "Court of Justice" is defined by s. 20.

79. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, justified by law in doing it.

Act done by a person justified, or by mistake of fact believing himself justified by law.

Illustration.

A sees Z commit what appears to A to be a murder. A, in the exercise, to the best of his judgment exerted in good faith, of the power which the law gives to all persons of apprehending murderers in the fact, seizes Z, in order to bring Z before the proper authorities. A has committed no offence, though it may turn out that Z was acting in self-defence.

Chapter IV aims at embracing all those exceptional circumstances which may render lawful an act which upon its face appeared to be unlawful. This chapter must be read along with all the other chapters of the Code which treat of unlawful acts. For instance, s. 299 states that :—

"Whoever causes death by doing an act with the intention of causing such bodily injury as is likely to cause death, commits the offence of culpable homicide."

This section taken by itself would impose the penalties of murder upon a Surgeon who properly performs a dangerous operation which results in death. Modified by the exceptions in this chapter such consequences are to a great extent (though not, in my opinion, entirely) prevented.

Ss. 76 to 79 relate to the cases of persons who are, or who justifiably believe themselves to be, acting under the authority of law.

Where a party actually is bound by law, or justified by law, in doing a particular act, of course there can be no more question upon the point. By the very force of the terms he is doing that which is lawful. Occasionally however a difficulty may arise, where the law under which he acts is of an exceptional character, and opposed to the ordinary law of the country. This may take place where the ordinary law is suspended, either by the interposition of a foreign or over-ruling power, or by some special act of the sovereign.

The effect of foreign conquest is to annul or suspend the ordinary sovereignty of the conquered country, and while the occupation lasts, the laws of the subject state can no longer be rightfully enforced, or be obligatory upon the inhabitants, who remain and submit to the conquerors. No other laws can, in the nature of things, be obligatory upon them, for where there is no protection or sovereignty, there can be no claim to obedience. (Per Mr. Justice Story cited 3 Phill. Int. Law 737—39.) In cases of civil war there is greater difficulty, for the first stage of a civil war is always, and necessarily termed rebellion, and those who take part in, or aid it, rebels and traitors. But it is quite clear that with respect to civil war also, obedience involves sovereignty, and sovereignty is tested by protection. Dr. Phillimore says

“The case supposed is always one of nicety and difficulty. It would rather seem as a matter of speculation, that when an old Government is so far overthrown that another Government entirely claims, and at least partially exercises, the jurisdiction which formerly belonged to it, that the individual is left to attach himself to, and to become, by adoption at least, the subject of either Government. The analogy under which it is most just to range such cases has been thought to be that which has just been discussed, viz., the rule which applies to cases of foreign conquest, where those only are bound to obedience and allegiance who remain under the protection of the Conqueror.” (3 Phill. Int. L. 739.)

Upon this principle, during the recent mutiny, the inhabitants of Delhi would have been perfectly justified in paying taxes to, and obeying the commands of the king of Delhi, but it would have been otherwise at Agra where British rule was still maintained. So long ago as the year 1494 the same principle was asserted in the Statute 11 Hen. vii. c. 1, which pronounces all subjects excused from any penalty or forfeiture, which do assist or obey a king *de facto*.

A much more difficult question arises, when the defence is that the matter complained of was an Act of State, done under the immediate orders of the Sovereign. Here the defence takes the shape not of a justification, but of a plea to the jurisdiction, for if the defence is made out no municipal tribunal can take cognisance of the matter.

It would probably be impossible to define the term "Act of State," as from its very nature such acts are of a very exceptional character. No Act will bear this character unless it is done by the State, in its corporate and Sovereign character, for some State purpose, and rests avowedly upon grounds higher than Municipal law. Such acts generally take place in time of war, but not necessarily so, the existence of a war being merely the strongest possible evidence that the State is acting in its Sovereign capacity. Upon this ground, no action will lie in any Municipal Court for false imprisonment, or any other act which takes place in consequence of the capture of a ship as prize, even though the ship be ultimately acquitted, and the seizure declared by the prize Court to be illegal. (*LeCaux v. Eden* 2 Dougl. 594, *Lindo v. Rodney* 2 Dougl. 613) In a later case, the facts were as follows. After the overthrow of the Peishwa in 1818, the British Government seized his territory. The Governor of the fort of Ryeghur surrendered it, and was allowed to retire to Poonah where he lived under military surveillance. During his residence a quantity of treasure found in his house was seized by the Bombay Government as being public property. The seizure was made in July. The Peishwa had surrendered in June, but the Mahratta forces were not finally subdued till December. It was admitted that Poonah had been for some months in the undisturbed possession of the provisional Government, and that Courts of justice under the authority of that Government were sitting for the administration of law. An action brought by the executor of the Governor of Ryeghur was declared untenable by the Privy Council; Lord Tenterden said;—

"We think the proper character of the transaction was that of hostile seizure made, if not *flagrante yet non dum cessante bello*, regard being had both to the time, the place, and the person, and consequently that the Municipal Court had no jurisdiction to adjudge upon the subject; but that, if anything was done amiss recourse could only be had to the Government for redress." (*Elphinstone v. Bedreechund*, 1 Knapp. 316, 360.)

A similar question arose incidentally in the case of the Rajah of Coorg v. East India Company (25 L. J. Ch. 345). The Rajah sued the Company for the recovery of two promissory notes, which had been taken from him in war, and which he alleged that the Company still held in trust for him. It was held that a motion for the production of documents in support of this case could not be granted, the suit itself being unsustainable. Lord Justice Turner, referring to the bill, said—

"The plaintiff submits that the circumstances above detailed did not justify an appeal to complainants on the part of the defendants, and that the invasion and forcible occupation of the plaintiff's raj, and the plaintiff's expulsion therefrom, were not the consequence of a just war, but acts of spoliation and rapine, and did not and could not confer the rights of conquest, as alleged and pretended by the defendants? Now those are matters which clearly relates to the proceedings of the Company in their public capacity as a sovereign power, or as exercising rights of sovereignty." (*Ibid.* 350.)

The same principle was maintained in two cases in which the Madras Government were defendants. The first was a case of *Syed Ally v. E. I. Co.* not reported, but referred to in the case next cited.

There the bill alleged that the plaintiff's ancestor held an Altungah Jaghire under grant from the Nabab of the Carnatic. That after the treaty of 1801 the E. I. Co. assumed the Government of the Carnatic, and thereupon ordered all sunnuds under which Jaghires were held to be sent in to the Collector for the purpose of examining into the titles under which they were claimed, but expressly promised to restore all such Jaghires to the persons found to be entitled. The plaintiff further alleged that Altungah grants were perpetual, and not removable by the sovereign, and complained that the E. I. Co. had granted away the Jaghire to a person not lawfully entitled to it. The Supreme Court decided that the grant by the Nabob was perpetual and valid and decreed for the plaintiff, but this decree was reversed on appeal by the Privy Council, who reported it as their opinion—

“That it should be declared, that the Governor in Council of Fort Saint George, having, in exercise of the Sovereign authority acquired by the E. I. Co. by virtue of the treaty with the Nabob of the Carnatic, bearing date on the 31st of July 1801, resumed the Jaghire which had been granted to Assim Khan, and re-granted the same to Kullee Moollah Khan, the Supreme Court of Judicature at Madras had not jurisdiction to question the propriety of such re-sumption and re-grant.”

The last case was that of Kamachee Boye v. E. I. Co. which arose out of the annexation of the Raj of Tanjore. The Rajah died in 1855 leaving no male descendants, and in 1856 the Court of Directors declared the dignity of the Raj of Tanjore to be extinct. A Commissioner was sent down to Tanjore for the purpose of making the necessary arrangements. He informed the family that he intended to take possession of all the public property of the State, and availing himself of the presence of some British troops, he entered the Fort, and put his seal upon all property, public and private. A bill was filed by the personal representatives of the late Rajah, in which they acquiesced in the seizure of the public property, but claimed to be entitled to an account of the personal property. As in Syed Ally's case, the Supreme Court decreed for the plaintiff, but this decree was recovered on appeal by the Privy Council. Their judgment is important as showing, that not only the act of State itself, but every act which is incidental and accessory to its completion is protected from Municipal jurisdiction. Their Lordships said;—

“The next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power, on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore, in trust for those who by law might be entitled to it on the death of the last possessor? If it were the latter, the defence set up, of course, has no foundation.”

Their Lordships answered part of this question by showing that the seizure could not be justified on any ground of legal title, and then proceeded to say—

“It is clear from Mr. Forbes' report to the Madras Government of what took place on the occasion, that though no resistance was offered by the

family of the Rajah, or the inhabitants of the fort, to the seizure of the Raj and of the palace and property of the Rajah, it was regarded on both sides as a mere act of power not resisted because resistance would have been vain. "Much sorrow," he says, "was expressed, and much grief was shown; but all submitted at once to the authority of the Government, and placed themselves in its hands."

"It is by these acts of Mr. Forbes that the E. I. Co. is in possession of whatever it holds now claimed by the Respondent. The acts of Mr. Forbes were approved by the Governor of Madras by a Minute dated the 21st of October 1856, and they are adopted and ratified by the appellants in their answer in this suit."

"What property of the Rajah was within the authority given to Mr. Forbes, and what may be the consequence of any seizure in excess of that authority, we will consider under the next head; but that the seizure was an exercise of sovereign power effected at the arbitrary discretion of the Company, by the aid of Military force, can hardly admit of doubt."

"But then it is contended, that there is a distinction between the public and private property of a Hindu Sovereign, and that although, during his life, if he be an absolute monarch, he may dispose of all alike, yet on his death some portions of his property, termed his private property, will go to one set of heirs, and the Raj with that portion of his property which is called public will go to the succeeding Rajah."

"It is very probable that this may be so; the general rule of Hindu inheritance is partibility, the succession of one heir, as in the case of a Raj, is the exception. But assuming this, if the Company in the exercise of their Sovereign Power, have thought fit to seize the whole property of the late Rajah, private as well as public, does that circumstance give any jurisdiction over their acts to the Court at Madras? If the Court cannot inquire into the act at all, because it is an act of State, how can it inquire into any part of it, or afford relief on the ground that the Sovereign Power has been exercised to an extent which Municipal law will not sanction?"

"The result, in their Lordship's opinion, is that the property now claimed by the respondent has been seized by the British Government, acting as a Sovereign Power, through its delegate the E. I. Co., and that the act so done, with its consequence, is an act of State over which the Supreme Court of Madras has no jurisdiction."

Before leaving the subject of Acts of State, it is necessary to observe that an Act which would possess this character, if expressly ordered by the Crown, will become such by a subsequent ratification. This was so laid down in the case of *Buron v. Denman* 2 Exch. 167, and was approved in the case of *Kamachee Boye v. E. I. Co.* last referred to. There the defendant, who was in command of a cruiser off the Coast of Africa seized and burnt a barracoon belonging to the plaintiff, who was a Spaniard carrying on a trade in slaves, and carried away his slaves. This procedure was not warranted by his instructions, but was approved of by the British Government when reported. It was held that this approval converted the act into an Act of State, for which the Crown alone was responsible, and was beyond the reach of any Municipal tribunal. It was also held that such ratification might be communicated by either a written or verbal direction from the proper Department, just as an original order might have been.

All the cases cited upon this head have been instances of civil actions, but the rule would be exactly the same if the proceeding were of a criminal character. For instance, if the Spanish slave dealer had resisted,

and been fired on, and killed, the same reasons which made a civil action inadmissible would have served as a defence for Captain Deuman on an indictment for murder.

The first illustration appended to s. 76 gives rise to what is occasionally a difficult question, viz., how far a soldier is justified in obeying the commands of his superior officer, where those commands are illegal. A case of this sort arose in Ireland in 1852. A party of soldiers were escorting a body of voters into an election at Six-mile Bridge in the County Clare. The mob tried to carry away the voters, and the officer in command ordered the soldiers to fire, and several of the rioters were killed. Several of the soldiers were tried for murder, and Mr. Justice Perrin directed the jury, that soldiers were merely armed citizens, and that the orders of their officers did not justify any acts of violence, unless the orders themselves were legal. "Probably however the sounder view of the law is laid down in *Alisons Crim. L.* p. 673, where he says—

"The express command of a magistrate or officer will exonerate an inferior officer or soldier, unless the command be to do something plainly illegal, or beyond his known duty."

Then after pointing out the peculiar position of a soldier, who is "subjected to a peculiar and peremptory code of laws, armed with powers of extraordinary severity, for the purpose of enforcing on his part the most implicit obedience to command," he proceeds—

"It will require, therefore the very strongest case to subject a soldier to punishment for what he does in obedience to the distinct commands of his commanding officer. But still this privilege must have its limits: it is confined to what commanded in the course of official duty, and which does not plainly and evidently transgress its limits. For what if an officer command a private soldier to commit murder, or to steal, or to aid him in a rape, or if he order a file of soldiers to fire on an inoffensive multitude; certainly in none of these cases will the privates be exempted if they yield obedience to such criminal mandates."—(See also *Alison Crim. L.* 39, 461.)

And so if a police peon were to plead the order of his jemadar, as an excuse for torturing a prisoner to make him confess, such an excuse would be untenable.

Neither the orders of a parent, or a master will furnish any defence for an illegal act (*Alison. Crim. L.* 671, 672.)

The orders of a foreign Government will only justify its own subjects, or British subjects while within its own jurisdiction. In a very recent case, the master of an English Ship contracted with the Chilian Government to carry to England some prisoners who were sentenced to banishment. On reaching England, they indicted him for assault and false imprisonment, and on appeal the conviction was affirmed. The Court held that there could be no conviction for what was done within the Chilian territory, for that in Chili the acts of the Government towards its subjects must be assumed to be lawful, and that an English ship while within the territorial waters of a foreign State, was subject to the laws of that State, as to acts done to the sub-

jects thereof. But that an English ship on the high Seas, out of any foreign territory was subject to the laws of England, and therefore any justification under the orders of the Chilian Government ceased, when the ship passed the line of Chilian jurisdiction. It might be that transportation to England was lawful by the law of Chilin, and that a Chilian ship might so lawfully transport Chilian subjects. But for an English ship the laws of Chili out of the State were powerless, and the lawfulness of the acts must be tried by English law. (Per. Erle. C. J. Reg. v. Lesley 29 L. J. M. C. 97.)

Under English law criminal acts, not being heinous felonies, if committed by the wife in the presence of her husband, were presumed to be committed under his coercion, and he only was punishable. (Arch. 18. Reg. v. Wardroper 29 L. J. M. C. 116.) But under Scotch law these facts furnished no defence, and only went in mitigation of punishment. (Alison Crim. L. 668.) The present Code follows the Scotch law in this respect, with the single exception of "Harbouring" which is no offence when a wife harbours her husband.

Mistake will be no justification, unless it is a mistake of fact, and not invariably then. The criterion is to inquire, whether assuming the fact to be, as it was erroneously supposed to be, the act done in consequence was lawful. A man who shoots an inmate of the house, who comes into his room at night, supposing him to be a burglar, would be justified; because if his supposition were correct, he would have authority under s. 103 to kill the offender. But if he fired out of his window by day at the same person, supposing that he was trespassing upon his paddy field, this would not be justifiable, for an actual trespasser could not lawfully be so assailed.

Mistake, or ignorance of law, is no ground of defence, the general rule being, that every person who has capacity to understand the law is presumed to have a knowledge of it. And so far is this principle carried, that it has been held that a foreigner could not be allowed to show as a justification of his act, (though he might in mitigation of punishment), that it was no offence in his own country, and that he was not aware it was considered wrong where he was tried. And, however hardly it may bear in some few cases, it is evident that the rule is a necessary one. If a criminal could get off by pleading ignorance of law, convictions would probably be rare, nor could society exist for a year, if even a sincere belief in the propriety of his conduct could justify any one who chose to murder or steal. (Arch. 19.)

Where however an act was innocent before, and was for the first time made an offence by statute, a physical impossibility that the prisoner should have known of the statute was held to be a bar to a conviction. Accordingly in such a case, the parties were allowed to show that they were at sea when the statute was passed, and that they could not possibly have been aware of it. (Ibid.)

By s. 52 the words "in good faith" are interpreted as implying due care and attention.

Sections 77, 78 extend to Judges and persons acting under their orders a protection from criminal process somewhat, though not altogether similar to that which has already been granted to them in the case of civil suits by Act 18 of 1850. One difference between the two acts is with regard to officers, who are not protected under s. 78 unless they do "in good faith, believe that the Court had jurisdiction." If the bailiff happens to be a better lawyer than the Judge or Magistrate, and sees that the order is beyond the jurisdiction, he will have no defence if he executes it. This seems very hard upon him, as he cannot refuse to execute it without resigning his office, or, in the case of a soldier refusing to carry out an illegal order of a Court Martial, without exposing himself to be shot. Under Act 18 of 1850 he is protected in "the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same." This certainly seem a more sensible provision.

It seems very doubtful whether s. 77 protects a Judge in respect of an act done by him in a matter where he had no jurisdiction whatever. It will be observed that although the Legislature had in view the possibility of acts done wholly beyond the jurisdiction of the Court, the protection which is expressly granted in such a case to the officer, is not granted in any such express and positive words to the Judge. It may well be said that a Judge can only be acting judicially where he is within his jurisdiction. A Supreme Court Judge who chose to amuse himself by hearing cases in the Mofussil could not be said to be acting judicially, even though he fancied his Commission extended so far. In *Calder v Halket* (2 Moo. P. A. 293) this view was taken of a somewhat similar Stat: 21 Geo. III. c. 70 s. 34 provides,

"That no action for wrong or injury shall lie in the Supreme Court against any person whatsoever, exercising a judicial office in the Country Courts for any judgment, decree, or order of the said Court."

It was held by the Privy Council (p. 306) that this Statute did not protect the Judge where he gave judgment, or made an order, in the *bonâ fide* exercise of his jurisdiction, and under the belief of his having jurisdiction, where he had not; but that it only operated to the extent of "protecting them from actions for things done within their jurisdiction, though erroneously or irregularly done, leaving them liable for things done wholly without jurisdiction."

In either case the Act only applies where the defendants have used "due care and attention." (s. 52) or, in the language of the Privy Council, "where parties *bonâ fide* and *not absurdly* believe that they are acting in pursuance of Statutes, and according to law." (4 Moo. P. A. 379). Knowledge is the great criterion upon this point. As the Privy Council say in *Calder v. Halket* (2 Moo. P. 309.)

"It is well settled that a Judge of a Court of Record in England, with limited jurisdiction, or a Justice of the Peace, acting judicially, with a special and limited authority, is not liable to an action of trespass for acting without jurisdiction, unless he had the knowledge or means of knowledge of which he ought to have availed himself, of that which constitutes the defect of jurisdiction."

Accordingly where a Judge took proceedings against a European, over whom he had no jurisdiction, it was held that he was protected under 21 Geo. III. c. 70 s. 34 because,

“ It did not appear from the evidence in the case, that the defendant was at any time informed of the European character of the plaintiff, or knew it before, or had such information as to make it incumbent on him to ascertain that fact.” (Ibid p. 310.)

The nature of the acts to which protection is given was pointed out by the Privy Council in the same case, (p. 301) where they said,

“ It is not merely in respect of Acts in Court, Acts *Sedente Curia*, that a Judge has an immunity, but in respect of all Acts of a judicial nature; and an order under the seal of the Foujdary Court, to bring a native into that Court, to be there dealt with on a criminal charge, is an act of a judicial nature, and, whether there was irregularity or error in it, or not, would be punishable by ordinary process of law.”

The words “ Judge” and “ Court of Justice” are defined by ss. 19 and 20.

80. Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution.

Accident in the doing of a lawful act.

Illustration.

A is at a work with a hatchet ; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

In cases of accident the two material questions are, first as to the innocence of the act really intended, and secondly as to the caution with which it is done. If a horse runs away with its rider, and kills some one in the road, this will be merely accident ; but it would be otherwise, though the immediate act was beyond the prisoner’s control, if he has himself by his own misconduct, brought such a state of things about. Where two omnibuses were racing, and one ran over a man, the defence was, that the horses were running away. Pattenon J., in charging the Jury, said,

“ The question is, whether you are satisfied that the prisoner was driving in such a negligent manner that, by reason of his gross negligence, he had lost the command of his horses ; and that depends on whether the horses were unruly, or whether you believe that he had been racing with the other omnibus, and had so urged his horses that he could not stop them ; because, however he might be endeavouring to stop them afterwards, if he had lost the command of them by his own act, he would be answerable.” (1 Russ. 650.)

As to the second point,

“ The caution which the law requires is not the utmost caution that can be used, but such reasonable precaution as is used in similar cases, and has

been found by long experience, and in the ordinary course of things to answer the end." (Alison. Crim. L. 143).

Where a man discharged his gun before he went out to dinner, and on returning took it up and touched the trigger, when it went off and killed his wife, the fact being that it had been loaded in his absence, and without his knowledge, Mr. Justice Foster directed an acquittal, "being of opinion, upon the whole evidence, that he had reasonable ground for believing the gun was not loaded." (Foster. Cr. L. 265.) And so in another Case, the prisoner was charged with having fired a fowling piece, loaded with small shot, in a field within an easy shot of a high road, where persons frequently passed, and in the direction of the road, and killed a girl who was passing at the time. It appeared in evidence that the shot was really a long one, being above fifty yards, and that it proved fatal only by one of the leads having unfortunately penetrated the child's eye, while the other shot hardly penetrated the skin. The Court held the death accidental in these circumstances, and so the jury found. (Alison. Crim. L. 144.)

81. Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

Act likely to cause harm, but done without a criminal intent, and to prevent other harm.

Explanation.—It is a question of fact in such a case, whether the harm to be prevented or avoided was of such a nature, and so imminent, as to justify or excuse the risk of doing the act, with the knowledge that it was likely to cause harm.

Illustrations.

(a) A, the Captain of a Steam Vessel, suddenly and without any fault or negligence on his part, finds himself in such a position that, before he can stop his vessel, he must inevitably run down a boat B, with 20 or 30 passengers on board, unless he changes the course of his vessel, and that, by changing his course, he must incur risk of running down a boat C with only 2 passengers on board which he may possibly clear. Here, if A alters his course without any intention to run down the boat C, and in good faith for the purpose of avoiding the danger to the passengers in the boat B, he is not guilty of an offence, though he may run down the boat C by doing an act which he knew was likely to cause that effect, if it be found as a matter of fact that the danger which he intended to avoid was such as to excuse him in incurring the risk of running down the boat C.

(b) A in a great fire pulls down houses in order to prevent the conflagration from spreading. He does this with the intention, in good

faith, of saving human life or property. Here, if it be found that the harm to be prevented was of such a nature and so imminent as to excuse A's act, A is not guilty of the offence.

This Section is very obscure. Every person is supposed to intend what he knows will happen. If he knows that an act will cause harm, he is supposed to intend harm, and an intention to do harm is *prima facie* criminal. We are not told except by the illustrations, what are the circumstances under which such an act could be done without a criminal intention. Nor are we told whether the harm to be prevented or avoided must be harm to others, or may be merely harm to the person himself.

Looking at the illustrations, it would appear that the words "if it be done without any criminal intention to cause harm," must be taken to mean very much the same thing as the clause which follows them; and that the whole section comes to this, that where a man reasonably believing that injury to some one is inevitable, honestly does that which he thinks will produce the smallest amount of injury, he is not to be held liable for the harm which actually results. Take for instance such an extreme case as that of the general who sent a small party of men to stand over a mine, with the deliberate intention that they should be blown up, in order that the rest of the division might pass over in safety.

The more important question remains, whether a man is justified in doing an injury to others to prevent an injury to himself? For instance, if he is starving may he steal? The explanation furnishes no assistance, for it does not inform us what sort of harm it is, which is of such a nature and so imminent as to justify the act. I conceive that unless in cases which come under ss. 96-105, the harm must be harm to others, and in general harm of a public character. The English Jurists are all agreed that no amount of necessity will justify a man in stealing clothes or food, however much his wants may go in mitigation of his punishment. (1 Hale 54. 2 East. P. C. 698.) And the rule of Scotch law is the same. (Alison. Crim. L. 674.) The only instance in which the English law admits that one man may sacrifice the rights of an innocent man for his own interests, is the case of two shipwrecked men getting upon a plank which will only support one, where either may thrust off the other, if he can. (1 East P. C. 294.) But here plainly the only question is whether one or both are to perish.

Lord Hale observes, however, that,

"By the Rhodian law, and the common maritime custom, if the common provision for the ship's company fail, the master may under certain temperaments break open the private chests of the marines or passengers, and make a distribution of that particular and private provision for the preservation of the ship's Company." (1 Hale. 55.)

And so I have no doubt it would be lawful to do in the case of a town besieged, where it was indispensable for the safety of all that the provisions should be equally divided.

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82. Nothing is an offence which is done by a child under seven years of age.

Act of a child under 7 years of age.

83. Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

Act of a child above 7 and under 12 years of age, who has not sufficient maturity of understanding.

These Sections leave the law very much as it is in England and Scotland, making allowance for the comparative precocity of children in the East. Accordingly to English law, life is divided into three periods. Up to seven years there is an absolute incapacity for crime, and this is so enacted by s. 82. After fourteen, a youth is in precisely the same state as to criminal responsibility as any grown man. s. 83. makes this period of responsibility come two years earlier. In the intermediate period criminal responsibility depends upon the state of the mind, and this also agrees with s. 83. Nothing is said in the Code however upon the presumption which is to be drawn, in the absence of all evidence, as to whether a child in this transition stage is of sufficient maturity to be called to account for its actions or not. Probably this was passed over as being a matter of evidence. According to English law during this second period,

“An infant shall be *prima facie* deemed to be *doli incapax*, and presumed to be unacquainted with guilt; yet this presumption will diminish with the advance of the offender's years, and will depend upon the particular facts and circumstances of his case. The evidence of malice, however, which is to supply age, should be strong and clear beyond all doubt and contradiction.” (1 Russ. 2.)

The onus of proof therefore will in all cases lie upon the prosecution. Accordingly instances are to be found in which children so young as eight years have been hung, the evidence showing them to have had a perfect knowledge of the nature of their act, and a steady determination to perpetrate it. One remarkable instance is mentioned by Mr. Russel. A boy of ten and a girl of five years old were living together in the same house, the latter was missed one day, and after considerable search her body was found buried in a dunghill and shockingly mangled. The boy, when questioned, at first denied all knowledge of the matter. When the Coroner's Jury met he was again charged, but persisted still in his denial. At length being closely interrogated, he fell to crying, and said he would tell the whole truth. He then said that the child had been used to foul herself in bed; that she did so that morning, (which was ascertained to be untrue) that thereupon he took her out of her bed, and carried her to the dunghill, and with a large knife, which he found about the house, cut her in the manner the body appeared to be mangled, and buried her

in the dungheap ; placing the dung and straw that was bloody under the body, and covering it up with what was clean ; and having so done, he got water and washed himself as clean as he could. He was ultimately convicted upon his own confession corroborated by other circumstances, and his case was referred for the opinion of all the Judges, who unanimously agreed, " that there were so many circumstances stated in the report which were undoubtedly tokens of what Lord Hale calls a *mischievous discretion*, that he was certainly a proper subject for capital punishment, and ought to suffer ; for it would be of a very dangerous consequence to have it thought that children may commit such crimes with impunity." (1 Russ. 2 5. Arch 12.) Practically, the boy was not executed, and probably the humane spirit of the present age would refuse under any circumstances to carry out the extreme sentence of the law upon one so young. Still the case is of value as exemplifying the maxim, *malitia supplet aetatem* ; a mischievous discretion makes up for want of years.

There is another point which is not referred to in s. 83, possibly as being also a matter of evidence ; I refer to the invincible presumption raised by the English law that up to fourteen there is a physical incapacity for the crime of rape. (Arch. 12.) It will be observed that the only ground of exemption under s. 83 is mental immaturity ; but where a particular crime involves a certain organic power which is invariably wanting up to a certain age, it seems only fair to raise a presumption that up to that age the crime cannot be committed. Admitting the principle to be a correct one, it may be doubted whether exactly the same time would be fixed in this country, taking the precocious maturity of Hindoos into consideration. With respect to offences upon girls, the legislature seems to assume that they come to maturity two years earlier here than in Europe. (Compare the Indian Act 9 Geo. IV. c. 74, § 65 with the corresponding English one 9 Geo. IV. c. 31, § 17.) And possible the same view might be taken in the case of a boy charged with rape. Where a boy only ten years old, was convicted by the Futwa of rape on a girl only three years old, the court of N. A. viewed it as an attempt only, and punished it as a misdemeanour, with one years imprisonment. (1 M. Dig. 190, § 636.)

84. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

Every one at the age of discretion is by law presumed to be sane, and accountable for his actions, unless the contrary be proved. And if a lunatic has lucid intervals, the law presumes the offence to have been committed in a lucid interval, unless it appears that he was actually under the influence of his distemper at the time, (1 Russ. 6.) or

that a fit of madness had existed a very short time previously. (Alison Cr. L. 652,659.) And in all cases, where the commission of the crime is admitted, but this, or any other, incapacity, is alleged, the onus of proving it lies upon those who set it up, and if they fail to prove it affirmatively to the satisfaction of the Judge, he is bound to convict. (Reg. v. Stokes 3 C. and K. 185.)

Defect of understanding is of three sorts, Idiocy Lunacy, and that which is merely temporary and artificial, being brought on by drunkenness, opium eating or such like cause.

Idiocy is the ordinary case of one who has never had any reason, or lucid interval, from his birth. It is generally easy of proof, as being a matter of notoriety, and of course when established is a complete defence. One who was deaf and dumb from birth used formerly to be also assumed to be an idiot, since he had no means of acquiring information as to the law of the land, or learning the distinction between right and wrong. (Arch 13,) the presumption, however, might be rebutted by showing that he had the use of his understanding, and of course would vanish, if it were proved that he had been fully instructed, as many have been by the well known discoveries in the art of teaching such persons. Great caution would be requisite however before such a conviction could be considered satisfactory.

Lunacy presents much greater difficulties on account of the numberless phases which it presents, and the imperceptible degrees by which it dwindles down into something little beyond eccentricity, or oddity of manner. In the majority of cases, where a prisoner is shown to be a violent madman, dangerous to all around him, or to be mentally estranged from mankind, incapable of thinking or acting like a human being, the matter is simple enough. Providence has not left him that amount of reason which is necessary to make him accountable for his acts. If this state of mind is subject to lucid intervals, the further question is introduced whether the act was perpetrated in a lucid interval or not. But often the insanity is of a different type;—the delusion is only partial—a *monomania* as it is called—which affect him on particular points or in respect to particular persons, leaving him as to other matters in the ordinary state. How is his act to be judged of when it is connected with the subject of his delusion? How, when it has no connection with it? May a man justify a larceny on the ground of a belief that he is Emperor of China, or can he be acquitted of murder because he conceived that the murdered man was an enemy to his country?

These points have all undergone repeated discussion, and probably the most clear and lucid treatment of the entire matter will be found in the answers given by the English Judges to certain questions proposed to them by the House of Lords, in the case of Reg. v. M'Naughten, and quoted in Archbold. (15-17) the questions were as follows.

“1st. What is the law respecting alleged crimes committed by persons

afflicted with insane delusion in respect of one or more particular subjects or persons ; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion of redressing or revenging some supposed grievance or injury, or of producing some public benefit ?

“ 2nd. What are the proper questions to be submitted to the Jury when a person, alleged to be afflicted with insane delusion respecting one or more, particular subjects or persons, is charged with, the commission of a crime, (murder, for example,) and insanity is set up as a defence ?

“ 3rd. In what terms ought the question to be left to the Jury as to the prisoner's state of mind at the time when the act was committed ?

“ 4th. If a person, under an insane delusion as to the existing facts commits an offence in consequence thereof, is he thereby excused ?

“ 5th. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under and what delusion at the time ?”

To these questions the Judges (with the exception of *Maule, J.*, who gave on his own account a more qualified answer) answered as follows :—

To the first question :—“ Assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion, that, notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your Lordships to mean the law of the land.”

To the 2nd and 3rd questions :—“ That the Jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction ; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the Jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the Jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the Jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction, whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable ; and the usual course, therefore, has been to leave the question to the Jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong ; and this course, we think, is correct, accompanied

with such observations and explanations as the circumstance of each particular case may require."

To the fourth question :—"The answer to this question must of course depend on the nature of the delusion ; but making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

And to the last question :—"We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the Jury to decide ; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

It is a wise caution which was given by Baron Hume not "to receive as evidence of madness the atrocity or brutality of the act itself that has been done, though there has been no previous symptom of the disease." (Alison. Crim. L. 653.) In many remarkable trials in England an attempt has been made to set up insanity on this ground, but the Judges have always strenuously resisted the introduction of a principle, which would make a criminal safe in proportion to the barbarity of his acts. Mere crime, however savage and purposeless, is unfortunately only too consistent with all that we know of human nature. And it is also most necessary to remember, that "mere oddity of manner, a half craziness of disposition, if unaccompanied by an obscuring of the conscience will not avail the prisoner." (Alison. Crim. L. 655.) The evidence must prove an alienation of reason, perverting the moral sense.

Of course it must not be supposed that the effect of a plea of lunacy, when established, is to let the mad man loose upon the world again. All this is provided for by Act 4 of 1849.

"§ 2. Whenever a person charged with any offence shall be acquitted, because he is within the exception made by the foregoing Section, the Court or Jury shall give a special Judgment or verdict, that he did the act charged against him, being then of unsound mind, so as to excuse him according to law.

"§ 3. Whenever such special Judgment or verdict, as aforesaid, shall have been given against any person, the Court, before which the trial was had, shall order him to be kept in safe custody, in such place and manner as to the Court shall seem fit, until the pleasure of the Government can be known thereon : and thereupon the Government may order such person to be kept in strict custody, for such time and in such manner as to the Government shall seem fit.

"§ 4. In all cases in which, before the passing of this Act, any person has been acquitted of any offence, on the ground of insanity, lunacy, idiocy,

or unsoundness of mind, such person may be kept in the same strict custody in which persons may be kept, who shall be hereafter acquitted, for unsoundness of mind.

“ § 5. No person against whom any such special Judgment or verdict shall have been given, shall be entitled to be discharged out of custody, on being restored to soundness of mind, unless by order and at the discretion of Government.

“ § 6. Whenever it shall appear to the Government that any person, imprisoned by the sentence of any Court, is of unsound mind, the Government, by a warrant which shall set forth the grounds of belief that such prisoner is of unsound mind, may order the removal of such prisoner to a Lunatic Asylum, or other fit place of safe custody, there to be kept and treated as the Government shall order; and, when it shall appear to the Government that such prisoner has become of sound mind, the Government by a warrant directed to the person having charge of him, shall remand such prisoner to the prison from which he was removed, if then still liable to be kept in custody, or if not, shall order him to be discharged out of custody.

“ § 7. The word ‘Government’ in this Act shall be taken to mean the Governor, or Governor in Council, or other person or persons administering the Government of the Presidency or place where the trial is had.”

In addition to the powers conferred by this Act, provision has been made by Act 14 and 15, Vict. c 81, for the removal from India of persons charged with offences, and acquitted on the ground of insanity. Section 1 makes it lawful for the person or persons, administering the Government of the Presidency in which such person shall be in custody, to order such person to be removed from India to any part of the United Kingdom, there to abide the Order of Her Majesty concerning his or her safe custody, and to give such directions for enabling such order to be carried into effect as may be deemed proper.

Sect. 4 provides for the recovery from the lunatic of the expences so incurred.

85. Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law; provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

Act of a person incapable of judgment by reason of intoxication caused against his will.

86. In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had

Offence requiring a particular intent or knowledge committed by one who is intoxicated.

if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

The effect of these Sections is to enact that which has always been the common law upon the subject.

Drunkenness, when voluntarily brought on by a person's own act, is no excuse for any crime committed while in that state. It could never be endured that one who has been given reason to guide his conduct, should first deprive himself of its aid, and then plead the incapacity which he had himself brought on, as exculpating him from guilt. (Arch 14). And on this point the Mahometan law is exactly the same. (1 M. Dig. 153, § 312 : 3 M. Dig. 124. § 149. But it would be different if the intoxication were accidental, or if it were produced by the acts of others, to which the prisoner was no party. In such cases, he could not be responsible for the drunkenness, which he had not anticipated, nor for the crimes committed while under its influence, as he was not then a rational being. And the same rule applies, where repeated and voluntary instances of intoxication have brought on a state of permanent madness, or such an affection as *delirium tremens*, during the paroxysms of which the sufferer is no longer a voluntary agent. It would be rather hard to connect a murder perpetrated while in such a state, with a series of faults, committed years ago, and perhaps long since repented of with bitter tears. (Arch. 14.)

87. Nothing, which is not intended to cause death or grievous hurt, and which is not known by the doer to be likely to cause death or grievous hurt, done by consent, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, to any person above eighteen years of age, who has given consent, whether express or implied, to suffer that harm ; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to take the risk of that harm.

Illustration.

A and Z agree to fence with each other for amusement. This agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play ; and if A, while playing fairly, hurts Z, A commits no offence.

88. Nothing, which is not intended to cause

Act not intended to cause death, done by consent in good faith for the benefit of a person.

death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied, to suffer that harm, or to take the risk of that harm.

Illustration.

A, a surgeon, knowing that a particular operation is likely to cause the death of Z, who suffers under a painful complaint, but not intending to cause Z's death, and intending, in good faith, Z's benefit, performs that operation on Z, with Z's consent. A has committed no offence.

89. Nothing, which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to that person : Provided—

Act done in good faith for the benefit of a child or person of unsound mind, by or by consent of guardian.

Provisoes.

First. That this exception shall not extend to the intentional causing of death, or to the attempting to cause death ;

Secondly. That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity ;

Thirdly. That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity ;

Fourthly. That this exception shall not extend

to the abetment of any offence, to the committing of which offence it would not extend.

Illustration.

A, in good faith, for his child's benefit, without his child's consent, has his child cut for the stone by a surgeon, knowing it to be likely that the operation will cause the child's death, but not intending to cause the child's death. A is within the exception, inasmuch as his object was the cure of the child.

90. A consent is not such a consent as is intended by any Section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception—Or

Consent known to be given under fear or misconception.

If the consent is given by a person who, from unsoundness of mind or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or, unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

Consent of a child or person of unsound mind.

91. The exceptions in Sections 87, 88, and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause, or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Acts which are offences independently of harm caused to the person consenting, are not within the exceptions in Sections 87, 88, and 89.

Illustration.

Causing miscarriage (unless caused in good faith for the purpose of saving the life of the woman) is an offence independently of any harm which it may cause or be intended to cause to the woman. Therefore it is not an offence "by reason of such harm;" and the consent of the woman or of her guardian to the causing of such miscarriage does not justify the act.

92. Nothing is an offence by reason of any harm

Act done in good faith for the benefit of a person without consent.

impossible for

Provisoos.

person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit. Provided—

which it may cause to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other

First. That this exception shall not extend to the intentional causing of death, or the attempting to cause death ;

Secondly. That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity ;

Thirdly. That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt, for any purpose other than the preventing of death or hurt ;

Fourthly. That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Illustrations.

(a.) Z is thrown from his horse, and is insensible. A, a surgeon, finds that Z requires to be trepanned. A, not intending Z's death, but in good faith, for Z's benefit, performs the trepan before Z recovers his power of judging for himself. A has committed no offence.

(b.) Z is carried off by a tiger. A fires at the tiger knowing it to be likely that the shot may kill Z, but not intending to kill Z, and in good faith intending Z's benefit, A's ball gives Z a mortal wound. A has committed no offence.

(c.) A, a surgeon, sees a child suffer an accident which is likely to prove fatal unless an operation be immediately performed. There is not time to apply to the child's guardian. A performs the operation in spite of the entreaties of the child, intending, in good faith, the child's benefit. A has committed no offence.

(d.) A is in a house which is on fire, with Z, a child. People below hold out a blanket. A drops the child from the house-top, knowing it

to be likely that the fall may kill the child, but not intending to kill the child, and intending, in good faith, the child's benefit. Here, even if the child is killed by the fall, A has committed no offence.

Explanation. Mere pecuniary benefit is not benefit within the meaning of Sections 88, 89, and 92.

93. No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of that person.

Communication
made in good faith.

Illustration.

A, a surgeon, in good faith, communicates to a patient his opinion that he cannot live. The patient dies in consequence of the shock. A has committed no offence, though he knew it to be likely that the communication might cause the patient's death.

Sections 87—93 applies to cases in which an act likely to result in dangerous consequences is done to a person with his permission or for his benefit. These exceptions are as follows.

1. Acts not intended, or known to be likely to cause death, or grievous hurt, are not offences, when done to a person above eighteen, who has consented to suffer, or run the risk of the harm. (s. 87)

The phrase "grievous hurt" is defined in s. 320. Of course every man is assumed to intend that harm which is the probable result of the weapon he uses; therefore if two persons were to fence with naked swords, though in the most friendly spirit, and one were to kill the other, this would be manslaughter. (1 East. P. C. 268. Foster. 260.) It is to be observed that this exception only applies where the person suffering the harm is above eighteen, and therefore a boxing match between two schoolboys would be criminal. But it would not be criminal for a parent or master to inflict moderate punishment upon a child or apprentice, for this is in itself a lawful act, and comes under the exception in s. 79, (Arch. 544.) Nor is any act, whether with or without consent, an offence, if the harm is of a very slight character. (s. 99.)

The harm done must not be different in kind or degree from what the person has agreed to run the risk of. Therefore if two men were to begin boxing with gloves, one would not be justified in throwing aside the gloves, and striking with his fist. Similarly either of the players in a fencing match would be bound to discontinue the moment the button fell off his foil. On the same principle all the recognized rules of the contest must be observed, for they enter into the estimate of the risk. Where two men are sparring, every blow must be fair. And so it is laid down in East, (1. E. P. C. 269.)

"That in cases of friendly contests with weapons, which though not of a deadly nature, may yet breed danger, there should be due warning

given that each party may start upon equal terms. For if two were engaged to play at cudgels, and the one made a blow at the other, likely to hurt, before he was upon his guard, and without warning, and death ensued, the want of due and friendly warning would make such act amount to manslaughter, but not to murder, because the intent was not malicious."

It may be questioned whether a prize fight between two adults, fairly conducted according to English rules, would be protected under this section. Notwithstanding the apparent ferocity of the contest, it may well be argued, that it is not on the whole likely to cause death or grievous hurt, and certainly the annals of boxing are in favor of such a position, where the combatants are at all matched. On the other hand there is no doubt that the law of England, which countenances such sports as fencing, wrestling, and cudgel-playing, always treated prize-fighting as absolutely illegal, and even extended the criminality to every one present, and countenancing the transaction. (1 Russ. 638.) To a certain extent the greater danger of prize-fighting may be the reason for the difference, but probably the real cause is the publicity with which such contests are attended, and the disorderly crowd which they collect. Accordingly in cases where no death ensued the English practice is to indict the offender for riot and breach of the peace. (Foster. 260. Reg. v. Billingham 2 C. & P. 234. Reg. v. Perkins. 4 C. & P. 537.) This being so, a prize fight would still be criminal under s. 91, independently of any injury intended, or accruing to the parties engaged.

2. No act, not intended to cause death, is to be an offence, if it is done, for the benefit of the person suffering it; first; with the consent of such person, being qualified to give such consent, and giving it of his own free will, and with full knowledge of all the facts. (ss. 88. 90.) Secondly; in the case of persons not capable of giving consent, if the consent of the person lawfully in charge of them is obtained; (s. 89.) or thirdly, even without obtaining consent, where under the circumstances such consent could not possibly be obtained. (s. 92.)

These Sections will have to be very liberally construed, or they may prove most dangerous to Medical practitioners, who must take steps, often of a most dangerous character, upon the spur of the moment.

No act which is intended to cause death will be protected. And therefore a man who killed a woman in order to save her from being lavished, or who supplied another with poison, in order to enable him to escape from death upon the scaffold, would not be within the exception. (See ss. 305 306.) But it is no offence to do an act before the birth of a child, which prevents its being born alive, or causes it to die after its birth, when the act is done in good faith for the purpose of saving the mother's life. (s. 315.)

Mere pecuniary benefit will not be sufficient. I once knew a strange case in which a man who had a life estate in himself, entailed upon his children, with reversion to himself in fee, wanted to raise a loan upon the security of his estate. He had no children, but as it was possible he might have issue, the security was rejected. He hit upon the

strange idea of having himself castrated in order to make possibility of issue extinct ! I need hardly say that the proposal to effect this singular covenant against encumbrances was not sanctioned by his lawyer. The performance of such an operation for such a purpose would of course be illegal under this Code ; first, because the benefit is not such as is contemplated by the act ; secondly, because grievous hurt, such as emasculation is declared to be, can only be done for the purpose of preventing death or other grievous hurt, or for cure of a disease. And therefore a soldier who should aid another in mutilating himself in order to procure his discharge, would also be guilty.

As to the consent which is necessary, I conceive that every proper consent should always be presumed, where the act is in itself proper and beneficial ; as for instance a surgical operation. And this is in accordance with the principle of the law of evidence, that innocence will always be presumed, and therefore where the act is *prima facie* lawful, but may be unlawful by omitting certain precautions, it will be assumed that those precautions have been taken, until the contrary is shown.

“ Thus, where the Plaintiff complained that the defendant who had chartered his ship had put on board an article highly inflammable and dangerous, without giving notice of its nature to the master or others in charge of the ship, whereby the vessel was burnt, he was held bound to prove this negative averment.” (1 Tayl. Ev : § 91.)

Even where no actual consent could possibly have been given, as in the case of a patient who had not been informed of the necessity of any operation, and who was suddenly given chloroform, I have no doubt that the mere fact of his having placed himself under medical care, carried with it an implied consent to do every thing necessary and proper for a cure.

The contrary presumption would arise where the act was in itself apparently unlawful. Therefore a person who had killed or wounded another in a struggle, and who pleaded that it was the accidental result of an amicable contest, entered into by mutual consent, would have to prove his plea. (1 Tayl. Ev. §. 96.)

A more difficult case, but one which might easily happen, would be where the party expressly withheld his consent, though the act were admitted to be for his benefit, and for the sole purpose of saving his life. Such a case might possibly arise, where a timid patient could not nerve himself to undergo an operation, however necessary. Such a case is not provided for by this act, and should it arise, the surgeon, if he wished to be absolutely safe against subsequent charges, would be compelled to leave the sufferer to his fate. Of course if such a charge were brought, and a conviction procured, the punishment could be no more than nominal.

S. 93 seems to be either a singular instance of unnecessary precaution or a curious novelty in criminal law. It could hardly have occurred to any one that a mere communication made to another could

possibly be an offence. The act says that it is not to be an offence if made in good faith. But this implies that it is to be one, if not made in good faith. What offence is it to be? Mere words do not amount to an assault; (s. 351) and libellous words communicated to the person libelled alone, and not to any third party, do not constitute defamation under the old law, (*Phillips v. Jansen* 2 Esp. 624) nor apparently under the present Code. Perhaps the exception may be intended to apply in cases which would otherwise come under the head of criminal trespass, (s. 441) or insult (s. 504.)

94. Except murder and offences against the State, punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence; provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1.—A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits, knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2.—A person seized by a gang of dacoits, and forced, by threat of instant death, to do a thing which is an offence by law, for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

This Section differs slightly from the doctrines of English and Scotch law. By English law, it would appear that a threat of actual death, impending at the moment, would be an excuse for the commission of any crime except murder. In the last named case, Lord Hale lays it down that

“ If a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself than kill the innocent.” (1 Hale 51.)

But actual present and continuing fear of death has been held as an excuse for joining in a riot, for giving supplies to rebels, and assisting them in minor acts of treason, and even for joining and marching with rebels. (1 Russ. 17, 1 Hale 49—51. 139.) But in no case will fear of injury to houses or goods, or apprehension of personal violence short of death, be any excuse whatever; (1 Russ. 17, Reg. v. Tyler. 8 C. & P. 620) nor will even threats of death avail the prisoner, where time permits him to procure the protection of the law. (1 Hale 51.)

By Scotch law it is laid down that,

“The excuse of compulsion will only avail if the prisoner was in such a situation that he could not resist without manifest peril to his life or property.” (Alison. Crim. L. 672.)

Accordingly the plea of compulsion was held sufficient upon indictments for high treason and piracy. In all the cases cited by Mr. Alison the fear was a fear of immediate death, and I am inclined to think that the proposition as to peril to property being sufficient justification for crime is too widely stated.

Under s. 94 the compulsion must be such as is required by English law, and in the cases of murder and waging war against the Queen, (s. 121) even this plea will be insufficient.

95. Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

Act causing slight harm.

This is rather a singular Section. It is plain that the “person of ordinary sense and temper” must be taken from the class to which the actual complainant belongs. Gross language and even personal violence may be so common among members of a particular class of the Community, that such acts may be done by one to another without any idea that any just ground for complaint is given. Similar acts in a different rank of life might necessarily exhibit an intention to insult and injure. The section is valuable as allowing the judge a means of evading the strict letter of the law, whenever merely litigious charges are brought under such Sections as 294, 295, 499, 503 &c.

OF THE RIGHT OF PRIVATE DEFENCE.

96. Nothing is an offence which is done in the exercise of the right of private defence.

Nothing done in private defence is an offence.

97. Every person has a right, subject to the restrictions contained in Section 99 to defend—

Right of private defence of the body and of property.

First. His own body, and the body of any other

person, against any offence affecting the human body ;

Secondly. The property, whether moveable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief, or criminal trespass, or which is an attempt to commit theft, robbery, mischief, or criminal trespass.

98. When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind, or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

Right of private defence against the act of a person of unsound mind, &c.

reason of the youth, the want of maturity of understanding, the unsoundness of mind, or the intoxication of

Illustrations.

(a.) Z, under the influence of madness, attempts to kill A ; Z is guilty of no offence. But A has the same right of private defence which he would have if Z were sane.

(b.) A enters by night a house which he is legally entitled to enter. Z, in good faith, taking A for a house-breaker, attacks A. Here Z, by attacking A under this misconception, commits no offence. But A has the same right of private defence against Z, which he would have if Z were not acting under that misconception.

99. *First.*—There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

Acts against which there is no right of private defence.

against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in

Second.—There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office,

though that direction may not be strictly justifiable by law.

Third.—There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

Fourth.—The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Extent to which the right may be exercised.

Explanation 1.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 2.—A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction ; or unless such person states the authority under which he acts, or, if he has authority in writing, unless he produces such authority, if demanded.

100. The right of private defence of the body extends, under the restrictions mentioned in the last preceding Section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely—

When the right of private defence of the body extends to causing death.

First.—Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault—

Secondly.—Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault—

Thirdly.—An assault with the intention of committing rape—

Fourthly.—An assault with the intention of gratifying unnatural lust—

Fifthly.—An assault with the intention of kidnapping or abducting—

Sixthly.—An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

101. If the offence be not of any of the descriptions enumerated in the last preceding Section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in Section 99, to the voluntary causing to the assailant of any harm other than death.

When such right extends to causing any harm other than death.

102. The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed ; and it continues as long as such apprehension of danger to the body continues.

Commencement and continuance of the right of private defence of the body.

103. The right of private defence of property extends, under the restrictions mentioned in Section 99, to the voluntary causing of death or of any other harm to the wrong-doer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely—

When the right of private defence of property extends to causing death.

First.—Robbery.

Secondly.—House-breaking by night.

Thirdly.—Mischief by fire committed on any building, tent, or vessel, which building, tent, or vessel is used as a human dwelling, or as a place for the custody of property.

Fourthly.—Theft, mischief, or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

104. If the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding Section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in Section 99, to the voluntary causing to the wrong-doer of any harm other than death.

When such right extends to causing any harm other than death.

105. *First.*—The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

Commencement and continuance of the right of private defence of property.

Second.—The right of private defence of property against theft continues till the offender has effected his retreat with the property, or the assistance of the public authorities is obtained, or the property has been recovered.

Third.—The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint, or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

Fourth.—The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

Fifth.—The right of private defence of property against house-breaking by night, continues as long as the house-trespass which has been begun by such house-breaking continues.

106. If, in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

Right of private defence against a deadly assault when there is risk of harm to an innocent person.

Illustration.

A is attacked by a mob who attempt to murder him. He cannot effectually exercise his right of private defence without firing on the mob, and he cannot fire without risk of harming young children who are mingled with the mob. A commits no offence if by so firing he harms any of the children.

The right of private defence extends to defence against injuries either to person or property, whether the injury affects the person or property of him who stands on his defence, or of some one else. (s. 97.)

The principle of the right is, that it shall only be exercised when and so far as is necessary.

The right of private defence will seldom be necessary when the act is done by a public servant, acting in good faith under colour of his office. For in such cases an appeal to superior authority will always redress the grievance, if the act be not strictly justifiable. But sometimes the act may be one which would not admit of redress. For instance if an attempt were made to flog or execute the wrong man. Here resistance would be admissible. (s. 99.)

The expression "public servant" is defined in s. 21. It will be observed however that the exemption does not in terms apply in favor of persons who in good faith assist a public servant, whether he is or is not justified in his conduct. But it is plain that in practice it does so apply. Suppose the case of a constable who calls on the bystanders to help him in arresting a supposed burglar. Here the "act done" is the attempt to arrest, and resistance to this entire act is forbidden, and of course equally forbidden whether the resistance takes the form

of knocking down the constable, or the persons whose assistance is necessary to him. And explanation 2 s. 99, expressly refers to acts done "by direction of a public servant."

Nor does this section of the act at all apply to the case of private persons acting lawfully in discharge of a public duty, or supposing themselves to be lawfully so acting. The question however will always resolve itself into a further question, whether the act of the private person was really lawful or not. For instance a private person may without warrant arrest a man who has actually committed a murder, but he may not arrest him upon suspicion, if that suspicion turns out to be unfounded. (1 Russ. 593.) If then the act is lawful, it cannot be resisted by any species of force; for the lowest species of force must amount to an assault, and an assault cannot be justified on the score of provocation, "by any thing done in obedience to the law." (s. 352.)

It may be argued indeed that even where a private person does an act which he *bonâ fide* believes to be justifiable; as for instance the arrest of an innocent person honestly believed to be a murderer, that the right of private defence does not exist. It may be argued that s. 97 only gives the right of private defence against *offences*, and that by ss. 76 and 79 acts done by a person who under a mistake of fact *bonâ fide* believes himself to be bound or justified by law in doing the act are not offences. But it will be observed that in s. 99 the word used throughout is *act* not *offence*. The cases put in explanations 1 and 2, s. 99 are cases of acts which are not offences. It is plain also that the person who stands upon his defence cannot judge of the motives, but only of the conduct of his assailant. As he is allowed to resist a public officer, whom he does not know to be such, *a fortiori* must he be allowed to resist one who is not a public officer, and who is acting illegally.

Persons lawfully executing legal process should always commence by showing their warrant, if they have any, or if they have none, should plainly announce their object and the authority under which they act. This is necessary both for their own protection, and in justice to those with whom they are dealing. The mere showing by a constable of his staff of office is sufficient, as an intimation of his character. But when a bailiff rushed into a bed-chamber early in the morning, without giving the slightest intimation of his business, and the gentleman, not knowing him, wounded him with his sword in the impulse of the moment, this was held not to be murder, as there was nothing to show the prisoner that the deceased was acting by authority of law. (Arch. 533.)

The right of voluntarily causing death in self-defence is only granted in the cases named in Sections 100 and 103. A death is said to be voluntarily caused, when it is actually intended, or when such a weapon is used as would necessarily or naturally produce death. It would be no justification for a man who shot another through the head, or ran him through the body, to say that he did not intend to cause his death. And so, where a park-keeper, having found a

boy stealing wood, tied him to a horse's tail, and dragged him along the park, and the boy died of the injuries he received this was held to be murder. (Arch. 523.) So in one case where the prisoner struck the deceased with an iron bar, and in another where he stamped upon his belly, so that each of the sufferers died; these were justly held to be murders; because the correction being excessive, and such as could not but proceed from a bad heart, it was equivalent to a deliberate act of killing. (Arch. 524.)

Where the defence is that the party was about to commit such a crime as would justify his death, this must be proved; not indeed so as to establish the fact conclusively, but so as to prove that the party had such grounds for supposing violence was intended, as would warrant a rational man in so acting. Where the prisoner was in possession of a room at a tavern, and several persons insisted on having it, and turning him out, which he refused to submit to, whereupon they drew their swords upon him and his companions, and he then drew his sword, and killed one of them; this was held to be justifiable homicide; not that he would have been authorized to act so, in maintaining his possession of the room, which under those circumstances might fairly be questioned;—but because the facts rendered it apparently necessary in self-defence. (1 Russ. 669.) Where, however, a servant set to watch in his master's garden at night, shot a person whom he saw going into the hen-roost, it was decided that he was not justified in so doing, unless he had fair grounds to believe his own life to be in actual danger.

Even in cases where the nature of the crime which is committed or contemplated would justify the voluntary infliction of death, such an act would be unlawful if the crime could be prevented by milder means. (s. 99. cl. 4.)

Accordingly, in Bengal, the slaying of a robber after he had been taken into safe custody was held to be wilful murder. (1 M. Dig. 182, § 577.) And so, in Bombay,

“The prisoner killed with a sword a thief he found at night stealing his chillies in a field. Held by the S. F. U. that this was not a case of justifiable homicide, but of culpable homicide; it being proved that the prisoner's own life was not in danger, that the deceased offered no resistance, and did not even attempt to escape, and that the prisoner might have apprehended the deceased without resorting to extreme means, which the circumstances of the case did not warrant.” (3 M. Dig. 119, § 109.)

The right of defence begins when a reasonable apprehension of danger commences, (ss. 102, 105) that is, when there is a reasonable apprehension of such danger as would justify the particular species of retaliation employed. A man who is attacked by another who wears a sword, is not justified in killing him on the chance that he may use the weapon, but if he sees him about to draw it, it is not necessary to wait till he does draw it. So a man who hears a burglar busy opening the lock of the house door, may fire at him before he gets in. But he would not be justified in firing at a man whom he saw prowling about his compound at night, unless he had reasonable ground

to suppose that the party was about to force his way into the house.

The right of defence ends with the necessity for it. Where the injury is to the person, the right ceases with the apprehension of danger; (s. 102) that is, as I said before, with the apprehension of such danger as would justify the particular form of violence employed in self-defence. Where a man is attacked by another with a sword, he is as we have seen, justified in killing him. But if the sword is broken, or the assailant is disarmed, so that all apprehension of serious harm is over, the party attacked would be committing murder or manslaughter at the least, if he were still to proceed to the death of his opponent. But a man who is assaulted is not bound to modulate his defence, step by step, according to the attack, before there is reason to believe the attack is over. He is entitled to secure his victory, as long as the contest is continued. "He is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if in a conflict between them, he happens to kill, such killing is justifiable." (1 Russ. 667.) And of course, where the assault has once assumed a dangerous form, every allowance should be made for one, who with the instinct of self-preservation strong upon him, pursues his defence a little farther than to a perfectly cool bystander would seem absolutely necessary. The question in such cases will be, not whether there was an actually continuing danger, but whether there was a reasonable apprehension of such danger.

The right of defence against injuries to property is governed by the same principle, viz. the continuance of an injury which may be prevented. (s. 105.) Therefore resistance, within the justifiable limits, may be continued so long as the wrongful act is going on. But when the robber, for instance, has made his escape, the principle of self-defence would not extend to killing him if met with on a subsequent day. If however the property were found in his possession, the right of defence would revive for the purpose of its recovery. It by no means follows however that the right would revive to the same extent as it formerly existed, at the commission of the original offence. For instance, if a house-breaker is found carrying away property at night, he may be killed. But if he is met with next day in possession of the same property, it would be unlawful to kill him, as the house breaking has come to an end. Only such violence is lawful as would be justifiable against a person who has stolen property without intimidation, and if he resists by means which create no apprehension of death or grievous hurt, he cannot be killed, by virtue of anything contained in these sections. This is the ground of the distinction drawn in explanations 2 and 3 between theft and robbery. In the former case the right of defence appears to last longer than it does in the latter. What is meant is, that the right of defence against robbery, *as such*, only lasts as long as the robbery. While the fear of death, hurt, or wrongful restraint, which causes theft to grow into robbery, (s. 390) continues, the offender may be killed. But when he takes to his heels with the booty, the

robbery is over, and the right of defence is reduced to what would have been admissible against a pick-pocket. This seems, as a mere matter of public policy, to be a grave error, and is certainly opposed to English law which would allow a man to fire upon a highwayman while he was galloping away. A similar remark applies to explanation 5. The right of defence against house-breaking as such, only lasts so long as the house trespass continues, that is, (s. 442) so long as the criminal is within the building. It would appear that if he died of a shot fired at him after he had effected his escape from the house, this would be an unlawful killing, though if he did not die, but was maimed for life, it would be all right. (s. 104.)

Death caused by the exercise of the right of private defence of property or person, in good faith, but to an extent not warranted by the law, is not murder, but culpable homicide. (s. 300. Exception 2.)

It will be observed that the above sections refer to the right of private defence only, not to another right which frequently arises on the commission of crime, viz., the right to arrest. This rests upon a completely different ground, viz. upon considerations of public policy.

Resistance to a legal arrest will always justify the death of the party resisting, where the authority of the law can be maintained in no other way.

“So that in all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force by force, and need not give back; and if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable.” (1 Russ. 665.)

In such cases the party trying to effect the arrest, is not required to stand on his defence. He is bound to advance and perform his duty, at all hazard to himself, and therefore is entitled to protect himself so far as may be necessary.

“But in judging of the degree of resistance which shall justify the assumption of deadly weapons, the rule is, that none is sufficient which does not give the officer reason to believe that his life shall come to be in hazard if he shall persist, the execution of his warrant. The fear of a wrestling bout, or even of a beating or bruising, is not a relevant defence, nor indeed any thing short of a preparation of a deadly weapon against the officer, or of such an overpowering force as plainly indicates that, but with the peril of his life, he cannot advance and discharge his duty. But, on the other hand, it is equally clear, that if the officer shall hastily, and without any sufficient cause, make use of deadly weapons to enforce his warrant, and death shall ensue, this crime will not be construed any thing less than murder. This will be more especially the case, if there be any appearance of premeditation or malice on the officer's part, or reason to believe that he has made use of his office, and his commission, to give a colour to, and obtain impunity for private vengeance.” (Alison. Crim. L. 29.)

And the same necessary violence, which may be employed by an officer in making an arrest will be justifiable on the part of gaolers, or others, resisting a forcible attempt to escape from their custody. (Arch. 534.)

Precisely the same protection is extended to private persons, aiding public officers, or effecting an arrest, of their own accord, under circumstances which justify them in so doing.

“In order to justify an officer or private person in these cases it is necessary that they should, at the time, be in the act of legally executing a duty imposed upon them by law, and under such circumstances, that if the officer or private person were killed, it would have been murder. For if the circumstances of the case were such, that it would have been manslaughter only to kill the officer or private person, it will be manslaughter at least in the officer or private person to kill the party resisting.” (Arch. 534.)

The rule which always allows a person legally executing an arrest, to proceed even to death, if resisted, does not apply with the same universality where the party, instead of resisting, merely flies to avoid arrest. There the course to be pursued by the officer depends on the nature of the proceeding.

“If the offence with which the man was charged were a treason or felony, or a dangerous wound given, and he flies, and cannot otherwise be apprehended, the homicide is justifiable; but if charged with a breach of the peace, or other misdemeanour only, or if the arrest were intended in a civil suit, the killing in these cases will be murder; unless, indeed, the homicide were occasioned by means not likely or intended to kill, such as tripping up his heels, giving him a blow of an ordinary cudgel, or other weapon not likely to kill, or the like; in which case the homicide, at most, would be manslaughter only.” (Arch. 534.)

In such a case, I conceive the question for the Court would be; whether the means employed to stop the fugitive, were such as an ordinarily prudent man would make use of, who had no intention of doing any serious injury. Suppose a peon, who was after a runaway debtor, were to run him through the back with his sword, this would be clearly murder. If he struck him a blow on the head with his staff, from which in the great majority of cases no serious injury would arise, this would be only manslaughter; but if he tripped up his heels, and the man pitched on a stone, and died of the concussion, this would be merely homicide by misadventure, as the act was perfectly lawful in itself, and the result could not have been foreseen.

The Scotch law is even stricter upon this point, and only justifies the killing of a runaway criminal in cases where the charge against him is a capital offence. As Mr. Alison observes, (Crim. L. 37.)

“Certainly nothing can be found in the consideration of public interest or state necessity, urged on the other side, in such a case, to counterbalance the consideration that the officer has here taken upon himself to kill a person suspected of an offence, for which, if convicted, the law would have inflicted a milder punishment. But this is to be observed, on the other side, that in the case of an atrocious assault bordering on death, or with deadly weapons, and where the future consequences of the wound are uncertain, the officers or their assailants are clothed with nearly the same privilege as if death had actually ensued.”

In India, where the ultimate escape of a known criminal is next to impossible, the rule of Scotch Law seems to me the safer rule to follow.

CHAPTER V.

OF ABETMENT.

Abetment of a thing. 107. A person abets the doing of a thing, who—

First.—Instigates any person to do that thing ; or,

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing ; or,

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration.

A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C. is not Z, wilfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does any thing in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act.

108. A person abets an offence who abets either the commission of an offence, or the commission of an act, which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Abettor.

Explanation 1.—The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

Explanation 2.—To constitute the offence of abetment, it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

Illustrations.

(a) A instigates B to murder C. B refuses to do so. A is guilty of abetting B to commit murder.

(b) A instigates B to murder D. B in pursuance of the instigation stabs D. D recovers from the wound. A is guilty of instigating B to commit murder.

Explanation 3.—It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

Illustrations.

(a) A, with a guilty intention, abets a child or a lunatic to commit an act which would be an offence if committed by a person capable by law of committing an offence, and having the same intention as A. Here A, whether the act be committed or not, is guilty of abetting an offence.

(b) A, with the intention of murdering Z, instigates B, a child under seven years of age, to do an act which causes Z's death. B, in consequence of the abetment, does the act, and thereby causes Z's death. Here, though B was not capable by law of committing an offence, A is liable to be punished in the same manner as if B had been capable by law of committing an offence, and had committed murder, and he is therefore subject to the punishment of death.

(c) A instigates B to set fire to a dwelling-house. B, in consequence of the unsoundness of his mind, being incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law, sets fire to the house in consequence of A's instigation. B has committed no offence, but A is guilty of abetting the offence of setting fire to a dwelling-house, and is liable to the punishment provided for that offence.

(d) A, intending to cause a theft to be committed, instigates B to take property belonging to Z out of Z's possession. A induces B to believe that the property belongs to A. B takes the property out of Z's possession, in good faith believing it to be A's property. B, acting under this misconception, does not take dishonestly, and therefore does not commit theft. But A is guilty of abetting theft, and is liable to the same punishment as if B had committed theft.

Explanation 4.—The abetment of an offence be-

ing an offence, the abetment of such an abetment is also an offence.

Illustration.

A instigates B to instigate C to murder Z. B accordingly instigates C to murder Z, and C commits that offence in consequence of B's instigation. B is liable to be punished for his offence with the punishment for murder; and as A instigated B to commit the offence, A is also liable to the same punishment.

Explanation 5.—It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engage in the conspiracy in pursuance of which the offence is committed.

Illustration.

A concerts with B a plan for poisoning Z. It is agreed that A shall administer the poison. B then explains the plan to C, mentioning that a third person is to administer the poison, but without mentioning A's name. C agrees to procure the poison, and procures and delivers it to B for the purpose of its being used in the manner explained. A administers the poison; Z dies in consequence. Here, though A and C have not conspired together, yet C has been engaged in the conspiracy in pursuance of which Z has been murdered. C has therefore committed the offence defined in this Section, and is liable to the punishment for murder.

109. Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment.

Explanation.—An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of instigation, or in pursuance of the conspiracy, or with the aid which constitutes the abetment.

Illustrations.

(a) A offers a bribe to B, a public servant, as a reward for showing A some favor in the exercise of B's official functions. B accepts the bribe. A has abetted the offence defined in Section 161.

(b) A instigates B to give false evidence. B, in consequence of the

instigation, commits that offence. A is guilty of abetting that offence, and is liable to the same punishment as B.

(c) A and B conspire to poison Z. A, in pursuance of the conspiracy, procures the poison and delivers it to B in order that he may administer it to Z. B, in pursuance of the conspiracy, administers the poison to Z in A's absence and thereby causes Z's death. Here B is guilty of murder. A is guilty of abetting that offence by conspiracy, and is liable to the punishment for murder.

110. Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

111. When an act is abetted and a different act is done, the abettor is liable for the act done, in the same manner and to the same extent as if he had directly abetted it ; provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.

Punishment of abetment if the person abetted does the act with a different intention from that of the abettor.

Liability of abettor when one act is abetted and a different act is done.

Proviso.

Illustrations.

(a) A instigates a child to put poison into the food of Z, and gives him poison for that purpose. The child, in consequence of the instigation, by mistake puts the poison into the food of Y, which is by the side of that of Z. Here, if the child was acting under the influence of A's instigation, and the act done was under the circumstances a probable consequence of the abetment, A is liable in the same manner, and to the same extent, as if he had instigated the child to put the poison into the food of Y.

(b) A instigates B to burn Z's house. B sets fire to the house, and at the same time commits theft of property there. A, though guilty of abetting the burning of the house, is not guilty of abetting the theft ; for the theft was a distinct act, and not a probable consequence of the burning.

(c) A instigates B and C to break into an inhabited house at midnight for the purpose of robbery and provides them with arms for that purpose. B and C break into the house, and being resisted by Z, one of the inmates, murder Z. Here, if that murder was the probable con-

sequence of the abetment, A is liable to the punishment provided for murder.

112. If the act for which the abettor is liable under the last preceding Section is committed in addition to the act abetted, and constitutes a distinct offence, the abettor is liable to punishment for each of the offences.

Abettor when liable to cumulative punishment for act abetted and for act done.

Illustration.

A instigates B to resist by force a distress made by a public servant. B, in consequence, resists that distress. In offering the resistance, B voluntarily causes grievous hurt to the officer executing the distress. As B has committed both the offence of resisting the distress, and the offence of voluntarily causing grievous hurt, B is liable to punishment for both these offences; and if A knew that B was likely voluntarily to cause grievous hurt in resisting the distress, A will also be liable to punishment for each of the offences.

113. When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment causes a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.

Liability of abettor for an effect caused by the act abetted different from that intended by the abettor.

Illustration.

A instigates B to cause grievous hurt to Z. B, in consequence of the instigation, causes grievous hurt to Z. Z dies in consequence. Here, if A knew that the grievous hurt abetted was likely to cause death, A is liable to be punished with the punishment provided for murder.

114. Whenever any person who, if absent, would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.

Abettor, present when offence is committed.

115. Whoever abets the commission of an offence

Abetment of an offence punishable with death or transportation for life, if the offence be not committed in consequence of the abetment.

a term which

If an act which causes harm be done in consequence of the abetment.

abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

punishable with death or transportation for life, shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if any act for which the abettor is liable in consequence of the abetment, and which causes hurt to any person, is done, the abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

Illustration.

A instigates B to murder Z. The offence is not committed. If B had murdered Z he would have been subject to the punishment of death or transportation for life. Therefore A is liable to imprisonment for a term which may extend to seven years, and also to a fine; and if any hurt be done to Z in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and to fine.

116. Whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence, for a term which may extend to one-fourth part of the longest term provided for that offence, or with such fine as is provided for that offence, or with both; and if the abettor or the person abetted is a public servant, whose duty it is to prevent the offence, of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of

Abetment of an offence punishable with imprisonment, if the offence be not committed in consequence of the abetment.

vided for that offence, for a term which may extend to one-fourth part of the longest term provided for that offence, or with such fine as is provided for that offence, or with both; and if the abettor or the person abetted is a public servant, whose duty it is to prevent the offence.

If the abettor or the person abetted be a public servant whose duty it is to prevent the offence.

of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of

imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence, for a term which may extend to one-fourth part of the longest term provided for that offence, or with such fine as is provided for that offence, or with both; and if the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of

the longest term provided for that offence, or with such fine as is provided for the offence or with both.

Illustrations.

(a) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B refuses to accept the bribe, A is punishable under this Section.

(b) A instigates B to give false evidence. Here, if B does not give false evidence, A has nevertheless committed the offence defined in this Section, and is punishable accordingly.

(c) A, police officer, whose duty it is to prevent robbery, abets the commission of robbery. Here, though the robbery be not committed, A is liable to one-half of the longest term of imprisonment provided for that offence, and also to fine.

(d) B abets the commission of a robbery by A, a police officer, whose duty it is to prevent that offence. Here, though the robbery be not committed, B is liable to one-half of the longest term of imprisonment provided for the offence of robbery, and also to fine.

117. Whoever abets the commission of an offence by the public generally, or by any number or class of persons exceeding ten, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Abetting the commission of an offence by the public, or by more than 10 persons.

Illustration.

A affixes in a public place a placard, instigating a sect consisting of more than ten members, to meet at a certain time and place for the purpose of attacking the members of an adverse sect while engaged in a procession. A has committed the offence defined in this Section.

The English law used to divide Criminals, into four classes, according to the manner in which they were connected with the act. They were either, principals in the first or second degree, or accessories before or after the fact.

A principal in the first degree is defined to be, one who, either actually or constructively, is the immediate perpetrator of the crime. (Arch. 4.)

A principal in the second degree is, one who is present, aiding and abetting, at the commission of the fact. (Ibid.)

An accessory before the fact is he who, being absent at the time of the felony committed, doth yet procure, council, command, or abet another to commit a felony. (Arch. 71.)

An accessory after the fact is one, who knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. (Arch. 10.)

The three first classes are included under the general term abettor, or defined by (ss. 107, 108.) The person pointed to in s. 108. Exp: 3, would have been termed a principal in the first degree. (See Reg. v. Butcher 28 L. J. M. C. 14.) A principal in the second degree would come under clause 2 of s. 107, and an accessory before the fact under clause 1. There is nothing in this chapter which applies to accessories after the fact. All of the sections refer to something done prior to, or at the time of the commission of the act, not to assistance or concealment rendered after the crime is accomplished. This is treated of under the head "Harbouring" which will be found in ss. 130, 136, 212, 216.

A person is said to instigate another to an act, when he actively suggests and stimulates him to the act, by any means or language, direct or indirect, whether it take the form of express solicitation or of hints, insinuation, or encouragement. (Arch. 8.) But a mere acquiescence or permission does not amount to an instigation.

"As if A says he will kill J. S. and B says you may do your pleasure for me, this makes not B accessory." (1 Hale 616.)

There seems at first to be some contradiction between clause 2 of s. 107, and ss. 115 and 116. The former seems to imply that some abetments are only offences if something follows upon them; the latter that an abetment is an independent crime, irrespective of ulterior results. I conceive that the legislature contemplated two sorts of abetment, active and inactive. An active abetment, such as instigation, is in itself punishable, though nothing comes of it. But an inactive abetment, as where a person consents to take part in a conspiracy pressed upon him by others, is only a crime where some overt-act is done in consequence.

By English law, it is laid down that, if

"A commands B to kill C, but before the execution thereof A repents, and countermands B, and yet B proceeds in the execution thereof, A is not accessory, for his consent continues not, and he gave timely countermand to B. But if A had repented, yet if B had not been actually countermanded before the fact committed, A had been accessory." (1 Hale 618, 2 Hawk P. C. 442.)

The doctrine is contrary to the general principle of English law, which will not suffer a party who has once committed a crime to purge it by subsequent acts, as for instance, in the case of larceny, even by restitution. (Arch. 274.) No such exception is hinted at in the Code, and I conceive the principle would be too dangerous in its application to render its introduction desirable.

What is meant by the phrase "illegal omission," which is mentioned in s. 107. cl. 3, as one of the ways by which a person may abet an act? By English law a man does not become an accessory by mere non-feasance, as for instance withholding assistance which he had it in his power to give; concealment of an intended crime, of which he has information. (Arch. 8.) I do not imagine that the framers of the Code intended to alter this rule. It seems to me that

the "omission" must be one which has an active effect in bringing about the result; that it must be one of the chain of facts by which the crime is accomplished, and that it will not be sufficient if it is merely an omission to do something which might prevent the crime. For instance if a servant were intentionally to leave a door unlocked, in order to facilitate the entrance of a burglar; if a nurse were intentionally to refrain from giving a sick man his medicine, in order to hasten his death; there would be illegal omissions by which the crimes were aided. The mere passive assistance afforded by concealment of facts which might be disclosed, is rendered punishable by ss. 118, 119 and 176.

These remarks apply with still greater force to s. 107 cl. 3, Exp. 1, where the "wilful concealment" which amounts to abetting must be of a material fact, which the party is bound to disclose, by which something is voluntarily caused or procured. The latter words point clearly to an active, and not merely a passive part in the result arrived at. For instance a witness at a trial who voluntarily concealed a material fact, in pursuance of a conspiracy to get an innocent man executed, (See ss. 194, 195,) would be an abettor under this Section. Accordingly in England the balance of authority seems to be in favour of the position that giving false evidence against an innocent man to procure his execution would be murder. (1 Russ. 494, notes *g.* and *h.*) In Scotland however it is said that such a crime could only be punished as perjury or conspiracy. (Alison Crim. L. 73.)

Three different states of facts may arise after an abetment. First, no offence may be committed. In this case the offender is punishable under ss. 115, and 116 for the mere attempt to cause crime. Secondly, the very act at which the abetment aims may be committed, and will be punishable under ss. 109, and 110. Lastly, some act different, but naturally flowing from the act abetted, may be perpetrated, in which case the instigator will fall under the penalties of ss. 111—113.

S. 113 may lead to dangerous laxity, unless the proper interpretation is put upon the concluding proviso. The law assumes that a man knows and contemplates the natural result of his acts, and will not permit him to escape the consequence of his acts by merely pleading ignorance. Such ignorance can at most amount to recklessness or indifference, which is no excuse. Take for instance the illustration in the text. If the grievous hurt instigated by A were the maiming of L, under the effects of which he died, no Court of Justice could allow him to plead ignorance of this probability as rendering his offence less than murder. (Arch. 522. Alison Crim. L. 3.) As Lord Justice Clerk laid down the law in one case in Scotland, (Alison Crim. L. 4.)

"This was an instance of absolute recklessness and utter indifference about the life of the sufferer; and the law knows no difference between the guilt of such a case, and that of an intention to destroy."

118. Whoever, intending to facilitate or knowing

Concealing a design to commit an offence punishable with death or transportation for life—

any act or illegal omission,

If the offence be committed.

If the offence be not committed.

it to be likely that he will thereby facilitate the commission of an offence punishable with death or transportation for life, voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design shall, if that offence be committed, be punished with imprisonment of either description for a term which may extend to seven years, or if the offence be not committed, with imprisonment of either description for a term which may extend to three years : and in either case shall also be liable to fine.

Illustration.

A knowing that dacoity is about to be committed at B, falsely informs the Magistrate that a dacoity is about to be committed at C, a place in an opposite direction, and thereby misleads the Magistrate with intent to facilitate the commission of the offence. The dacoity is committed at B in pursuance of the design. A is punishable under this Section.

119. Whoever, being a public servant, intending

A public servant concealing a design to commit an offence which it is his duty to prevent—

If the offence be committed.

If the offence be punishable with death, &c.

If the offence be not committed.

to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence, the commission of which it is his duty as such public servant to prevent, voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design, shall, if the offence be committed, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of such imprisonment, or with such fine as is provided for that offence, or with both ; or if the offence be punishable with death or transportation for life, with imprisonment of either description for a term which may extend to ten years ; or, if the offence be

not committed, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-fourth part of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

Illustration.

A, an officer of police, being legally bound to give information of all designs to commit robbery which may come to his knowledge, and knowing that B designs to commit robbery, omits to give such information, with intent to facilitate the commission of that offence. Here A has by an illegal omission concealed the existence of B's design, and is liable to punishment according to the provision of this Section.

120. Whoever intending to facilitate or knowing it to be likely that he will thereby facilitate the commission of an offence punishable with imprisonment, voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design, shall, if the offence be committed, be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth, and, if the offence be not committed, to one-eighth of the longest term of such imprisonment, or with such fine as is provided for the offence, or with both.

Concealing a design to commit an offence punishable with imprisonment.

If the offence be committed.

If not committed.

There seems a good deal of confusion in the conception of these two Sections, and with one exception it seems difficult to see the difference between the offence aimed at and that of abetting. The facts stated in the illustration to s. 118 clearly amounted to an act by which the doing of the dacoity was intentionally aided, and therefore came expressly under the definition given in s. 107. Should the offence be punished with 7 years imprisonment under s. 118, or with transportation for life under s. 109? The real force of the Sections will arise in the cases alluded to, (Ante pp. 69-70) under s. 107, where there is no active aid given, but merely passive concealment. These will present no difficulty where there is a positive misstatement, as for instance where a Villager knowing that his neighbour had started off on a Gangrobbery, should give false answers to the Police as to the man's absence from home, the cause of it, the direction he had taken, the fact of his being armed or the like. But what will be the law, where he simply abstains from giving information which is in his

power? This must come under the words "illegal omission." Now according to English law the mere omission to give information is only illegal in the case of treason or felony. This was known by the term *misprision*, and is defined by Lord Hale (vol. 1. 374) as being "when a person knows of a treason or felony, though no party or consentor to it, and doth not reveal it in convenient time." There was no such offence as misprision of a misdemeanour. This distinction is not however maintained in the present Code, which applies to the concealment of all offences, except those which are merely punishable with fine.

It is probable however that the word "illegal" is intended to draw the distinction between cases in which an omission of this nature might be lawful and those in which it might not. It could hardly be contended that a party who hears of an intended robbery is bound to start off to a distance in search of the police, in the heat of the day, or the darkness of night, or to the neglect of pressing business. Nor is a person bound to hurry off to communicate an intended crime, of which he has been informed, but upon evidence which he sees reason to doubt. No definite rule can be laid down, but it is clear that in all such cases the certainty of the information, the amount of belief reposed in it, the emergency of the occasion, and the facility for communicating the design to those who would be able to avert it, must all be taken into consideration. The circumstances must almost be such as to render the party accused an accomplice in the guilt of the principal offenders.

The Code is stricter in its penalties upon public servant, (s. 21) who conceal any offence which it is their duty to prevent. In this case every omission is illegal, and justly so, because every such omission is a direct breach of the duty which they are paid to perform. It must be observed, however, that this Section only applies in reference to offences which it was their "duty as such public servants to prevent." It would be no part of the duty of a revenue officer, or judicial subordinate to prevent a riot, nor of a police constable to see to the accuracy of the village accounts.

CHAPTER VI.

OF OFFENCES AGAINST THE STATE.

121. Whoever wages war against the Queen, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or transportation for life, and shall forfeit all his property.

Illustration.

(a) A joins an insurrection against the Queen. A has committed the offence defined in this Section.

(b) A in India abets an insurrection against the Queen's Government of Ceylon by sending arms to the insurgents. A is guilty of abetting the waging of war against the Queen.

The offence of waging war under s. 121 is the same as that which in the English Statute of Treasons—25 Edw. III. st. 5. c. 2, was styled levying war. No specified number of persons is necessary to constitute the offence; three or four will constitute it as fully as a thousand. (Arch. 598.) Though of course the smallness of the numbers would be most important as a matter of evidence, for the purpose of negating any treasonable design. Nor is it necessary to show that there was any of the usual pageantry of war, such as military weapons, banners or drums, or any regular consultation before the rising. (Foster. 208.) The possession of arms is indeed spoken of as one of the elements in the offence, but this I conceive is also merely a matter of evidence. Numbers sufficiently overwhelming would make arms unnecessary, or ensure their being speedily obtained. Nor is it necessary that any blows should actually be fought. "Listing and marching are sufficient overt-acts, without coming to a battle." (Foster 218.)

The mere fact of an armed assembly meeting and marching, or even fighting will not of itself constitute a waging of war. It must be by some public and premeditated plan, for some public and general purpose. The law upon this point cannot be better laid down than in the words of the Statute of Edw. III, which was declaratory of the Common Law upon the point, as explained by Mr. Justice Foster. His commentary deserves especial comment from the circumstance that it was accepted as being the authoritative exposition of the law, by the present Lord Campbell, when Attorney General, and prosecuting for the Crown in a Case of High Treason. (Frosts case 9 C. & P. 141.)

"The true criterion therefore in all these cases is *Quo animo* did the parties assemble? For if the assembly be upon account of some private quarrel, or to take revenge on particular persons, the Statute of treasons hath already determined that point in favour of the subject. If, saith the statute, any man ride armed openly, or secretly with men of arms against any other to slay or to rob him, or to take and keep him till he make fine for his deliverance, it is not the mind of the King nor his Council, that in such case it shall be judged treason; but it shall be judged felony or trespass according to the law of the land of old time used, and according as the case requireth."

The words of the first clause descriptive of the offence, 'if any man ride armed openly or secretly with men of arms,' did, in the language of those times, mean nothing less than the assembling bodies of men, friends, tenants or dependants, armed and arrayed in a warlike manner in order to effect some purpose or other by dint of numbers and superior strength; and yet these assemblies so armed and arrayed, if drawn together for purposes of a private nature, were not deemed treasonable."

"Though the statute mentioneth only the cases of assembling to kill, rob or imprison, yet these, put as they are by way of example only, will not exclude others which may be brought within the same rule; for the retrospective clause provideth, that if in such case or other like it hath been adjudged. What are the other like cases? All cases of the

like private nature are, I apprehend, within the reason and equity of the act. The case of the Earls of Gloucester and Hereford, and many other cases cited by Hale, some before the statute of treasons, and others after it,—those assemblies, though attended many of them with bloodshed and with the ordinary apparatus of war, were not holden to be treasonable assemblies; for they were not, in construction of law, raised against the King or his Royal Majesty, but for purposes of a private personal nature.”

“Upon the same principle and within the reason and equity of the statute, risings to maintain a private claim of right, or to destroy particular inclosures, or to remove nuisances, which affected or were thought to affect in point of interest the parties assembled for those purposes, or to break prisons in order to release particular persons without any other circumstance of aggravation, have not been holden to amount to levying war within the statute.”

“And upon the same principle and within the same equity of the statute, I think it was very rightly holden by five of the Judges, that a rising of the weavers in and about London to destroy all engine-looms, maulines which enabled those of the trade who made use of them to undersell those who had them not, did not amount to levying war within the statute; though great outrages were committed on that occasion, not only in London but in the adjacent countries, and the magistrates and peace-officers were resisted and affronted.”

“For those judges considered the whole affair merely as a private quarrel between men of the same trade about the use of a particular engine, which those concerned in the rising thought detrimental to them. Five of the judges indeed were of a different opinion; but the Attorney-General thought proper to proceed against the defendants as for a riot only.”

“But every insurrection which in judgment of law is intended against the person of the King, be it to dethrone or imprison him, or to oblige him to alter his measures of Government, or to remove evil counsellors from about him, these risings all amount to levying war within the statute, whether attended with the pomp and circumstances of open war or not; and every conspiracy to levy war for these purposes, though not treason within the clause of levying war, is yet an overt act within the other clause of compassing the King's death. For these purposes cannot be effected by numbers and open force without manifest danger to his person.”

“Insurrections in order to throw down all inclosures, to alter the established law or change religion, to enhance the price of all labour or to open all prisons,—all risings in order to effect these innovations of a public and general concern by an armed force are, in construction of law, high treason, within the clause of levying war: for though they are not levelled at the person of the King, they are against his Royal Majesty; and besides, they have a direct tendency to dissolve all the bonds of Society, and to destroy all property and all government too, by numbers and an armed force. Insurrections likewise for redressing national grievances, or for the expulsion of foreigners in general, or indeed of any single nation living here under the protection of the King, or for the reformation of real or imaginary evils of a public nature and in which the insurgents have no special interest,—risings to effect these ends by force and numbers are, by construction of law, within the clause of levying war: for they are levelled at the King's Crown and Royal Dignity.” (Foster 203—211.)

In a case which is charged as being the offence of waging war, the prisoners are not bound of necessity to show what was the object and meaning of the acts done. The onus rests upon the prosecution not only to make out the facts but the motives which constitute the offence. (Reg. v. Frost 9 C. & P. 129.) These will in general be easily ascertained, since the language and acts of those engaged in the same

common enterprise will all be admissible for the general purpose of showing the objects and character of the assembly. Accordingly in the case of *Reg. v. Hunt* (5. B. & A. 566) where Hunt and others were indicted for unlawfully meeting together for the purpose of exciting disaffection, it was held that resolutions proposed at a former meeting at which he had presided, were admissible as showing the intention of those who assembled at the second meeting, both having avowedly the same object. The meeting in question was attended by large bodies of men who came from a distance, marching in regular military order, and it was held to be admissible evidence of the character and intention of the meeting, to show that within two days of the same, considerable numbers of men were seen training and drilling before day-break, at a place from which one of these bodies had come to the meeting; and that on their discovering the person who saw them, they ill-treated them, and forced one of them to swear never to be a King's man again. Also, that it was admissible evidence for the same purpose to show, that another body of men in their progress to the meeting, in passing the house of the person who had been so ill-treated, exhibited their disapprobation of his conduct by hissing. And inscriptions, and devices on banners and flags, displayed at a meeting were held to be admissible evidence for the same purpose.

Nothing is said in this Code as to the evidence necessary to prove a charge of waging war; and therefore I presume it was intended to leave the law as it was formerly in cases of High Treason. A larger amount of proof was required to establish this crime on account of its greater enormity, and the severity of the punishment which ensued. Accordingly it has long been the English law, that

“There must be two witnesses to prove the treason, both of them to the same overt-act, or one of them to one, and the other of them to another overt-act, of the same treason; unless the defendant shall willingly, without violence, confess the same. And if the jury do not give credit to both witnesses, the defendant shall be acquitted. But one witness is sufficient to prove a collateral fact; as that the defendant is a natural born subject, or the like.” (Arch. 597.)

And so by the Indian Evidence, Act 2 of 1855, s. 28, treason is made an exception to the general rule that the evidence of a single witness is sufficient.

122. Whoever collects men, arms, or ammunition, or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Queen, shall be punished with transportation for life or imprisonment of either description for a term not exceeding ten years, and shall forfeit all his property.

Collecting arms, &c. with the intention of waging war against the Queen.

123. Whoever by any act, or by any illegal omis-

Concealing with intent to facilitate a design to wage war. sion, conceals the existence of a design to wage war against the Queen, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

124. Whoever with the intention of inducing or compelling the Governor-General of India, or the Governor of any Presidency, or a Lieutenant-Governor, or a Member of the Council of the Governor-General of India, or of the Council of any Presidency, to exercise or refrain from exercising in any manner any of the lawful powers of such Governor-General, Governor, Lieutenant-Governor, or Member of Council, assaults, or wrongfully restrains, or attempts wrongfully to restrain, or overawes by means of criminal force or the show of criminal force, or attempts so to overawe, such Governor-General, Governor, Lieutenant-Governor, or Member of Council, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Assaulting Governor-General, Governor, &c. with intent to compel or restrain the exercise of any lawful power.

125. Whoever wages war against the Government of any Asiatic power in alliance or at peace with the Queen, or attempts to wage such war, or abets the waging of such war, shall be punished with transportation for life, to which fine may be added ; or with imprisonment of either description for a term which may extend to seven years, to which fine may be added ; or with fine.

Waging war against any Asiatic power in alliance with the Queen.

126. Whoever commits depredation, or makes preparations to commit depredation, on the territories of any power in alli-

Committing depredation on the

territories of any power at peace with the Queen. **ance or at peace with the Queen, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used, or intended to be used, in committing such depredation, or acquired by such depredation.**

127. **Whoever receives any property knowing the same to have been taken in the commission of any of the offences mentioned in Sections 125 and 126, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property so received.**

Receiving property taken by war or depredation mentioned in Sections 125 and 126.

128. **Whoever, being a public servant, and having the custody of any State Prisoner or Prisoner of War, voluntarily allows such prisoner to escape from any place in which such prisoner is confined, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.**

Public servant voluntarily allowing Prisoner of State or War in his custody to escape.

129. **Whoever, being a public servant, and having the custody of any State Prisoner or Prisoner of War, negligently suffers such prisoner to escape from any place of confinement in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.**

Public servant negligently suffering Prisoner of State or War in his custody to escape.

According to English law it would seem that the mere fact of an escape is *prima facie* evidence of negligence in the part of the keeper. For it is his duty to keep the prisoner safely. (Arch. 66.) But this may be negatived on the part of the defendant by showing force, or other circumstances which rebut the presumption. No presumption however can be raised from the mere fact of an escape that it was voluntarily permitted, or that it was knowingly aided or assisted, and ex-

press evidence must be brought to this effect, if any conviction under ss. 128 or 130 is desired.

130. Whoever knowingly aids or assists any State Prisoner or Prisoner of War in escaping from lawful custody, or rescues or attempts to rescue any such prisoner, or harbours or conceals any such prisoner, who has escaped from lawful custody, or offers or attempts to offer any resistance to the re-capture of such prisoner, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Aiding escape of, rescuing or harbouring such prisoner.

Explanation.—A State Prisoner or Prisoner of War who is permitted to be at large on his parole within certain limits in British India, is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.

CHAPTER VII.

OF OFFENCES RELATING TO THE ARMY AND NAVY.

131. Whoever abets the committing of mutiny by an officer, soldier, or sailor in the Army or Navy of the Queen, or attempts to seduce any such officer, soldier, or sailor from his allegiance or his duty, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Abetting mutiny, or attempting to seduce a soldier or sailor from his duty.

132. Whoever abets the committing of mutiny by an officer, soldier, or sailor in the Army or Navy of the Queen, shall, if mutiny be committed in consequence of that abetment, be punished with

Abetment of mutiny, if mutiny is committed in consequence thereof.

death or with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

133. Whoever abets an assault by an officer, soldier, or sailor in the Army or Navy of the Queen, on any superior officer being in the execution of his office, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Abetment of an assault by a soldier or sailor on his superior officer, when in the execution of his office.

134. Whoever abets an assault by an officer, soldier, or sailor in the Army or Navy of the Queen, on any superior officer being in the execution of his office, shall, if such assault be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Abetment of such assault, if the assault is committed.

135. Whoever abets the desertion of any officer, soldier, or sailor in the Army or Navy of the Queen, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Abetment of the desertion of a soldier or sailor.

136. Whoever, except as hereinafter excepted, knowing or having reason to believe that an officer, soldier, or sailor in the Army or Navy of the Queen has deserted, harbours such officer, soldier, or sailor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Harbouring a deserter.

Exception.—This provision does not extend to the case in which the harbour is given by a wife to her husband.

137. The master or person in charge of a mer-

Deserter concealed on board merchant vessel through negligence of master. chant vessel, on board of which any deserter from the Army or Navy of the Queen is concealed, shall, though ignorant of such concealment, be liable to a penalty not exceeding five hundred Rupees, if he might have known of such concealment, but for some neglect of his duty as such master or person in charge, or but for some want of discipline on board of the vessel.

138. Whoever abets what he knows to be an act of insubordination by an officer, soldier, or sailor in the Army or Navy of the Queen, shall, if such act of insubordination be committed in consequence of that abetment, be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Abetment of act of insubordination by a soldier or sailor.

139. No person subject to any Articles of War for the Army or Navy of the Queen, or for any part of such Army or Navy, is subject to punishment under this Code for any of the offences defined in this Chapter.

Persons subject to Articles of War not punishable under this Code.

140. Whoever, not being a soldier in the Military or Naval service of the Queen, wears any garb, or carries any token resembling any garb or token used by such a soldier, with the intention that it may be believed that he is such a soldier, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred Rupees, or with both.

Wearing the dress of a soldier.

CHAPTER VIII.

OF OFFENCES AGAINST THE PUBLIC
TRANQUILLITY.

141. An assembly of five or more persons is designated an "unlawful assembly," if the common object of the persons composing that assembly, is—

Unlawful assembly.

First. To overawe by criminal force, or show of criminal force, the Legislative or Executive Government of India, or the Government of any Presidency, or any Lieutenant-Governor, or any Public Servant in the exercise of the lawful power of such Public Servant ; or

Second. To resist the execution of any law, or of any legal process ; or

Third. To commit any mischief or criminal trespass, or other offence ; or

Fourth. By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right ; or

Fifth. By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

142. Whoever, being aware of facts which render

Being a member of an unlawful assembly. any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

143. Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Punishment.

144. Whoever, being armed with any deadly weapon, or with any thing which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Joining an unlawful assembly armed with any deadly weapon.

145. Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Joining or continuing in an unlawful assembly, knowing that it has been commanded to disperse.

146. Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

Force used by one member in prosecution of common object.

147. Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Punishment for rioting.

148. Whoever is guilty of rioting, being armed with a deadly weapon, or with any thing which, used as a weapon of offence, is likely to cause death, shall

Rioting, armed with a deadly weapon.

be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

149. If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

Every member of an unlawful assembly to be deemed guilty of any offence committed in prosecution of common object.

150. Whoever hires or engages or employs, or promotes or connives at the hiring, engagement, or employment of any person to join or become a member of any unlawful assembly, shall be punishable as a member of such unlawful assembly, and for any offence which may be committed by any such person as a member of such unlawful assembly, in pursuance of such hiring, engagement, or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.

Hiring, or conniving at hiring of persons to join an unlawful assembly.

151. Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse.

Explanation—If the assembly is an unlawful assembly within the meaning of Section 141 the offender will be punishable under Section 145.

152. Whoever assaults or threatens to assault; or

Assaulting or obstructing public servant when suppressing riot, &c.

obstructs or attempts to obstruct, any public servant in the discharge of his duty as such public servant in endeavouring to disperse an unlawful assembly or to suppress a riot or affray, or uses, or threatens or attempts to use criminal force to such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

153. Whoever maliciously or wantonly, by doing any thing which is illegal, gives provocation to any person, intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both ; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Wantonly giving provocation, with intent to cause riot.

If rioting be committed.

If not committed.

154. Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held or such riot is committed, and any person having or claiming an interest in such land, shall be punishable with fine not exceeding one thousand Rupees, if he or his agent or manager, knowing that such offence is being or has been committed or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest Police station, and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it, and

Owner or occupier of land on which an unlawful assembly is held.

in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

155. Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he or his agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

156. Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes place, or who claims any interest in such land or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, the agent or manager of such person shall be punishable with fine, if such agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place, and for suppressing and dispersing the same.

157. Whoever harbours, receives, or assembles in any house or premises in his occupation or charge, or under his control, any persons, knowing that such persons have been hired, engaged, or employed, or are about

Liability of person for whose benefit a riot is committed.

Liability of agent of owner or occupier for whose benefit a riot is committed.

Harbouring persons hired for an unlawful assembly.

to be hired, engaged, or employed, to join or become members of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

158. Whoever is engaged or hired, or offers or attempts to be hired or engaged, to do or assist in doing any of the acts specified in Section 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both; and whoever, being so engaged or hired as aforesaid, goes armed, or engages or offers to go armed, with any deadly weapon or with any thing which used as a weapon of offence is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Being hired to take part in an unlawful assembly or riot.

Or to go armed.

159. When two or more persons, by fighting, in a public place, disturb the public peace, they are said to "commit an affray."

160. Whoever commits an affray shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred Rupees, or with both.

Punishment for committing affray.

Unlawful assemblies, as defined in s. 141, may either aim at the accomplishment of public or of private ends. Where the object in view is of a public character, the difference between such an assembly and a waging of war under s. 121 may be a very narrow one. Whatever amounts to a threat of force, to be employed at some indefinite future period, will, as I understand the Section, be an unlawful assembly. But if the object is to carry out the design of the assembly by an immediate exercise of force, this would amount to a waging of war. Suppose for instance, that during the progress of some obnoxious scheme of taxation through the Legislative Council, crowds were to assemble every day to hoot the members supposed to be in favour of it, or monster processions were to parade the streets as an exhibition of the numbers of those opposed to the plan, this would constitute an unlawful assembly. But if the procession were to force their way into

the Council itself, for the purpose of then and there compelling the abandonment of the measure, this would be an actual waging of war. And so it was laid down by Lord Mansfield in the case of the Gordon riots, where he stated to the jury,

“That it was the unanimous opinion of the Court, that an attempt, by intimidation and violence to force the repeal of a law, was a levying war against the king, and high treason.” (Reg. v. Gordon, Doug. 592.)

It must not however be supposed that mere numbers will make an assembly unlawful, where the object is to procure some public result. The question will always be, what are the means by which it is proposed that the object should be brought about. Public meetings for the purpose of eliciting, declaring, or altering public opinion upon any State matter are perfectly lawful. Where such meetings are for the purpose of petitioning, they have the additional sanction of the Bill of Rights (1 Win. & M. st. 2 c. 2) in which it is expressly laid down,

“That it is the right of the subjects to petition the king, and that all commitments and prosecutions for such petitioning are illegal.”

But where such meetings, under the cloak of public discussion or petitioning, are really used and intended as exhibitions of physical force, for the purpose of overawing and intimidating those whose conduct they canvass, they will be illegal. The series of monster meetings which were convened by O’Connell throughout Ireland in 1844 for the purpose of carrying the Repeal of the Union may serve as an instance.

A very common instance of unlawful assembly is that of tumultuous meetings, which from the private character of their objects cannot rise to a waging war. For instance a caste procession, marching in an insulting and defiant manner through streets inhabited by another caste, so as to provoke angry passions, or excite to a breach of the peace. And so, in times of scarcity, assemblies held to discuss the conduct of the merchants in demanding high prices, or of the Government in refusing remissions of revenue, might become unlawful, not from the mere opinions expressed, but from their tendency to end in violence. Accordingly it has been ruled that

“Any meeting, assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighbourhood, is an unlawful assembly; and in viewing this question, the jury should take into their consideration the way in which the meetings were held, the hour at which they met, and the language used by the persons assembled, and by those who addressed them; and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace, as the alarm must not merely be such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage.” (Arch. 701.)

“All persons who join an assembly of this kind, disregarding its probable effect, and the alarm and consternation which are likely to ensue, and all who give countenance and support to it, are criminal parties.” (Ibid.)

Clause 4. s. 141 applies equally whether the possession is sought

for under colour of title or without it, and whether the right which is asserted is a valid, or an invalid one. The object of the clause is the same as that of the old English Statute, 5 Ric. II. st. 1. c. 7, against forcible entries, and is to prevent breaches of the peace, by compelling every one who asserts rights which may be contested, to do so under the authority of law.

Upon this Statute it has been held, that in order to make an entry forcible,

“ It seems clear that it ought to be accompanied with some circumstances of actual violence or terror; and therefore that an entry which had no other force than such as is implied by the law in every trespass whatsoever, is not within the Statute.” (1 Hawk. 500.)

I conceive that the same principle is expressly pointed to throughout s. 141 by the epithet “ criminal ” qualifying force. It must be force used, or intended to be used, for the purpose of overcoming resistance, by causing fear, injury, or annoyance. (s. 350.) Accordingly Mr. Serjeant Hawkins says, (1 Hawk. 501.)

“ It is to be observed, that wherever a man, either by his behaviour or speech, at the time of his entry, gives those who are in possession of the tenements which he claims, just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible, whether he cause such a terror by carrying with him an unusual number of servants, or by avowing himself in such a manner, as plainly indicates a design to back his pretensions by force, or by actually threatening to kill, maim or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance.”

The force or violence which is necessary to render the members of an unlawful assembly guilty of rioting must be some act done “ in prosecution of the common object of such assembly.” (s. 146.) For instance a gathering of ryots to prevent a revenue officer from distraining would be an unlawful assembly under s. 141. cl. 5, and if any one of them were to beat the officer, or rescue the goods seized, this would be a riot for which one of the resisting party would be liable, even though he took no part in such act. And justly so, for the countenance and assistance of those who committed no violence rendered possible the conduct of those who actually committed it. But if a fight were to spring up between two of the persons unlawfully assembled, this would only make them individually responsible, and not convert the assembly into a riot.

Not only the object primarily intended, but every thing which naturally or necessarily follows from the prosecution of that object will be considered to have been contemplated by those who take part in it, and they will be held responsible for it. (s. 149.) And so according to English law ;

“ If several persons combine for an unlawful purpose, or for a purpose to be carried into effect by unlawful means ; particularly if it be carried into effect notwithstanding any opposition that may be offered against it ; and one of them in the prosecution of it, kill a man, it is murder in all who are present, whether they actually aid or abet or not, provided he

death were caused by the act of some one of the party in the course of his endeavours to effect the common object of the assembly. But the act must be the result of the confederacy ; for if several are out for the purpose of committing a felony, and upon alarm and pursuit run different ways, and one of them kill a pursuer to avoid being taken, the others are not to be considered as principals in that offence." (Arch. 800.)

The essence of an affray (s. 159) consists in the publicity of the place and the disturbance of the public peace ; and therefore a quarrel among several persons in a private room, where there is no one to be injured but themselves, will only amount to an assault and battery by each. (1 Russ. 291.)

" It is no ground for a total remission of sentence that a party engaged in an affray was not the aggressing party ; though the Court in awarding punishment may admit the circumstance to operate in mitigation of punishment." (I. M. Dig. 124, § 633. M. Dig. 105. § 4.)

Just as the opposite state of facts will go in aggravation. (3 M. Dig. 105, §. 3.)

I understand the above dictum only to apply to cases where the party assailed was not forced into the affray in actual self-defence. There are many cases of insult, and even slight personal violence which would not compel a forcible resistance, and if in such a case, retaliation brought on an affray, both would be culpable, though not in equal degrees. But where the affray arose out of a boundary disputes between the villages of K. and A., in which several persons were killed and wounded ; the F. U. held, that as the villagers of A. had in the first instance endeavoured to settle the dispute by treaty, and had *throughout the affray* acted on the defensive, they were entitled to an acquittal. (3 M. Dig. 117, §. 89.)

There is one case in which a party can never justify an affray into which he has been led, and that is, where it has arisen in resistance to a professedly legal process. Accordingly parties have been sentenced where they had resisted a distress, which in one case was lawful, but irregularly levied, and in another was fraudulent from the very first. Because the party always has his remedy in a Court of Justice, and respect for the law requires that that which claims to be done under its authority, should be set aside only by legal means, and submitted to till it is set aside. (1 M. Dig. 123, §. 62, 3 M. Dig. 105, § 2.)

And so it is expressly enacted by s. 99, that the right of private defence does not exist in such cases.

CHAPTER IX.

OF OFFENCES BY OR RELATING TO PUBLIC SERVANTS.

161. Whoever, being or expecting to be a public servant, accepts or obtains, or agrees taking a gratification to accept or attempts to obtain from

tion other than legal remuneration, in respect of an official act.

any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show, in the exercise of his official functions, favor or disfavor to any person, or for rendering or attempting to render any service or disservice to any person, with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Explanations.—“Expecting to be a public servant.” If a person not expecting to be in office obtains a gratification by deceiving others into a belief that he is about to be in office, and that he will then serve them, he may be guilty of cheating, but he is not guilty of the offence defined in this Section.

“Gratification.” The word “gratification” is not restricted to pecuniary gratifications, or to gratifications estimable in money.

“Legal remuneration.” The words “legal remuneration” are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government which he serves to accept.

“A motive or reward for doing.” A person who receives a gratification as a motive for doing what he does not intend to do, or as a reward for doing what he has not done, comes within these words.

Illustrations.

(a) A, a Moonsiff, obtains from Z, a banker, a situation in Z's bank for A's brother, as a reward to A for deciding a cause in favor of Z. A has committed the offence defined in this Section.

(b) A, holding the office of Resident at the Court of a subsidiary

power, accepts a lakh of Rupees from the Minister of that power. It does not appear that A accepted this sum as a motive or reward for doing or forbearing to do any particular official act, or for rendering or attempting to render any particular service to that power with the British Government. But it does appear that A accepted the sum as a motive or reward for generally showing favor in the exercise of his official functions to that power. A has committed the offence defined in this Section.

(c) A, a public servant, induces Z erroneously to believe that A's influence with the Government has obtained a title for Z, and thus induces Z to give A money as a reward for this service. A has committed the offence defined in this Section.

162. Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favor or disfavor to any person, or to render or attempt to render any service or disservice to any person with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

163. Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant show favor or disfavor to any person, or to render or attempt to render any service or disservice to any person with the Legislative or Executive Government of India, or with the Government of any Presidency, or with any Lieutenant-Governor,

Taking a gratification, in order, by corrupt or illegal means, to influence a public servant.

Taking a gratification for the exercise of personal influence with a public servant.

or with any public servant, as such, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Illustration.

An advocate who receives a fee for arguing a case before a Judge ; a person who receives pay for arranging and correcting a memorial addressed to Government, setting forth the services and claims of the memorialist ; a paid agent for a condemned criminal, who lays before the Government statements tending to show that the condemnation was unjust—are not within this Section, inasmuch as they do not exercise or profess to exercise personal influence.

164. Whoever, being a public servant, in respect of whom either of the offences defined in the last two preceding Sections is committed, abets the offence, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for abetment by public servant of the offences above defined.

Illustration.

A is a public servant. B, A's wife, receives a present as a motive for soliciting A to give an office to a particular person. A abets her doing so. B is punishable with imprisonment for a term not exceeding one year, or with fine, or with both. A is punishable with imprisonment for a term which may extend to three years, or with fine, or with both.

165. Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any valuable thing, without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted, or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with simple im-

Public servant obtaining any valuable thing, without consideration, from person concerned in any proceeding or business transacted by such public servant.

prisonment for a term which may extend to two years, or with fine, or with both.

Illustrations.

(a) A, a Collector, hires a house of Z, who has a settlement case pending before him. It is agreed that A shall pay fifty Rupees a month, the house being such that, if the bargain were made in good faith A would be required to pay two hundred Rupees a month. A has obtained a valuable thing from Z without adequate consideration.

(b) A, a Judge, buys of Z, who has a cause pending in A's Court. Government Promissory Notes at a discount, when they are selling in the market at a premium. A has obtained a valuable thing from Z without adequate consideration.

(c) Z's brother is apprehended and taken before A, a Magistrate, on a charge of perjury. A sells to Z shares in a bank at a premium, when they are selling in the market at a discount. Z pays A for the shares accordingly. The money so obtained by A is a valuable thing obtained by him without adequate consideration.

166. Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant intending to cause, or knowing it to be likely that he will, by such disobedience, cause injury to any person, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

Public servant disobeying a direction of the law, with intent to cause injury to any person.

Illustration.

A, being an officer directed by law to take property in execution, in order to satisfy a decree pronounced in Z's favor by a Court of Justice, knowingly disobeys that direction of law, with the knowledge that he is likely thereby to cause injury to Z. A has committed the offence defined in this Section.

167. Whoever, being a public servant, and being, as such public servant, charged with the preparation or translation of any document, frames or translates that document in a manner which he knows or believes to be incorrect, intending thereby to cause, or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Public servant framing an incorrect document with intent to cause injury.

Sections 162 and 163 only apply to cases where the party who

is to exercise corrupt or undue influence, does so for a consideration, obtained from a third person. If he does so without receiving any gratification, to serve his own private interests, or for the benefit of another, whether voluntarily or upon solicitation, no offence will have been committed under these Sections. If guilty at all, he can only be guilty as an abettor. It will follow therefore, that if the act done is not an offence in the public servant, it is no offence in the person who instigates him to it. Hence a person who of his own accord, or without being himself bribed, offers any gratification whatever to a public servant will be punishable as an abettor of the offence in s. 161. So, if being in any way connected with the official functions of a public servant, he induces him to accept any thing for an inadequate consideration, he will have abetted the offence in s. 165. But it is no offence in a public servant to yield to mere personal influence, not accompanied by what is styled in s. 161 a gratification, unless by so doing he transgresses s. 166, or s. 217.

Hence if the friend of a party to a civil suit were by personal influence to induce a Moonsiff to give judgment against the defendant contrary to his own conviction, the Moonsiff would be guilty under s. 165, and the party who persuaded him would be guilty as an abettor. So if the successful solicitations were addressed to a Sessions Judge, who acquitted a prisoner in consequence, the Judge would be guilty under s. 217, and the person who exercised influence as an abettor. But the exercise of, or yielding to personal influence in the disposal of patronage, the conferring of rewards for services, the granting of contracts or the like, would be no offence in either of the parties concerned. If however the relative were to resort to threats instead of entreaties, this would be an offence under s. 189.

The personal influence referred to in s. 163 seems to mean that influence which one man possesses over another, irrespective of the merits of the case upon which it is brought to bear. Such considerations as rank, wealth, power, gratitude, relationship or affection, may induce a person to grant to the request of one man what he could not to the request of another. But influence exercised solely upon the merits of the case would seem not to be personal influence. If a person who was about to pay a visit to a Collector were to accept a sum of money, on the understanding that he was to draw the Collector into conversation upon the case, and represent it fully to him, such a proceeding however indelicate and improper, would, I conceive, not come under s. 163, provided no personal feeling was brought into play.

Under s. 167 it would be no offence if a Court translator employed in a criminal case were to mistranslate all the documents, for the purpose of procuring the acquittal of the prisoner, though it would be otherwise if he had the contrary motive. Such a case would probably come under s. 218, though the omission of the express words used in s. 167 might make the point doubtful. Where the mistranslation

is done intentionally; and does produce injury, it will not be necessary to show intention to injure, or knowledge that injury would follow. As Lord Mansfield says,

“Where an act, in itself indifferent, if done with a particular intent becomes criminal, then the intent must be proved and found: but when the act is of itself unlawful, that is *prima facie* and unexplained, the proof of justification or excuse lies on the defendant and in failure thereof the law implies a criminal intent.” (5 Burr. 2667.)

168. Whoever, being a public servant, and being legally bound as such public servant, Public servant unlawfully engaging in trade. not to engage in trade, engages in trade, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

By 33 Geo. III. c. 52, s. 137 it is rendered unlawful for any Governor-General, or Governor, or any Member of Council of any of the Presidencies of India, or for any Collector, Supervisor, or other person employed or concerned in the Collection of the Revenues, or the administration of justice in the provinces of Bengal, Behar, or Orissa, or for their Agents or servants, or any one in trust for them; or for any of the Judges of the Supreme Court of Judicature to be concerned in any trade or traffic whatever whether within or without India. (See also 3 and 4 W. IV. c. 85. s. 76.) Under Reg. II. of 1803 s. 64 Collectors and Assistants to Collectors are forbidden to exercise or carry on trade or commerce, directly or indirectly, or to be engaged in any bank or house of agency. Nor may they be concerned in the farming of the public revenue or in the lending of money to proprietors of land, renters, or persons responsible for the public revenue, or in any way connected with its management. (Ibid. ss. 60. 61.) So by the oath prescribed for a Judge, (Reg. II. of 1802, s. 13. Reg. VII. of 1827. s. 4) he binds himself not to be concerned directly or indirectly in any commercial transactions. By 37 Geo. III. c. 142. s. 28 the lending of money or any valuable thing by a British Subject to a Native Prince is made a misdemeanour. Here British Subject is used in its restricted sense, as meaning the legitimate son of a British father or mother.

Act 15 of 1848 forbids officers of the Supreme Courts in India, or of the Courts for the relief of Insolvent Debtors to carry on any dealings as banker, trader, agent, factor or broker, either for his own advantage, or for the advantage of any other person, except such dealings as it may be part of his duty to carry on.

169. Whoever, being a public servant, and being legally bound, as such public servant, Public servant unlawfully buying or bidding for property. not to purchase or bid for certain property, purchases or bids for that property, either in his own name or in the

name of another, or jointly or in shares with others, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both; and the property, if purchased, shall be confiscated.

See Reg. XXVI of 1802. s. 20. and Reg. VI of 1832, s. 2.

170. Whoever pretends to hold any particular office as a public servant, knowing that he does not hold such office, or falsely personates any other person holding such office, and in such assumed character does or attempts to do any act under color of such office, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

171. Whoever not belonging to a certain class of public servants, wears any garb or carries any token resembling any garb or token used by that class of public servants, with the intention that it may be believed, or with the knowledge that it is likely to be believed, that he belongs to that class of public servants, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred Rupees, or with both.

Personating a public servant.
Wearing garb or carrying token used by public servant with fraudulent intent.

CHAPTER X.

OF CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

172. Whoever absconds in order to avoid being served with a summons, notice, or order proceeding from any public servant, legally competent, as such public servant, to issue such summons, notice, or order shall be punished with

Absconding to avoid service or summons or other proceeding from a public servant.

simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred Rupees, or with both ; or, if the summons, notice, or order is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

173. Preventing service of summons or other proceeding, or preventing publication thereof. Whoever in any manner intentionally prevents the serving on himself, or on any other person, of any summons, notice, or order proceeding from any public servant, legally competent, as such public servant, to issue such summons, notice, or order, or intentionally prevents the lawful affixing to any place of any such summons, notice, or order, or intentionally removes any such summons, notice, or order from any place to which it is lawfully affixed, or intentionally prevents the lawful making of any proclamation, under the authority of any public servant legally competent, as such public servant, to direct such proclamation to be made, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred Rupees, or with both ; or, if the summons, notice, order, or proclamation is to attend in person or by agent, or to produce a document in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

174. Non-attendance in obedience to an order from a public servant. Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order, or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same, intentionally omits to attend at that place

or time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred Rupees, or with both ; or if the summons, notice, order, or proclamation is to attend in person or by agent in a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

Illustrations.

(a) A, being legally bound to appear before the Supreme Court at Calcuttā, in obedience to a subpœna issuing from that Court, intentionally omits to appear. A has committed the offence defined in this Section.

(b) A, being legally bound to appear before a Zillah Judge, as a witness, in obedience to a summons issued by that Zillah Judge, intentionally omits to appear. A has committed the offence defined in this Section.

175. Whoever, being legally bound to produce or deliver up any document to any public servant, as such, intentionally omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred Rupees, or with both ; or, if the document is to be produced or delivered up to a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

Omission to produce a document to a public servant by a person legally bound to produce such document.

Illustration.

A, being legally bound to produce a document before a Zillah Court, intentionally omits to produce the same. A has committed the offence defined in this Section.

176. Whoever, being legally bound to give any notice or to furnish information on any subject to any public servant, as such, intentionally omits to give such notice or to furnish such information in the

Omission to give notice or information to a public servant by a person legally bound to

give notice or information. manner and at the time required by law, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred Rupees, or with both ; or, if the notice or information required to be given respects the commission of an offence, or is required for the purpose preventing the commission of an offence, or in order to the apprehension of an offender, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

177. Whoever, being legally bound to furnish information on any subject to any public servant, as such, furnishes, as true, information on the subject which he knows or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both ; or, if the information which he is legally bound to give respects the commission of an offence, or is required for the purpose of preventing the commission of an offence, or in order to the apprehension of an offender, with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustrations.

(a) A, a landholder, knowing of the commission of a murder within the limits of his estate, wilfully misinforms the Magistrate of the District that the death has occurred by accident in consequence of the bite of a snake. A is guilty of the offence defined in this Section.

(b) A, a village watchman, knowing that a considerable body of strangers has passed through his village in order to commit a dacoity in the House of Z, a wealthy merchant residing in a neighbouring place, and being bound, under Clause 5 Section VII. Regulation III 1821 of the Bengal Code, to give early and punctual information of the above fact to the officer of the nearest Police Station, wilfully misinforms the Police Officer that a body of suspicious characters passed through the village with a view to commit dacoity in a certain distant place in a different direction. Here A is guilty of the offence defined in this Section.

178. Whoever refuses to bind himself by an oath

Refusing oath when duly required to take oath by a public servant. to state the truth, when required so to bind himself by a public servant legally competent to require that he shall so bind himself, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

179. Whoever, being legally bound to state the truth on any subject to any public servant, refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

Refusing to answer a public servant authorized to question.

180. Whoever refuses to sign any statement made by him, when required to sign that statement by a public servant legally competent to require that he shall sign that statement, shall be punished with simple imprisonment for a term which may extend to three months, or with fine which may extend to five hundred Rupees, or with both.

Refusing to sign statement.

181. Whoever, being legally bound by an oath to state the truth on any subject to any public servant or other person authorized by law to administer such oath, makes to such public servant or other person as aforesaid, touching that subject, any statement which is false, and which he either knows or believes to be false or does not believe to be true, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

False statement on oath to public servant or person authorized to administer oath.

182. Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to

False information, with intent to cause

a public servant to use his lawful power to the injury of another person.

cause, or knowing it to be likely that he will thereby cause such public servant to use the lawful power of such public servant to the injury or annoyance of any person, or to do or omit any thing which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

Illustrations.

(a) A informs a Magistrate that Z, a police officer subordinate to such Magistrate, has been guilty of neglect of duty or misconduct, knowing such information to be false, and knowing it to be likely that the information will cause the Magistrate to disnuss Z. A has committed the offence defined in this Section.

(b) A falsely informs a public servant that Z has contraband salt in a secret place, knowing such information to be false, and knowing that it is likely that the consequence of the information will be a search of Z's premises, attended with annoyance to Z. A has committed the offence defined in this Section.

There is a good deal of uncertainty in ss. 174 to 182 from the use of the words "legally bound" without any explanation, and with very few illustrations, as to the cases in which a person is legally bound. The instances given under s. 174 of persons legally bound to attend in obedience to a summons, relate to summonses to give evidence before a Court of Justice. Panchayets are also authorized to summon witnesses before them. (Reg. v. vii. xii. of 1816.) By Reg. xxviii. of 1802. s. 34, cl. 8. Zemindars and other landholders possess the power of summoning, and if necessary of compelling, the attendance of their tenants for the adjustment of their rents, or for measuring lands within their respective estates which may be liable to measurement, or for any other lawful purpose. And by Reg. iii. of 1831 s. 5 the right of Collectors and Tahsildars to summon ryots to attend at the Annual Settlement of revenue, is recognized.

There is a difference between ss. 176 and 177 and the previous Sections 118—120 in this respect, that the offence punishable under ss. 118—120 is only committed when the concealment or misrepresentation is done by the person with an intention to facilitate the commission of an offence, or the knowledge that the offence will be facilitated. In sections 176—177 the guilt consists simply in the breach of duty, apart from any ulterior views which the offender may have had. In these Sections I conceive that the words "legally bound" refer to some special obligation arising out of the rank or office of

the party concerned, different from his ordinary duty as a citizen. For instance by Reg xxv. of 1802. s. 15, it is enacted that,

“Zemindars shall aid and assist the officers of Government in apprehending and securing offenders of all descriptions, and they shall inquire and give notice to the magistrates of robbers or other disturbers of the public peace who may be found, or who may seek refuge within their Zemindaries.”

So by Reg. xi. of 1816, heads of villages and village watchers are required to report on all suspicious characters, and other circumstances of a criminal nature which come to their knowledge, of course all persons directly concerned in the preservation of the peace, and the administration of criminal justice, are under an express obligation to activity in this respect. (Reg. xi. of 1816. ss. 25. 50.)

Although however an ordinary person is not bound to volunteer information, except in the cases mentioned at page 73, he is legally bound to answer all questions which a public servant is legally entitled to ask him, and concealment or misrepresentation to reply to such questions, would subject him to the penalties of these Sections. For instance, suppose a gang robbery to have been committed, an ordinary villager would not be legally bound to go and inform the police that one of his neighbours had been absent for three days, and had returned with a wound in his head. But if the police came and questioned him as to these facts, he would be legally bound to give them true answers, and would be punishable if he did not do so. And the case would be the same with special statements which a party may be required to make. For instance, declarations as to the quantity or value of dutiable goods; as to the life of a person claiming a pension, and the like.

It is also to be remarked, that whereas ss. 118-120 only refer to information relative to the commission of offences, ss. 176-177 refer to any information which the party is legally bound to afford. For instance if a tahsildar were called in to report upon the state of the crops in his division, or a curnum were directed to supply information as to the assessments of his village, any mis-statement or concealment would be criminal under these sections, even though no interested motive could be shown. Of course where no such motive appeared, it would require conclusive evidence to show that the party was in actual possession of the information, before any conviction could be obtained. No crime will be committed under these sections, where a public officer through negligence is destitute of the knowledge which by proper diligence he might have acquired.

The word ‘oath’ is defined in s. 51, so as to include all solemn affirmations and declarations, whether intended to be used in a Court of Justice or not. The offence referred to in s. 178 will however in general be committed in judicial proceedings. The same remarks apply to the ensuing sections 179-181. A Police officer engaged in detecting the perpetrator of a crime would be authorised to ask any questions tending to throw light upon the matter, and a refusal to answer would constitute an offence under s. 179. (See the remarks upon ss. 176-177, ante.)

183. Whoever offers any resistance to the taking of any property by the lawful authority of any public servant, knowing or having reason to believe that he is such public servant, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

Resistance to the taking of property by the lawful authority of a public servant.

184. Whoever intentionally obstructs any sale of property offered for sale by the lawful authority of any public servant as such, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred Rupees, or with both.

Obstructing sale of property offered for sale by authority of a public servant.

185. Whoever, at any sale of property held by the lawful authority of a public servant as such, purchases or bids for any property on account of any person, whether himself or any other, whom he knows to be under a legal incapacity to purchase that property at that sale, or bids for such property not intending to perform the obligations under which he lays himself by such bidding, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to two hundred Rupees, or with both.

Illegal purchase or bid for property offered for sale by authority of a public servant.

Where property is sold for arrears of revenue or rent, it is not competent for the defaulters or their sureties to purchase it. (Reg. xxvi. of 1802. s. 18. xxviii. of 1802. s. 27.) Nor can land so set up for sale be purchased by the native officers of the Cutcherries of Collectors, or the private servants of Collectors. (Reg. xxvi. of 1802. s. 20.) Nor can property distrained for arrears be purchased by the distrainers or appraisers. (Reg. xxviii. of 1802. s. 26.)

186. Whoever voluntarily obstructs any public

Obstructing public servant in the discharge of his public functions. servant in the discharge of his public functions, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred Rupees, or with both.

187. Whoever, being bound by law to render or furnish assistance to any public servant in the execution of his public duty, intentionally omits to give such assistance, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred Rupees, or with both ; and if such assistance be demanded of him by a public servant legally competent to make such demand for the purposes of executing any process lawfully issued by a Court of Justice, or of preventing the commission of an offence, or of suppressing a riot or affray, or of apprehending a person charged with or guilty of an offence or of having escaped from lawful custody, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to five hundred Rupees, or with both.

The persons "bound by law to render assistance" under s. 187 will in general be public officials. There are however some cases in which even private persons are bound to render assistance. A slight sketch of the English law upon this point may therefore be useful.

Wherever a felony is committed in the sight of a private person, it is his duty to use his best endeavours to arrest the felon, or to raise hue and cry upon him, and if he fails to do so, he is punishable with fine and imprisonment. (1 Hale. 588.) And even when the felony has not been committed in his presence, still if he knew of it, and knew by whom it was committed, he is bound to take the same immediate steps, unless the case admits of going to a Magistrate for a Warrant, or calling in the aid of a constable. (2 Hale. 76.) But where the case is only one of suspicion, however strong, the arrest of a man by a private person is

"A thing permitted by law and therefore justifiable; but it is not a thing commanded by law, neither is the party punishable if he omits it, as in case where it is a known felony, or where done upon hue and cry levied, or by an officer, or by a precept; for no man is judge of a man's suspicion but himself." (2 Hale. 82—84.)

A Warrant may be addressed to a private person, and he will be justified in acting under it. But he is not bound to execute it, and may refuse to have anything to do with it. (2 Hale. 110.) But where an officer is entrusted with a warrant, and engaged in its execution, or even where he is acting lawfully without a warrant, he is authorised to call all private persons to his assistance ;

“ For every man in such cases is bound to be aiding and assisting to these officers upon their charge and summons in preserving the peace, and apprehending of malefactors, especially felons. And if any *being thereunto called* shall not give their assistance, they are to be punished by fine and imprisonment.” (2 Hale. 86.)

Hue and cry is the old common law term for an immediate general pursuit, made freshly after the commission of a felony, in which it was the duty, not only of all Constables, but also of all private persons above 15, the inhabitants of the district, to join, on penalty of fine and imprisonment. This hue and cry might be set on foot by the warrant of a justice of peace, but this is not necessary, for it may be raised by any private person who knows of the felony. The party injured, or other person capable of giving information, should proceed at once to the Constable of the district, and give him a full account of the circumstances of the case, and a description of the person accused, so as to enable him to judge whether a hue and cry ought to be raised. Thereupon pursuit will be made, and as every one is bound to join in it, so every one who does join in it is protected, even though it turns out that there was no felony committed, or that the persons suspected are wholly innocent. But those who raise hue and cry without sufficient cause will be punishable with fine and imprisonment. (2 Hale. 98-102.)

The contrivance is as simple as it is efficacious, and there is nothing in the state of Society in India which need prevent the practice above stated from being carried out here as advantageously as it had been in England before the days of Bracton.

188. Whoever, knowing that, by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act, or to take certain order with certain property in his possession or under his management, disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to any persons lawfully employed, be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred Rupees, or with both ; and if such

Disobedience to an order duly promulgated by a public servant.

disobedience causes or tends to cause danger to human life, health, or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

Explanation.—It is not necessary that the offender should intend to produce harm, or contemplate his disobedience as likely to produce harm. It is sufficient that he knows of the order which he disobeys, and that his disobedience produces, or is likely to produce harm.

Illustration.

An order is promulgated by a public servant lawfully empowered to promulgate such order, directing that a religious procession shall not pass down a certain street. A knowingly disobeys the order, and thereby causes danger of riot. A has committed the offence defined in this Section.

The validity of the order is immaterial, provided the order is promulgated by a public servant in a matter over which he has jurisdiction. But where the order is given by a person who had no authority whatever to pass such an order, the persons against whom it is directed would be entitled to treat it as a mere nullity. For instance, a Magistrate has power to order a person to refrain from interfering with property claimed by another, but he has no power to order property to be sold, and any person affected by such order would be justified in setting it at naught.

189. Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public functions of such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

190. Whoever holds out any threat of injury to any person for the purpose of inducing that person to refrain or desist

Threat of injury to induce any per-

son to refrain from applying for protection to a public servant. from making a legal application, for protection against any injury, to any public servant legally empowered as such to give such protection or to cause such protection to be given, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

I conceive that the injury referred to in the above two sections need not necessarily be an illegal injury, and that any threat of harm which is not the lawful result of the act itself, is prohibited. For instance it is perfectly lawful to prosecute a public servant for bribery. But if a suitor were to threaten a Moonsiff with disclosure of an act of bribery, in order to influence his decision in a suit pending before him, this would be a criminal act. If however an official were about to perform an illegal act, it would not be criminal to threaten that he should be reported and held up to the displeasure of his superiors. For this would be merely the lawful result of the act which he was committing.

CHAPTER XI.

OF FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

191. Whoever, being legally bound by an oath, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.

Explanation 1.—A statement is within the meaning of this Section, whether it is made verbally or otherwise.

Explanation 2.—A false statement as to the belief of the person attesting is within the meaning of this Section, and a person may be guilty of giving false evidence by stating that he believes a thing which he

does not believe, as well as by stating that he knows a thing which he does not know.

Illustrations.

(a) A, in support of a just claim which B has against Z for one thousand Rupees, falsely swears on a trial that he heard Z admit the justice of B's claim. A has given false evidence.

(b) A, being bound by an oath to state the truth, states that he believes a certain signature to be the handwriting of Z, when he does not believe it to be the handwriting of Z. Here A states that which he knows to be false, and therefore gives false evidence.

(c) A, knowing the general character of Z's handwriting, states that he believes a certain signature to be the handwriting of Z; A in good faith believing it to be so. Here A's statement is merely as to his belief, and is true as to his belief, and therefore, although the signature may not be the handwriting of Z, A has not given false evidence.

(d) A, being bound by an oath to state the truth, states that he knows that Z was at a particular place on a particular day, not knowing any thing upon the subject. A gives false evidence whether Z was at that place on the day named, or not.

(e) A, an interpreter or translator, gives or certifies as a true interpretation or translation of a statement or document which he is bound by oath to interpret or translate truly, that which is not and which he does not believe to be a true interpretation or translation. A has given false evidence.

192. Whoever causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry, or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry, or false statement, so appearing in evidence, may cause any person, who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said "to fabricate false evidence."

Fabricating false evidence.

Illustrations.

(a) A puts jewels into a box belonging to Z, with the intention that they may be found in that box, and that this circumstance may cause Z to be convicted of theft. A has fabricated false evidence.

(b) A makes a false entry in his shop book for the purpose of using it as corroborative evidence in a Court of Justice. A has fabricated false evidence.

(c) A, with the intention of causing Z to be convicted of a criminal

conspiracy, writes a letter in imitation of Z's hand-writing purporting to be addressed to an accomplice in such criminal conspiracy, and puts the letter in a place which he knows that the officers of the police are likely to search. A has fabricated false evidence.

The two previous Sections go very much beyond the old criminal law as to perjury. Perjury at common law could only be committed where the false statement had reference to some judicial proceeding. Hence where statutes provided for solemn declarations being made, or oaths taken in non-judicial proceedings, as for instance under the marriage act, it has been customary to add a clause, extending the penalties of perjury to any falsehood contained in such declaration. Under the present act the distinction only exists in reference to the degree of punishment imposed.

Section 191 includes all cases in which a party is expressly bound to make a statement, and a true statement. It does not apply to merely voluntary statements such as form the basis of a contract. A merchant who returns his income to the Income-tax Commissioners for Assessment, is making a statement which he is bound by law to make, and to make truly. And so it would be in the case of a person who fills up untruly the Municipal Assessment paper which is sent to him. But a horse dealer who makes a false statement as to the soundness of a horse would not come under this Section. He is not bound by an oath, or anything equivalent; there is no express provision of law which binds him to state the truth, nor is he bound by law to make any declaration at all upon the point.

The word 'oath' is defined in s. 51.

A statement may be false, though the thing sworn be true. As for instance, if a man swear to a fact having taken place *in his presence*; which did really take place, but not in his presence, that is perjury. For the material part of his statement is, that it took place in such a way as to enable him to swear to it, and that is false. (Arch. 680.) This I suppose was the ground of the following decision.

"A prisoner was convicted of perjury, in having come forward in the place of his brother, who had been summoned to give evidence in a criminal trial, and, declaring himself to be the person summoned, having given his deposition under a false name. The Court held that he was properly tried and convicted, without reference to the truth or falsehood of the deposition then made." (1 M. Dig. 173, § 490.)

I fancy that here the prisoner swore to facts which his brother knew, but which he did not. If the fact merely were that he knowingly answered to a wrong name, but gave perfectly true testimony, this could hardly have been perjury, even if he falsely stated his name. For his name would be quite immaterial, unless he were supposed, in consequence, to be a person with some peculiar facilities of knowledge.

The offence will equally have been committed whether the statement was known to be false, or was put forward as true, without any reason to conceive it to be true. But it must appear that the statement was deliberate and intentional. This can in general only be

judged of by the surrounding circumstances. Where a witness falsely asserts or denies a fact of which he must be cognisant, which he cannot well have forgotten, and which is so important that his attention must have been directed to it, there can be little doubt that he has perjured himself. But on the other hand great allowances must be made for a man who has been kept a whole day under the ordeal of examination, cross-examination, and re-examination; who has been questioned minutely as to complicated transactions, which he may have forgotten, or taken up erroneously from the first; and who is plunged into that pardonable perplexity and confusion, to which a practised advocate will often reduce the most honest witness. And hence it is an invariable rule, that the whole of a deposition or affidavit is to be taken together, and one part explained by the other, or even by a subsequent answer. For till this is done, you have not got at the full meaning of the witness. (Arch. 680.)

The Act is silent as to the amount of evidence which is necessary to procure a conviction, and in this respect I presume the law will remain as it does at present. By English law perjury must be proved by two witnesses, or by one witness confirmed by a written document, or by some material and relevant facts which contradict the statement upon which the perjury is assigned. For otherwise there would be merely oath against oath, and the presumption of innocence would turn the scale in favour of the prisoner. (Arch. 240. 683.) And this rule is recognised by the Indian Evidence Act II of 1855, s. 28.

There is one case in which no proof of the falsity of the prisoner's evidence need be given, and that is, where he is convicted out of his own mouth, by having given two depositions, so contradictory, that one of them must be false, whichever may be true. This is so provided by Reg. III. of 1826, which is as follows :

'If a party or witness shall wilfully and deliberately give two contradictory depositions, (Contradictions in the same deposition cannot be charged as perjury under this Regulation, there must be *two* depositions.—*F. U. 8th Jan. 1835.*) on oath, or under a solemn declaration taken instead of an oath, on a matter or matters of fact material to the issue of a judicial proceeding, such party or witness shall be liable to be committed for trial before the Session Court for wilful and corrupt perjury; provided that the contradiction between the two depositions be direct and positive, and that, upon the whole circumstances of the case, there be strong grounds to presume the corrupt intention of the party or witness.' (§ 2. Cl. 1.)

'For the conviction of a person committed for trial on a charge of perjury under the preceding Clause, no other evidence shall be requisite than clear and satisfactory proof that the party or witness, having been duly sworn, or having made a solemn affirmation, wilfully and deliberately caused the two contradictory depositions to be taken down in writing; and that, before he affixed his signature or make thereto, their contents were distinctly read over to him.' (Ibid. Cl. 3.)

This salutary provision has not been introduced into the practice of the Supreme Court, and the result is occasionally a most mortifying defeat of justice. I remember a case about two years ago in which the defendant had made one statement in an affidavit in support of a Bill in Equity, and contradicted it flatly when examined at the hear-

ing. He was indicted by the parties who had cited him, but as the law which prevailed in the Supreme Court compelled them to state which oath was untrue, (Arch. 681) and as they were forced to assign perjury in his second statement, the indictment failed. The jury found that his oral disposition was perfectly true, and that the real perjury was in his original affidavit!

A good deal of the old law upon the subject of perjury turned upon the fact that an oath, or an affirmation rendered equivalent to it by law, was an essential element of the offence. Therefore when the oath was administered by an incompetent authority, the crime was incomplete.

Accordingly

“A false deposition on oath, made before the *Muharrir* of a police *Thannah*, the *Daroghah* being present at the *Thannah* was held not to come within the legal definition of perjury, the *Muharrir* having no authority to administer an oath while the *Daroghah* was present, and the latter having no power to delegate it to another.” (1 M. Dig. 171. § 464, and see *Ibid.* § 466—468 : p. 170, § 462, p. 172, § 481.)

And so the prisoners were acquitted, where it appeared that they had been wrongly made to give evidence on a criminal charge, in which they were themselves deeply implicated. (1 M. Dig. 169, § 453, p. 170, § 463.)

And so it was essential to establish the actual taking of the oath or affirmation. But where

“The prisoner having given false evidence, pleaded that he was not upon oath; for though the oath was regularly administered, the sacred symbols were not in his hands, when he gave the false evidence; the Pundits referred to on this point declared his plea to be unavailing, and he was sentenced.” (1 M. Dig. 169, § 454.)

And in another case

“On a trial for perjury, it being certified by the Magistrate that the false deposition was taken on oath, and the prisoner not having denied being sworn, the Court of N. A. did not deem the omission to bring witnesses to that fact to be material, though it would have been more regular.” (1 M. Dig. 172, § 477.)

Under the present Act an oath is merely one of the forms by which a party may be bound to speak the truth. Hence even if an oath were unnecessarily and improperly administered by an incompetent person, as for instance if the Municipal Commissioners should force a rate payer to swear to the truth of his return, still the offence constituted by s. 191 would be committed, if the party making the statement were under a legal obligation to speak the truth even without an oath. But what would be the case when a party ought to have been sworn, and had not been so? For instance a witness called in the Supreme Court, and examined, the oath having been by accident omitted? Here the party would certainly not have been “legally bound by an oath,” nor, as I conceive, would he have been bound “by any express provision of law to state the truth.” Since the law

provided an oath for that purpose, which was omitted. Nor as I conceive could he be considered as a person "bound by law to make a declaration upon the subject." For his obligation dates from the moment that he is called on to give his evidence according to the form prescribed in each particular Court. And where he is never so called on, he has never been under any legal obligation to speak at all.

The offence of fabricating false evidence under s. 192 is confined to cases in which the intention of the fabricator is to produce "an erroneous opinion touching any point material to the result." But what will be the case if the intention is to produce a correct opinion? Suppose for instance that a Shopkeeper who has actually supplied a person with goods, but has no entry in his books, were to forge an entry as corroborative evidence. The result would be to induce the Judge to come to a perfectly sound view of the point in issue; viz., whether the articles had been supplied. But he would have been led to an erroneous opinion, not as to the result of the proceeding, but as to a point material to the result; viz., whether the plaintiff's books contained such an entry as might naturally be looked for under the circumstances. So that the real meaning of the section is, just as the old law upon perjury was, that the false statement must be upon a point material to the issue. And so I conceive it must be taken to be under s. 191, though nothing is said as to the materiality of the statement. No statement can fairly be called evidence, either true or false, which is utterly immaterial, and has no bearing upon the point at issue. It would not be fair to the witness to put him on his trial for mis-statements in reference to such matters, since he is not likely to have his attention attracted to an unimportant fact, and might easily make a mistake without noticing it. Nor is it necessary for the ends of justice, as no public injury can ensue from falsely asserting that which can have no imaginable influence upon the issue. If the question is whether a debt was paid, and the witness falsely swears it was paid on a Tuesday, whereas it was really paid on a Wednesday, this is not such a falsity as could have been made the ground of an indictment for perjury under the old law, unless from some peculiarity in the case, the specific day was a material fact. (Arch. 679.) Several cases in the Courts of India illustrate the same point.

"Swearing to the truth of the contents of a petition presented to the Magistrate, stating that a bullock belonging to the petitioner was unjustly detained by another, whereas, in fact, the bullock did not belong to the petitioner, but to his relation and fellow lodger, on whose account he wished to recover it, was not considered to merit the punishment of wilful perjury, as no malicious or fraudulent intent appeared." (1 M. Dig. 170, § 455.)

"The prisoners having, in a trial for robbery, deposed falsely on oath regarding their relationship to each other, the Court held that the point they had deposed to not being material to the issue of the trial, their offence did not amount to perjury, and accordingly acquitted them." (1 M. Dig. 173, § 489, and see Mad. F. U. 18 & 28 of 1852. To support a conviction under Regulation III. of 1826, each of the conflicting statements must be material, Mad. F. U. 85 of 1852.)

"The prisoner swore falsely in the Magistrate's Court to the degree of relationship in which he stood to a third party, with the view of inducing

the Court to give readier credit to the substantial part of his evidence, which was given under the solemn affirmation prescribed by Act V. of 1840, and he was convicted of perjury." (1 M. Dig. 173, § 491.)

In this last case it would appear that the fact of relationship was material, as it very well might be, as testing the weight of the evidence. Suppose, for instance, that the question is as to the division or non-division of a family, or as to the execution of a will, and that the witness deposes to having seen the family performing their ceremonies jointly, or to having been present when the dying man dictated the instrument, the most natural question in cross-examination would be, "How did you happen to be there?" If the witness says, "Because I was their first-cousin," this is a most important fact in confirmation of his statement, and if untrue, would shake his evidence into ruins. And so, it has always been held that all questions addressed to the credit of a witness, as, whether he has not been before convicted of felony, and the like, are material. (Arch. 679.) And it has been remarked, with reference to certain decisions where there had been an acquittal for want of materiality.

"That perhaps in all these cases it ought to be intended, that the question was put in such a manner, that the witness might reasonably apprehend that the sole design of putting it was to be informed of the substantial part of it, which might induce him through inadvertency to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly that the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, and he gave a particular and distinct account of the circumstances, which afterwards appears to be false; surely he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it." (2 Russ. 600.)

Anything will constitute a statement under s. 192, if it purports to embody a fact. For instance, the fabrication of a bill of lading with the Captain's name to it would be a statement by him that he had received certain goods on board the ship. A question may however arise, where the document is a genuine one, but some addition involving a statement is made to it. Suppose the case of an assignment of land, perfectly genuine, coming in evidence before a Court. Would it be a fabrication of false evidence to put a dead man's name to the bottom of it, for the purpose of giving it the credit of another witness? It could hardly be said that the party had made a document containing a false statement, merely by appending to it the false statement that a certain person had witnessed its execution. Such an act would however amount to forgery under s. 463.

193. Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment for false evidence.

sonment of either description for a term which may extend to seven years, and shall also be liable to fine ; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation 1.—A trial before a Court Martial or before a Military Court of Request is a judicial proceeding.

Explanation 2.—An investigation directed by law preliminary to a proceeding before a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration.

A, in an inquiry before a Magistrate for the purpose of ascertaining whether Z ought to be committed for trial, makes on oath a statement which he knows to be false. As this inquiry is a stage of a judicial proceeding, A has given false evidence.

Explanation 3.—An investigation directed by a Court of Justice according to law, and conducted under the authority of a Court of Justice, is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice.

Illustration.

A, in an inquiry before an officer deputed by a Court of Justice to ascertain on the spot the boundaries of land, makes on oath a statement which he knows to be false. As this inquiry is a stage of a judicial proceeding, A has given false evidence.

194. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by this Code, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine ; and if an innocent person be convicted and executed.

Giving or fabricating false evidence with intent to procure conviction of a capital offence.

If innocent person be thereby convicted and executed.

cuted in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.

195. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause any person to be convicted of an offence which by this Code is not capital, but punishable with transportation for life, or imprisonment for a term of seven years or upwards, shall be punished as a person convicted of that offence would be liable to be punished.

Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation or imprisonment.

intending thereby to cause, or knowing it to be likely that he will thereby cause any person to be convicted of an offence which by this Code is not capital, but punishable with transportation for life, or imprisonment for a

Illustration.

A gives false evidence before a Court of Justice, intending thereby to cause Z to be convicted of a dacoity. The punishment of dacoity is transportation for life, or rigorous imprisonment for a term which may extend to ten years, with or without fine. A, therefore, is liable to such transportation or imprisonment, with or without fine.

196. Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.

Using evidence known to be false.

as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the

On an indictment under this Section, the first thing will be to show that the evidence was false or fabricated, and next to establish a guilty knowledge. The mere fact that the party has produced the false evidence will in general be enough to throw on him the burden of showing his innocence. Accordingly it has been

“Held, that a debtor producing a witness, who deposed falsely to his having witnessed a payment to the creditor, forms sufficient presumptive evidence against the debtor to convict him of subornation of perjury.” (1 M. Dig. 172, § 475.)

And so in another case, where the party produced the false witness in Court through a Vakeel, being himself absent. (1 M. Dig. 171 § 493.) But where the prisoner was a minor at the time the perjury was committed in his favour, and did not appear to have been personally concerned in the subornation, though present at the time, and profiting by it, he was acquitted.” (1 M. Dig. 173 § 485.)

In a recent case the law upon this point was laid down by Sir Adam Bittleston in the following terms.

“ If a person calls witnesses in support of a statement which he makes, and causes those witnesses to come into the box for the purpose of giving evidence which he knows to be untrue, and they give that evidence, and the jury find that they knew it to be untrue, that is evidence on which a jury may find that he solicited them ; but the jury must be satisfied that he knew that the statement which they were called to make must be untrue to their own knowledge.” (Reg. v. Gunganmah. 3rd Madras sess. 1860.)

It is not sufficient that he should know or believe the statement to be untrue. It is necessary that the witnesses should have the same knowledge, for otherwise the evidence is not false.

197. Whoever issues or signs any certificate required by law to be given or signed, or relating to any fact of which such certificate is by law admissible in evidence, knowing or believing that such certificate is false in any material point, shall be punished in the same manner as if he gave false evidence.

Issuing or signing a false certificate.

Using as a true certificate one known to be false in a material point.

198. Whoever corruptly uses or attempts to use any such certificate as a true certificate, knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

199. Whoever, in any declaration made or subscribed by him, which declaration any Court of Justice, or any public servant or other person, is bound or authorized by law to receive as evidence of any fact, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence.

False statement made in any declaration which is by law receivable as evidence.

200. Whoever corruptly uses or attempts to use as true any such declaration knowing the same to be false in any material point shall be punished in the same manner as if he gave false evidence.

Using as true any such declaration known to be false.

Explanation.—A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of Sections 199 and 200.

201. Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false, shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the offence is punishable with transportation for life or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both.

Causing disappearance of evidence of an offence committed, or giving false information touching it, to screen the offender—

If a capital offence.

If punishable with transportation.

If punishable with less than ten years' imprisonment.

Illustration.

A, knowing that B has murdered Z, assists B to hide the body with the intention of screening B from punishment. A is liable to imprisonment of either description for seven years, and also to fine.

202. Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence

Intentional omission to give information of an offence

by a person bound to inform. which he is legally bound to give, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

203. Whoever, knowing or having reason to believe that an offence has been committed, gives any information respecting that offence which he knows or believes to be false, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Giving false information respecting an offence committed.

With the single exception of the clause relating to causing the disappearance of evidence, these three sections (201 - 203) are substantially the same as ss. 176, 177, 182, for the remarks on which see page 102. Sections 118, 120 which also relate to concealment of criminal acts are directed against persons who intend to facilitate the commission of the crime.

204. Whoever secretes or destroys any document which he may be lawfully compelled to produce as evidence in a Court of Justice, or in any proceeding lawfully held before a public servant as such, or obliterates or renders illegible the whole or any part of such document with the intention of preventing the same from being produced or used as evidence before such Court or public servant as aforesaid, or after he shall have been lawfully summoned or required to produce the same for that purpose, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Destruction of document to prevent its production as evidence.

205. Whoever falsely personates another, and in such assumed character makes any admission or statement, or confesses judgment, or causes any process to be issued, or becomes bail or security, or does any other act in any suit or criminal prosecution, shall be punished with imprisonment of either

False personation for the purpose of any act or proceeding in a suit.

description for a term which may extend to three years, or with fine, or with both.

206. Whoever fraudulently removes, conceals, transfers, or delivers to any person any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture, or in satisfaction of a fine, under a sentence which has been pronounced or which he knows to be likely to be pronounced by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made or which he knows to be likely to be made by a Court of Justice in a Civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Fraudulent removal or concealment of property to prevent its seizure as a forfeiture or in execution of a decree.

207. Whoever fraudulently accepts, receives, or claims any property or any interest therein, knowing that he has no right or rightful claim to such property or interest, or practises any deception touching any right to any property or any interest therein, intending thereby to prevent that property or interest therein from being taken as a forfeiture or in satisfaction of a fine, under a sentence which has been pronounced or which he knows to be likely to be pronounced by a Court of Justice or other competent authority, or from being taken in execution of a decree or order which has been made or which he knows to be likely to be made by a Court of Justice in a Civil suit, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Fraudulent claim to property to prevent its seizure as a forfeiture or in execution of a decree.

208. Whoever fraudulently causes or suffers a decree or order to be passed against him at the suit of any person for a sum not due, or for a larger sum than is

Fraudulently suffering a decree for a sum not due.

due to such person, or for any property or interest in property to which such person is not entitled, or fraudulently causes or suffers a decree or order to be executed against him after it has been satisfied, or for any thing in respect of which it has been satisfied, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Illustration.

A institutes a suit against Z. Z, knowing that A is likely to obtain a decree against him, fraudulently suffers a judgment to pass against him for a larger amount at the suit of B, who has no just claim against him, in order that B, either on his own account or for the benefit of Z, may share in the proceeds of any sale of Z's property which may be made under A's decree. Z has committed an offence under this Section.

The three preceding Sections have the effect of rendering criminal all collusive modes by which creditors, or lawful claimants may be defeated of their just remedies. By the English statute 13 Eliz. c. 5 such contrivances were made void as against such persons whose actions, suits, judgments or executions are or might be in any way disturbed, hindered, delayed, or defrauded. The decisions upon this Statute may be of some use in helping to the right construction of the present clauses. The whole subject is elaborately discussed in Smith's Leading cases, vol. I, to which I shall principally refer.

“A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise.” (s. 25.)

The question, fraud or no fraud, is always a question of fact, and is to be inferred, or may be negatived by the circumstances of each particular case. (1 Sm. L. C. 11. 13.) One great test of fraud is to inquire whether the appearance and reality of the transaction correspond. And therefore where there is a conveyance which is absolute in appearance but without any possession following upon it, or where there is merely a concurrent possession with the assignor, this will in general be deemed conclusive evidence of fraud. There must be an exclusive possession under the assignment, or else it will be fraudulent and void. (1 Sm. L. C. 11, 12.)

There are two cases however in which the want of actual possession is no fraud. The first is where an actual delivering is impossible; as in the case of a ship at sea, goods on their way from one place to another, &c. Here a symbolical delivery, by a transfer of such documents as convey the right to the property is sufficient. (1 Sm. L. C. 14). The second case is, where the tenor of the deed does not require possession. For instance in many cases of mortgage, by the express conditions of the instrument the possession of the property is not to be changed, and therefore the absence of such a change is no

emblem of fraud. Fraud will only be inferred when possession ought to accompany and follow the deed. (1 Sm. L. C. 13.)

A conveyance will also be fraudulent where it is made voluntarily, and without consideration, when the assignor is at the time insolvent, or even in such a state of debt as is likely to terminate in insolvency; provided the effect of the conveyance is in any material degree to diminish his power of meeting his liabilities (1 Sm. L. C. 17.) Of course such ordinary gifts as a man might make, though at the time embarrassed, without any deliberate intention of diminishing the security of his creditors, would not be criminal. But when the character of the assignment is such, that it can only be explained on the supposition of a desire to put property out of the way of those better entitled to it, fraud would necessarily be inferred. And so I conceive it would be in all cases of transfer of any specific property actually the subject of litigation at the time. But the act only contemplates legal liabilities, and therefore no transfer will be fraudulent which has merely the effect of preventing the party from complying with moral obligations, or discharging debts of honour.

It makes no difference in the fraud that the obligation which is evaded is one derived from another, provided the property transferred is legally liable to satisfy it. And therefore an heir or executor may be indicted under this Section for collusively getting rid of property liable to the debts of their ancestor or testator. (1 Sm. L. C. 17)

A voluntary conveyance by a man who is about to be tried for any crime, where conviction works a forfeiture, will be fraudulent. And even considerations of affection will not support the transfer, where the object is to remove the property from the effect of the sentence; as for instance where the conveyance by a man about to be tried for a felony, was made in trust for his wife. (1 Sm. L. C. 15.)

A conveyance will not be fraudulent merely because it deprives another of a security which he would otherwise have had, if that is not the object of the act. For instance, there will be no fraud in a sale by a debtor of his landed property, for a fair and adequate consideration, though it will of course be much less convenient to the creditors to pursue the purchase money than the property. And it would make no difference whatever that the debtor was actually in the throes of a lawsuit. For he is not bound to keep his property in one form rather than another for the convenience of his creditors. And in England it has been repeatedly held that the fact of such a sale having been effected when an immediate execution was anticipated will not vitiate the sale. In the latest case upon the point, it appeared that a tradesman, expecting the execution of a writ issued out of the Court of Chancery for payment of costs of a suit, effected a sale of the whole of his furniture and stock in trade. The only document which passed was a receipt for the purchase money. A few days after the purchaser had taken possession, a writ was issued, and a suit was brought

creditors unprovided for. But that is not the sense in which the law understands the term "fraudulent." The law leaves it open to a debtor to make his own arrangements with his several creditors, and to pay them in such order as he thinks proper. What is meant by an instrument of this kind being fraudulent is, that the parties never intended it to have operation as a real instrument, according to its apparent character and effect." (*Eveleigh v. Pursord*, 2 M. & R. 541. And see per Lord Hardwicke. 1 Ves. Sen. 245.)

209. Whoever fraudulently or dishonestly, or with intent to injure or annoy any person, dishonestly making false claim in a Court of Justice. makes in a Court of Justice any claim which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

210. Whoever fraudulently obtains a decree or order against any person for a sum not due, or for a larger sum than is due, or for any property or interest in property to which he is not entitled, or fraudulently causes a decree or order to be executed against any person after it has been satisfied, or for any thing in respect of which it has been satisfied, or fraudulently suffers or permits any such act to be done in his name, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

211. Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; and if such criminal proceeding be instituted on a false charge of an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, shall be punishable with imprison-

ment of either description for a term which may extend to seven years, and shall also be liable to fine.

Where it is established that the charge preferred or the proceeding taken, was known to be wholly without foundation, the law will infer an intent to injure. (See ante p. 70.) And an offence will equally have been committed under this section though the intent to injure was not the primary intention. As for instance, where the principal object in making a false charge was to obtain a reward offered for the conviction of the offender, or to divert suspicion from the party really guilty.

The knowledge that the charge was a false one must of course be inferred from the circumstances of each case, but this must be judged of according to the facts as they were known, or supposed to be when the charge was made, not as they are ascertained by a more complete inquiry. And accordingly the party accused of making a false charge will always be allowed to show the information on which he acted, and the rumours, even suspicions, which were afloat against the person accused. Not of course for the purpose of establishing the guilt of the latter but of showing the *bonâ fide* of his own conduct.

The mere fact of an acquittal, even for want of prosecution, is not even *primâ facie* evidence of such malice as is necessary to support an indictment under this Section. (Roscoe. N. P. 445.)

Where a charge is really well founded, the fact that it is preferred merely to gratify personal spite, will not make it indictable. (Broom. Com. 744.) But, where the accusation turns out to be untrue, evidence of actual malice is most important as tending to show that the charge was known to be false.

This section will not apply to a public officer who merely acts, in the course of his duty, upon information conveyed to him, even though he doubts or disbelieves it. In such a case there could be no intent to cause injury.

212. Whenever an offence has been committed, whoever harbours or conceals a person whom he knows or has reason to believe to be the offender, with the intention of screening him from legal punishment, shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of

Harbouring an offender—
If a capital offence.
If punishable with transportation for life, or with imprisonment.

either description for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment which may extend to one year and not to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

Exception.—This provision shall not extend to any case in which the harbour or concealment is by the husband or wife of the offender.

Illustration.

A, knowing that B has committed dacoity, knowingly conceals B in order to screen him from legal punishment. Here, as B is liable to transportation for life, A is liable to imprisonment of either description for a term not exceeding three years, and is also liable to fine.

The essence of this offence consists in the intention with which the act is done. And therefore the bare fact of receiving and assisting an offender, if done as a mere matter of humanity to a person in distress, and with no attempt to screen him from justice will be no offence. (Arch. 10.) The object must also be to screen him from the punishment due to an offence, and therefore the concealment of a person who was supposed to be a runaway debtor, would not be within the terms of s. 212. It would appear too that the offence which is supposed to have been committed must be the offence which actually has been committed. If a murderer were to induce another to conceal him, by a representation that he was pursued for a theft, I doubt very much whether any act would have been done for which the harbourer could be indicted. Certainly if indictable, he could not be punished as having concealed a murderer; for possibly if he had known the enormity of his guilt he would have surrendered the criminal at once. He could only be punished for the crime which he supposed he was committing; that crime in fact he never did commit, and I do not see how he could be made constructively guilty of another crime, simply because the person whom he admitted was guilty of another offence, of which he had no knowledge.

The offence committed by the primary offender must have been actually completed, when the harbouring takes place. Accordingly a man was acquitted who was indicted as an accessory after the fact to a murder, when it turned out that he had harboured the felon, after the injuries were inflicted, but before the death; for till death there was no murder. (Arch. 11.) But there would be no difficulty under this section in indicting the party for having harboured a person whom

he knew to have voluntarily caused grievous hurt. (s. 326.) Where the person harboured has escaped from custody, or where there has been an order issued for his apprehension by a public servant, competent to issue it, any person who harbours him with knowledge of such escape or order will be indictable under s. 216, whether he knows the offence which has been committed or not, and even though no offence has in fact been committed.

213. Whoever accepts, or attempts to obtain, or agrees to accept, any gratification for himself or any other person, or any restitution of property to himself or any other person, in consideration of his concealing an offence or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the purpose of bringing him to legal punishment, shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

Taking gift, &c. to screen an offender from punishment—

If a capital offence.

If punishable with transportation for life, or with imprisonment.

214. Whoever gives or causes, or offers or agrees to give or cause, any gratification to any person, or to restore or cause the restoration of any property to any person, in consideration of that person's concealing an offence, or of his screening any person from legal punishment for any offence, or of his not proceeding against any person for the

Offering gift or restoration of property in consideration of screening offender—

If a capital offence. purpose of bringing him to legal punishment, shall, if the offence is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; and if the offence is punishable with transportation for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment not exceeding to ten years, shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence, or with fine, or with both.

Exception.—The provisions of Sections 213 and 214 do not extend to any case in which the offence consists only of an act irrespective of the intention of the offender, and for which act the person injured may bring a civil action.

Illustrations.

(a) A assaults B with intent to commit murder. Here, as the offence does not consist of the assault only, irrespective of the intention to commit murder, it does not fall within the exception, and cannot therefore be compounded.

(b) A assaults B. Here, as the offence consists simply of the act, irrespective of the intention of the offender, and as B may have a civil action for the assault, it is within the exception, and may be compounded.

(c) A commits the offence of bigamy. Here, as the offence is not the subject of a civil action, it cannot be compounded.

(d) B commits the offence of adultery with a married woman. The offence may be compounded.

215. Whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any moveable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means

Taking gift to help to recover stolen property, &c.

in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

The offence constituted by ss. 213, 214 consists in the corrupt motive which is brought into play as much as in the delay to criminal justice; therefore the mere concealing an offence or not bringing an offender to punishment will be no offence under these sections, unless such conduct proceeds from some "gratification," obtained or aimed at. The word "gratification" it will be remembered is not restricted to pecuniary gratifications, or to gratifications estimable in money. Nor does it seem to be absolutely necessary that the person to be screened should have been guilty of any offence, or even that any offence should have been committed, if the facts upon which a charge ought to be brought forward are suppressed upon any corrupt consideration. For instance, suppose a man is found with his throat cut, and it comes to the knowledge of any person that one of the inmates of the house has been seen with bloody clothes, and part of the property of the deceased was in his possession immediately afterwards, if the person possessed of this knowledge were to offer to keep it secret if a sum of money were offered him, I conceive he would be guilty of the offence of attempting to obtain a gratification in consideration of his not proceeding against that other for the purpose of bringing him to legal punishment, even though it should turn out that the deceased had really committed suicide. It seems to me that the question would be, whether facts which entailed a reasonable suspicion of guilt were knowingly suppressed, and their suppression turned into a source of illicit gain. (See *R. v. Best* 2 Mood. C. C. 124 *R. v. Gotley*. Russ. & R. 84.)

It would also appear that the offence is completed when the corrupt consideration is accepted, or even when there is an attempt to obtain, or an agreement to accept it. If this be so, the fact that the very same person afterwards did prosecute even to conviction would not purge the offence. It was otherwise under the old law as to compounding felonies. There the offence consisted not in taking the money but in letting the delinquent escape. Accordingly where upon an indictment for compounding a felony it appeared that the felon had actually been prosecuted to conviction by the defendant, an acquittal was directed. (*R. v. Stone* 4 C. & P. 379.)

The Exception annexed to s. 214 is not so clear as might be wished. It can hardly be said of any act that it is an offence irrespective of the intention of the offender. To take the case of an assault which is employed in the illustration. The very definition of the term in s. 351, makes the offence depend upon the intention. Is manslaughter an offence irrespective of the intention? It would seem that it is in one point of view, for an intention to kill would make it murder; and that

it is not in another point of view, for an utter absence of intention to harm might in many cases render the act innocent, as in administering poison by mistake. Under no circumstances could a charge of manslaughter be compounded, as no civil action could be brought by the party injured. These words must mean the party primarily and directly injured. The wife and children of a slain man are deeply injured and may sue for that injury, (Act 13 of 1855) but they would not be allowed to compound a charge of manslaughter.

There are many cases in which no civil action will lie for acts criminally cognisable, as in the instance of bigamy given in the text. But there are also some cases in which the right of civil action is suspended until criminal justice has been satisfied. This is the ground of the doctrine that a civil action is merged in a felony; and therefore where an act which causes a civil injury also amounts to a felony, no action can be instituted till the offender has been brought to justice. But when he has been tried, and either convicted, or acquitted, an action may then be commenced to recover damages, even though the offence amounted to larceny, burglary, or felonious stabbing. (*Crosby v. Leng* 12 East 409 and cases cited.) And it has been held by the Madras Sudder Court that a party may be civilly sued for a breach of trust, even though the act would subject the defendant to an indictment under the breach of trust act. (Madras Decisions 258 of 1859.)

S. 215 only applies to persons who receive money for the purpose of helping another to recover property which has been unlawfully taken, but of course any one who instigates such an offence will be punishable as an abettor. Great caution will therefore be necessary in offering rewards for the recovery of stolen property. Under 9 Geo. IV. c. 74. s. 112 it is made an offence to publish any advertisement for the return of property, where any words are used purporting that no questions will be asked, or that a reward will be paid without seizing or making an inquiry after the person producing such property. The spirit of this act will probably guide the Courts if any indictment is preferred for the offence of advertising, or offering rewards. Every such advertisement should stipulate for such information as may lead to the apprehension of the criminal.

216. Whenever any person convicted of or charged with an offence, being in lawful custody for that offence, escapes from such custody, or whenever a public servant, in the exercise of the lawful powers of such public servant, orders a certain person to be apprehended for an offence, whoever, knowing of such escape or order for apprehension, harbours or conceals that person with the intention of preventing him from being apprehended—

Harbouring an offender who has escaped from custody, or whose apprehension has been ordered—

ed, shall be punished in the manner following, that is to say, if the offence for which the person was in

If a capital offence. custody or is ordered to be apprehended is punishable with death, he shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ; if the offence is punishable with transportation for life, or

If punishable with transportation for life, or with imprisonment. imprisonment for ten years, he shall be punished with imprisonment of either description for a term which may extend to three years, with or without fine ; and if the offence is punishable with imprisonment which may extend to one year and not to ten years, he shall be punished with imprisonment of the description provided for the offence for a term which may extend to one-fourth part of the longest term of the imprisonment provided for such offence, or with fine, or with both.

Exception.—This provision does not extend to the case in which the harbour or concealment is by the husband or wife of the person to be apprehended.

217. Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, intending thereby to save or knowing it to be likely that he will thereby save any person from legal punishment or subject him to a less punishment than that to which he is liable, or with intent to save or knowing that he is likely thereby to save any property from forfeiture or any charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Public servant disobeying a direction of law with intent to save person from punishment or property from forfeiture.

218. Whoever, being a public servant, and being,

Public servant framing an incorrect record or writing with intent to save person from punishment or property from forfeiture.

as such public servant, charged with the preparation of any record or other writing, frames that record or writing in a manner which he knows to be incorrect, with intent to cause or knowing it to be likely that he will thereby cause loss or injury to the public or to any person, or with intent thereby to save or knowing it to be likely that he will thereby save any person from legal punishment, or with intent to save or knowing that he is likely thereby to save any property from forfeiture or other charge to which it is liable by law, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

See the remarks upon this section, Ante p. 95.

219. Whoever, being a public servant, corruptly or maliciously makes or pronounces in any stage of a judicial proceeding, any report, order, verdict, or decision which he knows to be contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Public servant in a judicial proceeding corruptly making an order, report, &c., which he knows to be contrary to law.

220. Whoever, being in any office which gives him legal authority to commit persons for trial or to confinement, or to keep persons in confinement, corruptly or maliciously commits any person for trial or to confinement, or keeps any person in confinement, in the exercise of that authority, knowing that in so doing he is acting contrary to law, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Commitment for trial or confinement by a person having authority who knows that he is acting contrary to law.

221. Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any

Intentional omission to apprehend

on the part of a public servant bound by law to apprehend.

person charged with or liable to be apprehended for an offence, intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows, that is to say :—

Punishment.

With imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement or who ought to have been apprehended was charged with or liable to be apprehended for an offence punishable by death ; or

With imprisonment of either description for a term which may extend to three years, with or without fine, if the person in confinement or who ought to have been apprehended was charged with or liable to be apprehended for an offence punishable with transportation for life or imprisonment for a term which may extend to ten years ; or

With imprisonment of either description for a term which may extend to two years, with or without fine, if the person in confinement or who ought to have been apprehended was charged with or liable to be apprehended for an offence punishable with imprisonment for a term less than ten years.

222. Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any person under sentence of a Court of Justice for any offence, intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape

Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court of Justice.

Punishment.

from such confinement, shall be punished as follows, that is to say :—

With transportation for life or with imprisonment of either description for a term which may extend to fourteen years, with or without fine, if the person in confinement or who ought to have been apprehended is under sentence of death ; or

With imprisonment of either description for a term which may extend to seven years, with or without fine, if the person in confinement or who ought to have been apprehended is subject, by a sentence of a Court of Justice, or by virtue of a commutation of such sentence, to transportation for life or penal servitude for life, or to transportation or penal servitude or imprisonment for a term of ten years or upwards ; or

With imprisonment of either description for a term which may extend to three years, or with fine, or with both, if the person in confinement or who ought to have been apprehended is subject by a sentence of a Court of Justice to imprisonment for a term not exceeding ten years.

223. Whoever, being a public servant legally bound as such public servant to keep in confinement any person charged with or convicted of any offence, negligently suffers such person to escape from confinement, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Escape from confinement negligent-ly suffered by a public servant.

224. Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself for any offence with which he is charged or of which he has been convicted, or escapes or attempts to escape from any custody in which he is lawfully detained for any such offence, shall be punished with imprisonment of either description for

Resistance or obstruction by a person to his lawful apprehension.

a term which may extend to two years, or with fine, or with both.

Explanation.—The punishment in this Section is in addition to the punishment for which the person to be apprehended or detained in custody was liable for the offence with which he was charged, or of which he was convicted.

225. **Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained for an offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both ;**

Resistance or obstruction to the lawful apprehension of another person.

Punishment.

Or, if the person to be apprehended, or the person rescued or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with transportation for life or imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ;

Or, if the person to be apprehended or rescued, or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with death, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ;

Or, if the person to be apprehended or rescued, or attempted to be rescued, is liable, under the sentence of a Court of Justice, or by virtue of a commutation of such a sentence, to transportation of life, or to transportation, penal servitude, or imprisonment, for a term of ten years or upwards, shall be punished with

imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ;

Or, if the person to be apprehended or rescued, or attempted to be rescued, is under sentence of death, shall be punished with transportation for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

226. Whoever, having been lawfully transported, returns from such transportation, the term of such transportation not having expired, and his punishment not having been remitted, shall be punished with transportation for life, and shall also be liable to fine, and to be imprisoned with rigorous imprisonment for a term not exceeding three years before he is so transported.

227. Whoever, having accepted any conditional remission of punishment, knowingly violates any condition on which such remission was granted, shall be punished with the punishment to which he was originally sentenced if he has already suffered no part of that punishment, and if he has suffered any part of that punishment, then with so much of that punishment as he has not already suffered.

228. Whoever intentionally offers any insult or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

229. Whoever, by personation or otherwise, shall intentionally cause or knowingly suffer himself to be returned, empanelled, or sworn as a juror or assessor in any

case in which he knows that he is not entitled by law to be so returned, empanelled, or sworn, or, knowing himself to have been so returned, empanelled, or sworn contrary to law, shall voluntarily serve on such jury or as such assessor, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

CHAPTER XII.

OF OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS.

230. Coin is metal used as money stamped and issued by the authority of some Government in order to be so used.

Coin.

Coin stamped and issued by the authority of the Queen, or by the authority of the Government of India, or of the Government of any Presidency, or of any Government in the Queen's dominions, is the Queen's coin.

Queen's Coin.

Illustrations.

- (a) Cowries are not coin.
- (b) Lumps of unstamped copper, though used as money, are not coin.
- (c) Medals are not coin, inasmuch as they are not intended to be used as money.
- (d) The coin denominated as the Company's Rupees is the Queen's coin.

The definition of Coin in this Section must be taken as limited to Coin now in use. A Roman Coin of the time of Augustus is "money stamped and issued by the authority of a government in order to be so used." But I do not imagine that any indictment under s. 231 could be maintained for counterfeiting such a Coin, which could only be saleable as a curiosity, and would not pass anywhere as money.

231. Whoever counterfeits or knowingly performs any part of the process of counterfeiting coin, shall be punished with imprisonment of either description for a term

Counterfeiting coin.

which may extend to seven years, and shall also be liable to fine.

Explanation.—A person commits this offence, who, intending to practise deception, or knowing it to be likely that deception will thereby be practised, causes a genuine coin to appear like a different coin.

The word "Counterfeit" as used in this Code is defined by s. 28 to involve an intention by means of that resemblance to practise deception, or a knowledge that it is likely that deception will thereby be practised. And such an intention or knowledge will always be inferred from the mere fact of counterfeiting unless under circumstances which conclusively negative it. Such circumstances must be so rare that it is unnecessary to imagine instances.

The same definition provides that it is not essential to counterfeiting that the imitation should be exact. And this provision is of course peculiarly necessary in this country where the ignorance of the people might enable even a clumsy imitation to prove successful, while the low state of coining science renders it probable that no counterfeit will be minutely accurate. Accordingly a trifling variation from the real coin in the inscription, effigies, or arms was held under the corresponding English Statute not to remove the offence out of the Statute. And so it was held in another case, where the ingenious device was adopted of making coins without any impression whatever, in imitation of the smooth-worn money then in circulation. (Arch. 610) But it will still be necessary to show that the article produced, or partly produced was a counterfeit; that is that it was such a resemblance as might be received as the coin for which it was intended to pass, by persons using the caution customary in taking money. This caution of course will vary according to the class of persons among whom it may be supposed that it was intended to pass. Accordingly, where the prisoner had counterfeited the resemblance of a half-guinea upon a piece of gold previously hammered, but it was not round, nor would it pass in the condition in which it then was, the judges held the offence to be incomplete. (Arch. 609.)

The absence of apparent resemblance may possibly arise merely from the process being imperfectly carried out. If that be so, there will still be an offence under this section. And even if the metal in which the counterfeit was made was completely different from that of the coin represented, it would still be a question of fact, whether this difference did not arise merely from the manufacture having been interrupted in an early stage. Copper or lead may be washed over so as afterwards to bear a sufficiently strong resemblance to silver or gold. But I conceive that no conviction could be supported where it was plain that the thing actually made was never intended to result in a coin, but was merely an experiment as a step towards future productive efforts.

It is seldom possible, and never necessary, to show that the defendant has been caught in the act of counterfeiting. The act will generally have to be inferred, from such evidence as the possession of tools, dies, or metal necessary from the purpose; or from finding some coins finished, and others unfinished, or different coins in a different state of completion. (Arch. 609.) The mere possession of counterfeit coin by a person who has had nothing to do with its manufacture may be an offence under subsequent sections, (237 - 243) but is not punishable under s. 231.

The offence constituted by this section consists in the fact of the counterfeiting. It is not necessary to show that the coins were uttered, or that there was any attempt to utter them. (Arch. 610.)

232. Whoever counterfeits or knowingly performs any part of the process of counterfeiting the Queen's coin, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Counterfeiting the Queen's coin.

233. Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells, or disposes of, any die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Making or selling instrument for counterfeiting coin.

This and similar Sections must be taken as subject to ss. 76 and 79, which prevent an act being criminal if done by a person who is, or supposes himself to be justified in the act. Therefore if a die-sinker were to be applied to for the purpose of making coining moulds, and were in concert with the police to proceed with the task for the purpose of bringing the coiners to detection, this would not be a criminal act. (Arch. 624.) And so possession of coining tools, or counterfeit coin by a person entitled to retain them, as for instance a policeman, is no offence.

234. Whoever makes or mends, or performs any part of the process of making or mending, or buys, sells, or disposes of, any

Making or selling instrument

for counterfeiting Queen's coin. die or instrument, for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting the Queen's coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

235. Whoever is in possession of any instrument or material for the purpose of using the same for counterfeiting coin, or knowing or having reason to believe that the same is intended to be used for that purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the coin to be counterfeited is the Queen's coin, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Possession of instrument or material for the purpose of using the same for counterfeiting coin.

236. Whoever, being within British India, abets the counterfeiting of coin out of British India, shall be punished in the same manner as if he abetted the counterfeiting of such coin within British India.

Abetting in India the counterfeiting out of India of coin.

237. Whoever imports into British India, or exports therefrom, any counterfeit coin, knowing or having reason to believe that the same is counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Import or export of counterfeit coin.

238. Whoever imports into British India, or exports therefrom, any counterfeit coin which he knows or has reason to believe to be a counterfeit of the Queen's coin, shall be punished with transportation for life, or with imprisonment of either description for a term

Import or export of counterfeits of the Queen's coin.

which may extend to ten years, and shall also be liable to fine.

239. Whoever, having any counterfeit coin which at the time when he became possessed of it he knew to be counterfeit, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Delivery to another of coin, possessed with the knowledge that it is counterfeit.

240. Whoever, having any counterfeit coin which is a counterfeit of the Queen's coin, and which at the time when he became possessed of it he knew to be a counterfeit of the Queen's coin, fraudulently or with intent that fraud may be committed, delivers the same to any person, or attempts to induce any person to receive it, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Delivery of Queen's coin, possessed with the knowledge that it is counterfeit.

241. Whoever delivers to any other person as genuine, or attempts to induce any other person to receive as genuine, any counterfeit coin which he knows to be counterfeit, but which he did not know to be counterfeit at the time when he took it into his possession, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin counterfeited, or with both.

Delivery to another of coin as genuine, which when first possessed the deliverer did not know to be counterfeit.

Illustration.

A, a coiner, delivers counterfeit Company's Rupees to his accomplice B, for the purpose of uttering them. B sells the Rupees to C, another utterer, who buys them knowing them to be counterfeit. C pays away the Rupees for goods to D, who receives them, not knowing them to be counterfeit. D, after receiving the Rupees, discovers that they are

counterfeit, and pays them away as if they were good. Here D is punishable only under this Section, but B and C are punishable under Section 239 or 240 as the case may be.

242. Whoever, fraudulently or with intent that fraud may be committed, is in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Possession of counterfeit coin by a person who knew it to be counterfeit when he became possessed thereof.

243. Whoever, fraudulently or with intent that fraud may be committed, is in possession of counterfeit coin which is a counterfeit of the Queen's coin, having known at the time when he became possessed of it that it was counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Possession of Queen's coin by a person who knew it to be counterfeit when he became possessed thereof.

There are three classes of offences created by ss. 239—243. First, passing off coin known from the first to be counterfeit. Secondly, passing off such coin which was for the first time discovered to be counterfeit after its receipt. Thirdly, being in wrongful possession of coin known all along to have been counterfeit. Further subdivisions of classes first and third arise, according as the counterfeit coin is the Queen's or otherwise.

Guilty knowledge is generally a matter of circumstantial evidence. The possession of other pieces of base coin, whether of the same or a different description, or the fact that base coin has been passed off by the same defendant at other times, either before or after the offence charged in the indictment, will be evidence of such a guilty knowledge. (Arch. 475, 619.) And so it would be where the facts of the case showed a desire for concealment; as for instance, if it were shown that the defendant had employed a third person to make a purchase for him, without any apparent cause.

If coin is delivered to a person for the purpose of fraud, it is unnecessary to show that there was an intention to defraud the person to whom they are delivered. And even if the intention were negatived the offence would still be the same. For instance an offence would be committed under ss. 239, and 240, if it were delivered to an accomplice or an innocent person for the purpose of being passed off at once. Nor is it necessary that there should be any legal obligation to pay the

person upon whom the money was passed off. Hence the giving of a counterfeit coin to a woman as the price of connection with her was held to be indictable. (Arch. 619.) And the offence is complete, even though the person to whom the coin was tendered refused to receive it. (Ibid.)

The mere possession of counterfeit coin is an offence under ss. 242, 243, even though no attempt is made to pass it off, provided it can be shown that they were kept for a fraudulent purpose, and were originally obtained with a guilty knowledge. The mere fact of a single base coin being found in a party's possession would not, without further evidence, be sufficient to create a presumption that he knew it to be counterfeit when he obtained it, and intended to make a fraudulent use of it. But where a greater number of base coins is found in any man's possession, the presumption of guilt would be sufficient to make a conviction lawful, unless the possession could in some manner be explained or accounted for.

A coin will be in a man's possession when it is in any box, or place, which is under his control, and whether it is used for his benefit or not, provided it is shown that he is aware of its existence and character. And the same article may be in the possession of several persons, if they are acting in concert, and each of them have a guilty knowledge of the existence and character of the thing in question. (Arch. 622.)

244. **Whoever, being employed in any mint lawfully established in British India, does any act, or omits what he is legally bound to do, with the intention of causing any coin issued from that mint to be of a different weight or composition from the weight or composition fixed by law, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.**

Person employed in a mint causing coin to be of a different weight or composition from that fixed by law.

245. **Whoever, without lawful authority, takes out of any mint lawfully established in British India, any coining tool or instrument, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.**

Unlawfully taking from a mint any coining instrument.

246. **Whoever fraudulently or dishonestly per-**

Fraudulently or dishonestly diminishing the weight or altering the composition of any coin. forms on any coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Explanation.—A person who scoops out part of the coin, and puts anything else into the cavity, alters the composition of that coin.

247. Whoever fraudulently or dishonestly performs on any of the Queen's coin any operation which diminishes the weight or alters the composition of that coin, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Altering appearance of any coin with intent that it shall pass as a coin of a different description. 248. Whoever performs on any coin any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Altering appearance of the Queen's coin with intent that it shall pass as a coin of a different description. 249. Whoever performs on any of the Queen's coin any operation which alters the appearance of that coin, with the intention that the said coin shall pass as a coin of a different description, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Delivery to another of coin possessed with the knowledge that it is altered. 250. Whoever, having coin in his possession with respect to which the offence defined in Section 246 or 248 has been committed, and having known at the time when he became possessed of such

coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

251. Whoever, having coin in his possession with respect to which the offence defined in Section 247 or 249 has been committed, and having known at the time when he became possessed of such coin that such offence had been committed with respect to it, fraudulently or with intent that fraud may be committed, delivers such coin to any other person, or attempts to induce any other person to receive the same, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Delivery of Queen's coin possessed with the knowledge that it is altered.

252. Whoever, fraudulently or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the Sections 246 or 248 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Possession of altered coin by a person who knew it to be altered when he became possessed thereof.

253. Whoever, fraudulently or with intent that fraud may be committed, is in possession of coin with respect to which the offence defined in either of the Sections 247 or 249 has been committed, having known at the time of becoming possessed thereof that such offence had been committed with respect to such coin, shall be punished with impri-

Possession of Queen's coin by a person who knew it to be altered when he became possessed thereof.

sonment of either description for a term which may extend to five years, and shall also be liable to fine.

254. Whoever delivers to any other person as genuine or as a coin of a different description from what it is, or attempts to induce any person to receive as genuine or as a different coin from what it is, any coin in respect of which he knows that any such operation as that mentioned in Sections 246, 247, 248, or 249, has been performed, but in respect of which he did not, at the time when he took it into his possession, know that such operation had been performed, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine to an amount which may extend to ten times the value of the coin for which the altered coin is passed or attempted to be passed.

255. Whoever counterfeits, or knowingly performs any part of the process of counterfeiting, any stamp issued by Government for the purpose of revenue, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.—A person commits this offence who counterfeits by causing a genuine stamp of one denomination to appear like a genuine stamp of a different denomination.

256. Whoever has in his possession any instrument or material for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with im-

Delivery to another of coin as genuine, which, when first possessed, the deliverer did not know to be altered.

Counterfeiting a Government stamp.

Having possession of an instrument or material for the purpose of counterfeiting a Government stamp.

prisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

257. Making or selling instrument for the purpose of counterfeiting a Government stamp. Whoever makes, or performs any part of the process of making, or buys, or sells, or disposes of, any instrument for the purpose of being used, or knowing or having reason to believe that it is intended to be used, for the purpose of counterfeiting any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

258. Sale of counterfeit Government stamp. Whoever sells, or offers for sale, any stamp which he knows or has reason to believe to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

259. Having possession of a counterfeit Government stamp. Whoever has in his possession any stamp which he knows to be a counterfeit of any stamp issued by Government for the purpose of revenue, intending to use or dispose of the same as a genuine stamp, or in order that it may be used as a genuine stamp, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

260. Using as genuine a Government stamp known to be counterfeit. Whoever uses as genuine any stamp, knowing it to be a counterfeit of any stamp issued by Government for the purpose of revenue, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

261. Whoever, fraudulently or with intent to cause loss to the Government, removes or effaces from any substance bearing any stamp issued by Government for the purpose of revenue, any writing or document for which such stamp has been used, or removes from any writing or document a stamp which has been used for such writing or document, in order that such stamp may be used for a different writing or document, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Effacing any writing from a substance, or removing from a document a stamp used for it, with intent to cause loss to Government.

The intention with which the acts named in the above section are done, may be either fraudulent generally, or with a special view to cause loss to Government. And therefore a conviction would be good where the intention of the act was merely to efface a document with a view injuriously to affect the rights of another person. No intention to cause loss to Government can be assumed unless it is shown, or may be inferred, that the intention of the party was to use the stamp as a stamp a second time. And therefore no conviction could be supported, if the object of removing writing from a stamped paper was merely to write upon the blank space something which required no stamp.

262. Whoever, fraudulently or with intent to cause loss to the Government, uses for any purpose a stamp issued by Government for the purpose of revenue, which he knows to have been before used, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. *

263. Whoever, fraudulently or with intent to cause loss to Government, erases or removes from a stamp issued by Government for the purpose of revenue, any mark put or impressed upon such stamp for the purpose of denoting that the same has been used, or knowingly has in his possession, or sells or disposes of, any such stamp from which such mark has been

Erasure of mark denoting that Stamp has been used.

erased or removed, or sells or disposes of any such stamp which he knows to have been used, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

CHAPTER XIII.

OF OFFENCES RELATING TO WEIGHTS AND MEASURES.

264. Fraudulent use of false instrument for weighing. Whoever fraudulently uses any instrument for weighing which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

265. Fraudulent use of false weight or measure. Whoever fraudulently uses any false weight or false measure of length or capacity, or fraudulently uses any weight or any measure of length or capacity as a different weight or measure from what it is, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

266. Being in possession of false weights or measures. Whoever is in possession of any instrument for weighing, or of any weight, or of any measure of length or capacity, which he knows to be false, and intending that the same may be fraudulently used, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

267. Making or selling false weights or measures. Whoever makes, sells, or disposes of, any instrument for weighing, or any weight, or any measure of length or capacity which he knows to be false, in order

that the same may be used as true, or knowing that the same is likely to be used as true, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

CHAPTER XIV.

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY, AND MORALS.

268. A person is guilty of a public nuisance, who Public nuisance. does any act, or is guilty of an illegal omission, which causes any common injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the vicinity, or which must necessarily cause injury, obstruction, danger, or annoyance to persons who may have occasion to use any public right.

A common nuisance is not excused on the ground that it causes some convenience or advantage.

Nuisances are of two sorts, Public and Private. Those which only affect individuals cannot be made the subject of an indictment, but may be the ground of a Civil action for damages. Accordingly,

“Where upon an indictment against a tinman, for the noise made by him in carrying on his trade, it appeared in evidence, that the noise only affected the inhabitants of three sets of chambers in Clifford's Inn, and that by shutting the windows the noise was in a great measure prevented, it was ruled by Lord Ellenborough, C. J. that the indictment could not be sustained, as the annoyance was, if any thing, a private nuisance.” (1 Russ. 318.)

On the other hand a public nuisance, which affects all equally, can only be the subject of an indictment, for otherwise a party might be ruined by a million suits. (1 Russ. 317, but even then a private individual may sue for any especial damage he has suffered. For instance, a man may be indicted for digging a hole in a high road, and sued by a party who has fallen into it, and broken his leg. *Ibid. note.*)

In general it may be laid down, that anything which seriously affects the health, comfort, safety or morals of the community, may be indicted as a public nuisance. For instance, keeping filth upon premises, or exercising offensive trades, which destroy the purity of the

air ; keeping a savage bull in a field through which there is a footway ; keeping ferocious dogs unmuzzled ; bringing a horse diseased with glanders into a public place, to the danger of infecting the Queen's subjects ; exposing a child infected with small pox in the public streets ; (1 Russ. 317, Arch. 745,) keeping gunpowder, naphtha, or similar inflammable substances, in such large quantities as to be dangerous to life and property ; (Reg. v. Lister. 26 L. J. M. C. 196. See as to gunpowder, Act XVIII. of 1841, § 2 and Act XXVIII. of 1857, § 7.) keeping brothels and common gambling houses ; (1 Russ. 322, 323,) and although, as we have seen above, a smith's hammer is not considered sufficiently noisy to be a common nuisance, that more terrible weapon, a woman's tongue, is, and indictments, for being 'a common scold' were well known to the English law, and the offence was punished by placing her on an ingenious instrument, now extinct, called a trebucket, or cucking stool. (1 Russ. 327.)

It has been ruled that where a noxious trade or other nuisance, is established at such a distance as to be inoffensive to any one, and afterwards persons choose to build houses, or make roads, near it, no indictment can be brought, for the trade, &c., was legal before the building of the house, or construction of the road. (1 Russ. 323.) But this position is doubted in Archbold, (746,) and I would submit with justice. Otherwise the result would be, that a party, by doing that which could not be prevented at the time, might maintain a desert around him for ever, to the injury of public and private interests. The doctrine has also been expressly denied in the case of a civil action by an individual, which would have been a stronger case for exemption. (Elliotson v. Feetham, 2 Bing. N. C. 134. Bliss v. Hall, 4 Bing. N. C. 183.)

Nor is a party allowed to say, that the smells, &c., were so bad before he came there, that he has added nothing perceptible to the annoyance. Where such a defence was set up, Abbott C. J. said,

"It is not necessary that a public nuisance should be injurious to health ; if there be smells offensive to the senses, that is enough, as the neighbourhood has a right to fresh and pure air. It has been proved that a number of other offensive trades are carried on near this place, but the presence of other nuisances will not justify any one of them ; or the more nuisances there were, the more fixed they would be. However one is not the less subject to prosecution, because others are culpable." (1 Russ. 319.)

Nor is a party allowed to plead a sort of set off, and to show that however undoubted a nuisance he may be to some, he is conferring a more than proportionate benefit upon the entire community, for, as the Court of Queen's Bench observed in such a case,

"No greater evil can be conceived than the encouragement of capitalists and adventurers to interfere with known public rights, from motives of personal interest, on the speculation that the changes made may be rendered lawful, by ultimately being thought to supply the public with something better than what they actually enjoy." (Rex. v. Ward. 4 A. & E. 404.)

Nor, finally, can any length of time be held to justify a nuisance, for the lapse of ages cannot authorise a man to poison his fellow-subjects. (Arch. 746.)

Besides the remedy by indictment, summary powers are given to the Magistrate by Act XXI of 1841.

‘It shall be lawful for any Magistrate, when the public benefit and comfort are in question, to cause unlawful obstruction and nuisances to be removed from thoroughfares and public places, and to suppress, or cause to be removed to a different place, trades or occupations injurious to the health or comfort of the community, and to prevent such construction of buildings, and such disposal of combustible substances as may appear to him likely to occasion conflagration, and to cause the removal of buildings in such state of weakness, as by the probability of their falling, may appear to him to expose individuals to danger.’ (§ 1.)

‘In exercising the authority conferred by the above Section, the Magistrate shall after holding such inquiry, as may satisfy him of the necessity of proceeding under this Act, issue an injunction, which, if practicable, shall be served personally on the parties concerned; but if such service shall be impracticable or very inconvenient, the injunction shall be notified by oral proclamation, and a written notice thereof shall be set up at such place or places as may be best adapted for conveying information to the parties concerned. And in case such injunction be not obeyed, the Magistrate may compel observance thereof by force, and punish disobedience by fine not exceeding 200 Rupees, or by imprisonment without labour for any period not exceeding one month, and if the Magistrate finds it necessary to incur expense in removing noxious or dangerous articles, or buildings, it shall be lawful for him to sell the same, or their materials by public auction, in order to defray the charge, delivering any surplus that may remain to the owner. And it shall be lawful for the Magistrate to compel, under the like penalty, the owners of tanks or wells adjacent to any public thoroughfare, to fence the same in such manner as to prevent danger to the public arising therefrom.’ (§ 2.)

Powers of directing the removal of nuisances, and of imposing summary penalties for disobedience to such orders, are also given by Act XIV of 1856, for the conservancy and improvement of the Presidency Towns.

269. Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Negligent act likely to spread infection of any disease dangerous to life.

Under this Section it will be possible to arrest and punish persons who go about under the influence of infectious disorders, for the purpose of exciting public commiseration. A more valuable application of the same section would be to employ it in the checking of a disease, as loathsome as it is dangerous, which springs from promiscuous prostitution.

270. Whoever malignantly does any act which is,

Malignant act likely to spread infection of any disease dangerous to life. and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

271. Whoever knowingly disobeys any rule made and promulgated by the Government of India, or by any Government, for putting any vessel into a state of quarantine, or for regulating the intercourse of vessels in a state of quarantine with the shore or with other vessels, or for regulating the intercourse between places where an infectious disease prevails and other places, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Disobedience to a quarantine rule.

272. Whoever adulterates any article of food or drink, so as to make such article noxious as food or drink, intending to sell such article as food, or drink, or knowing it to be likely that the same will be sold as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

Adulteration of food or drink which is intended for sale.

273. Whoever sells, or offers or exposes for sale, as food or drink, any article which has been rendered or has become noxious, or is in a state unfit for food or drink, knowing or having reason to believe that the same is noxious as food or drink, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

Sale of noxious food or drink.

The adulteration mentioned in the two preceding sections must be such as renders it injurious to health. Mixing water with milk, sloe leaves with tea, or chicory with coffee would not be punishable.

It would be otherwise with such compounds as beer doctored with strychnine, spirits mixed with vitriol, cakes coated with red lead, and such like poisonous compounds. Where the person charged is himself the party who has directed the adulteration, the fact that the article has been sold, or was manufactured for sale, will be sufficient to warrant a conviction. On the other hand where the party is merely the vendor of that which has been manufactured by others, some further evidence will be necessary in order to show that he knew not only that there was some adulteration, but also what was the extent, and probable consequence of that adulteration. It must be remembered that in most cases there are some recognised modes of adulterating particular articles of food, which are perfectly well known to the trade, and therefore where it is shown that the vendor knew that the article was in fact adulterated, it will in most cases be no very unsafe presumption that he had reason to know what the character of the adulteration was. The knowledge of the adulteration will seldom be capable of direct proof. Where the article is in fact adulterated, and where it is shown that the vendor purchased it at a price below that for which the genuine article could be procured, such knowledge may safely be inferred. The presumption would be strengthened if it could be shown that the vendor had several articles of the same species on hand, at different prices, some adulterated and some not, or adulterated to different degrees.

Little difficulty can ever be felt where the bad quality of the article arises, not from any adulteration which might possibly escape notice, but from its own intrinsic defects. As for instance, where unsound meat is sold. And, even though the defect has escaped the notice of the purchaser, it must be remembered that the seller has generally such an accurate knowledge of the qualities of his ware, and of the previous history of each particular article, as renders it very unlikely that he could be ignorant of any fault of a glaring character.

274. Whoever adulterates any drug or medical preparation in such a manner as to lessen the efficacy or change the operation of such drug or medical preparation, or to make it noxious, intending that it shall be sold or used for, or knowing it to be likely that it will be sold or used for any medicinal purpose, as if it had not undergone such adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

275. Whoever, knowing any drug or medical

Sale of adulterated drugs. preparation to have been adulterated in such a manner as to lessen its efficacy, to change its operation, or to render it noxious, sells the same, or offers or exposes it for sale, or issues it from any dispensary for medicinal purposes as unadulterated, or causes it to be used for medicinal purposes by any person not knowing of the adulteration, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

Under this and the previous Section it is not necessary to show that the drug was so adulterated as to render it noxious to life. It is sufficient if its efficacy is lessened. The necessity for this enactment is obvious enough. All drugs are of a recognised average strength, and prescriptions are made up on the understanding that they possess such strength. If however the drug which a physician prescribes proves to be only half the strength on which he calculated, it may prove wholly useless, and death may ensue before the error is remedied. The act only speaks of the efficacy of the drug being lessened, or, its operation changed. It would however be necessary to show that the difference in the drug was of so considerable a character as to make an appreciable and important change on its character, and effect. The use of the word "adulteration" implies the mixture of some foreign element. And therefore a merely inferior quality of the same medicine will not amount to an adulteration. For instance, there are many different sorts of cod liver oil, and the same oil prepared in different ways may produce different degrees of effect. But if an apothecary, being ordered to supply a quart of cod-liver oil for a person in consumption, were to send a quart of the most inferior oil of that description, this would not be an act indictable under either section, provided the oil, however inferior in quality, was genuine of its kind.

It will be observed that the essence of the offence consists not so much in the adulteration, as in the passing the article off as unadulterated. Any one who chooses may mix anything he likes with any medicine, but he must not sell it as if it was unadulterated, nor for the purpose of being sold as unadulterated. This must I imagine be taken as the meaning of the words "knowing it to be likely that it will be sold as if it had not undergone such adulteration." If a druggist were to sell a compounded medicine to an apothecary, communicating exactly its real nature to him, he could not be rendered criminally answerable because the apothecary sold it again as genuine, even though his knowledge of the apothecary's morals made it very probable that such might be the result. But it would be very different if it could be shown that he supplied the spurious commodity, by

mutual understanding, for the purpose of being issued to the world as something different.

276. Whoever knowingly sell, or offers or exposes for sale, or issues from a dispensary for medicinal purposes, any drug or medical preparation as a different drug or medical preparation, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

The offence constituted by this Section does not involve the idea of any adulteration or inferiority in the substituted medicine. It is sufficient that it is not in fact what it purports to be. If a chemist were to discover a drug which he considered to be just as effective as quinine, and which could be procured for half the price, he would not be justified in selling it as quinine, even though it answered precisely the same purpose. The fraud consists, not in the injury done, but in the false pretence by which persons who suppose that they are using one medicine are forced to use another against their will.

277. Whoever voluntarily corrupts or fouls the water of any public spring or reservoir, so as to render it less fit for the purpose for which it is ordinarily used, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred Rupees, or with both.

278. Whoever voluntarily vitiates the atmosphere in any place so as to make it noxious to the health of persons in general dwelling or carrying on business in the neighbourhood or passing along a public way, shall be punished with fine which may extend to five hundred Rupees.

279. Whoever drives any vehicle, or rides on any public way in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with

imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

This is the first of a series of Sections (279—289) by which mere negligence is made punishable, apart from any injury actually done. It is plain that the essence of the offence consists in the possibility of injury, and not in its actual occurrence, as all the clauses contain the words “likely to cause hurt or injury,” or words of a similar nature, and the occurrence of actual injury meets with punishment under ss. 337 and 338; though strangely enough the actual inflicting of hurt is liable to a less punishment under s. 337 than the commission of the same act would be if no hurt resulted. Nor is it necessary that there should be any intention to injure. It is sufficient if the carelessness is such as does cause, or is likely to cause injury.

In order to make a person criminally responsible for negligence, the act complained of must appear to be his own personal neglect or default. In a civil suit a man is responsible for the acts of his servants, but in criminal matters he is not. In a recent case, the prisoner was a seller of fireworks. In his absence a fire took place in his house, in consequence of which a rocket went off, and caused the death of another. It was held that he was not criminally answerable, Cockburn J. C. said;

“The prisoner kept a quantity of fireworks in his house, but that alone did not cause the fire by which the death was occasioned. It was the super-added negligence of some one else that caused it. Had the death proceeded from the natural consequences of this keeping of the fireworks, or for instance, if from the prisoner's negligent keeping of them a rocket had gone off in spontaneous combustion, and so caused the death, the conviction might have been maintained. But here the death was caused by the act of the defendant *plus* the act of some one else.” (Reg. v. Bennett L. J. M. C. 27.)

The act complained of must also be one whose necessary or natural result would be of an injurious character. Therefore I conceive that the rule of civil law will apply, that even though there has been negligence on the part of the defendant, still, if that negligence would have been harmless only for equal or greater negligence on the part of some one else, no liability arises. In such cases the rule has been laid down, that

“Although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover: if, by ordinary care, he might have avoided them, he is the author of his own wrong.” (3 M. & W. 248.)

Hence where a Steamer ran down a Collier, and the jury found that the Steamer showed want of caution in going at too great a speed on so dark a night, but the immediate cause of the accident appeared to be that the Collier did not exhibit a light as she was bound to do by the Admiralty regulation, it was held that no action was maintainable against the owners of the steamer. (Dowell v. Steam Navigation Com-

pany 26 L. J. Q. B. 59, *Tuff v. Warman* 27 L. J. C. P. 322. *Ellis v. L. & S. W. Ry.* 26 L. J. Ex. 349.)

The evidence of negligence must always be affirmative and positive. It cannot be presumed. The mere fact that an injury has taken place, which would not have taken place if the defendant had acted in some different way, will be no evidence of negligence, unless he acted wrongly and negligently in what he did or left undone. In a very recent case where a woman was run down by an omnibus, *Erle C. J.* stated the facts of the case, and the law as follows :—

“ In this case it appears that the night was dark, and that there was a storm of snow, and foot-passengers crossing the street were bound to be extremely cautious in doing so, just as much as the drivers of vehicles were bound to drive cautiously. It does not appear that the defendant's vehicle was coming along at an improper speed, but, on the contrary, that there was abundant time at the rate at which the coachman was driving for foot-passengers, if aware of his approach to have slipped backward or forward, and got clear of his horses—as much time for them to have done that as for the driver to have stopped or got out of their way. The only ground suggested for imputing any breach of duty to the driver is, that at the time of the accident he was looking round to speak to the conductor; but that he might do for any lawful purpose, and at the time he did so he was driving on his proper side of the street, and at a proper speed, and it amounts to no affirmative breach of his duty. There appears to be just as much reason for saying that the woman negligently ran against the defendant's horses as that the horses were negligently driven against them; and if they had injured the horses or the omnibus it might with equal justice have been said that they were liable for such injury: the rule being, that it is equally the duty of foot passengers when crossing a street to look out for vehicles, as it is the duty of the drivers of vehicles to look out for foot passengers.”

Williams J. said;

“ I entirely concur; and only wish to add that there is another rule as to leaving evidence to a jury, which is of the greatest importance, and that is, that where the evidence is equally consistent with either negligence or no negligence, it is not competent for the judge to leave it to the jury to find either alternative, but it must be taken as amounting to no proof at all.” (*Cotton v. Wood* 29 L. J. C. P. 333.)

Where the person injured is in another vehicle, as for instance a carriage, railway train, or ship, he is so far identified with the person managing that vehicle, that if the accident is brought about by the fault of the manager, so that the latter could not complain of it, neither can he. (*Thorogood v. Bryan* 8. C. B. 115.) And so where the person injured was a child, who was under the care of a grown person, to whose negligence the accident was mainly owing, though the defendant was also in some degree to blame, it was held that no action could be maintained in the name of the child, since he was identified with the party under whose charge he was, and the latter was so much in fault that he could not have sued.” (*Waite v. N. E. Ry. Company*, 28 L. J. Q. B. 258.)

Of course the conductor of a vehicle will always be answerable criminally, as he would formerly have been answerable civilly, for an injury resulting to those under his own care through his rashness or neglect.

280. Rash navigation of a vessel. Whoever navigates any vessel in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

281. Exhibition of a false light, mark, or buoy. Whoever exhibits any false light, mark, or buoy, intending or knowing it to be likely that such exhibition will mislead any navigator, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

282. Conveying person by water for hire in a vessel overloaded or unsafe. Whoever knowingly or negligently conveys, or causes to be conveyed for hire, any person by water in any vessel, when that vessel is in such a state or so loaded as to endanger the life of that person, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

A ship owner who knowingly sends out an unseaworthy vessel will not be liable under this section, (though he would be under s. 336,) if it sinks carrying with it crew and captain, for they are not being conveyed for hire. But he would be answerable if a single passenger went to the bottom, or even if nothing whatever happened, provided the condition of the ship was, and might have been foreseen to be dangerous. And I conceive it would be just the same if no danger whatever occurred, provided there would have been danger in the ordinary course of things. If a ship were to be sent to China in a state which would render it unsafe if bad weather came on, it would be no answer, after the event, to show that in point of fact there had been a calm the whole way. But a ship may be seaworthy for one voyage, for instance a short coasting expedition, which would not be seaworthy if sent out across the ocean. (Smith. Merc. L. 368.)

283. Danger or obstruction in a pub- Whoever, by doing any act, or by omitting to take order with any property in his possession or under his charge, causes

lic way or naviga- danger, obstruction, or injury to any
tion. person in any public way or public
line of navigation, shall be punished with fine which
may extend to two hundred Rupees.

Under this Section also, as in all the similar cases, the danger or injury must be such as would naturally follow from the act. Therefore where the facts were, that the defendant being possessed of land abutting on a public foot-way, excavated an area in the course of building a house immediately adjoining the foot-way, and left it unprotected, and a person walking in the night fell in, the defendant was held to be liable; though in point of law the party who fell in was off the road, and was a trespasser. (*Barnes v. Ward*. 9 C. B. 392.) But the contrary was held where a man made a well in the middle of his field through which there was a right of way, and a person straying off the path at night fell into it. *Martin B*, after citing the last case with approval, said;

“But when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seem to me to be different. We do not see where the liability is to stop. A man going off a road in a dark night and losing his way, may wander to any extent. We think the proper and true test of legal liability is, whether the excavation be substantially adjoining the way.” (*Hardcastle v. S. G. Ry. Co.* 28 L J. Ex. 139. *Hounsell v. Smith*. 29 L J. C. P. 2031)

The property which creates the nuisance must be under the control of the person charged, so as to make it possible for him to remove the obstruction or cause of danger. Accordingly, where a ship sunk in a navigable river without the fault of the owner, and was abandoned by him, it was held that he was not answerable either by indictment or suit, for any injury that might result from its lying in the bed of the river. The Court considered that after shipwreck and abandonment, the property ceased to be in the possession and under the control of the former owner, and that he was under no obligation to add to his existing misfortune by incurring the expense of either raising the vessel, or keeping a continual watch over it. (*Brown v. Mallett*. 5 C. B. 599.)

Under all these Sections it will probably be held, in conformity with the principles of civil law, that much greater caution will be required in reference to the general public than will be called for in regard to a man's own servants who are employed in any occupation of danger. Their employment is voluntary, and, from its very nature, gives them full notice of all the perils to which they are exposed, and of the precautions by which those perils may be avoided. Accordingly where a workman was killed while using a machine for raising weights, the evidence being that another and safer mode of raising weights was usual, and had been discarded by orders of the defendant, it was held that the latter was not liable. *Pollock, C. B.* said, “A servant cannot continue to use a machine he knows to be dangerous at the risk of his

employer." (*Dynen v. Leach* 26 L. J. Ex. 221.) But it would be otherwise if the master had directly conduced to the injury of his servant by any act of personal neglect. As for instance, where the master was a miner, and the workman had pointed out that a stone overhanging the works was dangerous, and likely to fall, and it did fall soon after, and killed him. And so in another case, where a miner was killed by the fall of a stone upon him while he was being drawn up through the shaft of the mine. There it was found that the stone fell, "by reason of the shaft being in an unsafe state from causes for which the master, the defendant, was responsible." (Cited, 26 L. J. Ex. 222.)

So persons engaged in a gun powder manufactory, in a chemist's laboratory, or in a druggist's shop are expected to know the dangerous character of the articles with which they are surrounded, and to take the proper precaution against them. But if similar commodities were left about in places open to servants, strangers, and the public generally, a much greater degree of precaution would be necessary, in guarding against danger, and in giving notice to those who might expose themselves to risk.

By s. 336 any rash or negligent act by which life or safety is endangered is punishable.

284. Whoever does, with any poisonous substance, any act in a manner so rash or negligent as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any poisonous substance in his possession as is sufficient to guard against any probable danger to human life from such poisonous substance, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

285. Whoever does, with fire or any combustible matter, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any fire or any combustible matter in his possession as is sufficient to guard against any probable danger to human life from such fire or combustible matter, shall be punished with imprisonment of either description for a

term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

286. Whoever does, with any explosive substance, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any explosive substance in his possession as is sufficient to guard against any probable danger to human life from that substance, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

Negligent conduct with respect to any explosive substance.

287. Whoever does, with any machinery, any act so rashly or negligently as to endanger human life, or to be likely to cause hurt or injury to any other person, or knowingly or negligently omits to take such order with any machinery in his possession or under his care as is sufficient to guard against any probable danger to human life from such machinery, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

Negligent conduct with respect to any machinery in the possession or under the charge of the offender.

288. Whoever, in pulling down or repairing any building, knowingly or negligently omits to take such order with that building as is sufficient to guard against any probable danger to human life from the fall of that building, or of any part thereof, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

Negligence with respect to pulling down or repairing buildings.

289. Whoever knowingly or negligently omits to

Negligence with respect to any animal.

take such order with any animal in his possession as is sufficient to guard against any probable danger to human life, or any probable danger of grievous hurt from such animal, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.

The principal point to be considered under this section will be the knowledge that the defendant had of the dangerous properties of the animal. Where the very nature of the animal gives him warning, his knowledge will be assumed, as for instance if a person were to choose to make a pet of a tiger or a bear. Otherwise express knowledge will have to be shown, in order to involve the necessity of unusual caution. Where injury is done by a horse, a bull, or a dog, and it is not shown that the animal was peculiarly vicious, or that his vice was known to his master, no indictment could be maintained unless he had neglected the ordinary precaution employed by every one who uses such animals.

Where the animal is known to be mischievous, the rule of civil law seems to be to infer negligence absolutely, from the mere fact that an injury has followed. Where the injury arose from a savage monkey, Lord Denman laid down the law as follows ;

“The conclusion to be drawn from an examination of all the authorities appears to be this ; that a person keeping a mischievous animal, with knowledge of its propensities, is bound to keep it secure *at his peril*, and that if it does mischief, negligence is presumed, without express averment. The negligence is in keeping such an animal after notice.” (May v. Burdett 9 Q. B. 112.)

It is probable however that the interpretation of this section would be stricter, as is always the case where the doctrine of constructive negligence is applied to criminal law, and that if every proper and reasonable precaution had been taken, no criminal indictment would lie, even though the animal finally escaped, and did damage. A good deal would also turn upon the lawfulness of the object for which the creature was kept. Even if it were legal negligence in a private person to keep a tiger for his own amusement, the same doctrine could not be applied to the keeper of a government menagerie. If it were, such an institution would become impossible. Again it would be a different thing, if it could be shown that the animal was justifiably kept for purposes of self-defence. Accordingly where a man got into the garden of another by night, and was there injured by a dog, and it appeared that the dog was kept for the protection of the garden, and was tied up all day, but was let loose at night ; Lord Kenyon said ;

“That every man had a right to keep a dog for the protection of his garden or house : that the injury which this action was calculated to redress, was where an animal known to be mischievous was suffered to go at large, and

the injury therefore arose from the fault of the owner in not securing such animal, so as not to endanger or injure the public; that here the animal had been properly let loose, and the injury had arisen from the plaintiff's own fault in incautiously going into the defendants' garden after it had been shut up." (Brock v. Copeland. 1 Esp. 203.)

The defendant is only bound to guard against probable danger, that is, such danger as may be calculated to arise from the nature of the beast itself. But I conceive that no indictment would lie if an injury arose to any one from their own obstinate and foolhardy conduct in venturing too near it, with full knowledge of its qualities. And even in civil cases, Lord Denman said, that if the injury was solely occasioned by the wilfulness of the plaintiff after warning, that might be a ground of defence. (9 Q. B. 113.)

Here also as I have remarked before, a greater degree of precaution will be necessary in dealing with the general public than will be required in the case of servants, who take the risk with full knowledge of it. A livery stable keeper who knowingly sent a vicious, untrained horse to a customer to ride, without informing him of its qualities, would be liable under this section. But he would not be so, if he merely put a rough-rider upon the horse's back to break him in, though in fact the man were thrown and killed.

290. Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished with fine which may extend to two hundred Rupees.

Punishment for public nuisance.

291. Whoever repeats or continues a public nuisance, having been enjoined by any public servant who has lawful authority to issue such injunction not to repeat or continue such nuisance, shall be punished with simple imprisonment for a term which may extend to six months, or with fine, or with both.

Continuance of nuisance after injunction to discontinue.

292. Whoever sells or distributes, imports or prints for sale or hire, or wilfully exhibits to public view, any obscene book, pamphlet, paper, drawing, painting, representation, or figure, or attempts or offers so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Sale, &c. of obscene books.

Exception. This Section does not extend to any representation sculptured, engraved, painted, or otherwise represented, on or in any Temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

The word "obscene" is one of considerable ambiguity. In one sense Hiram Power's statue of the Greek Slave, Ruben's picture of the Judgment of Paris, and the works of Martial or Catullus must be considered as obscene, that is, as capable of exciting sensual feelings. But it could not be endured that a shopkeeper should be prosecuted for selling the works just mentioned. I conceive that the word must be limited to those productions whose primary and palpable purpose is to excite to lust. Whatever may have been the original object of such writers as Martial or Catullus in their amatory odes, in the present day they are bought and read as monuments of a classical age. Nor can there be any greater indelicacy than the delicacy of those, who profess to find impropriety in some of the noblest works of painting and sculpture that have descended to our times. But, however difficult it may be to draw the line in words, the distinction between the two cases will always be bold enough. The test will always be, whether prurency is the object aimed at by the work in question, and for the gratification of which it is exhibited or sold, or whether such feelings are merely the results that may be excited in an ill-regulated mind.

293. Whoever has in his possession any such obscene book or other thing as is mentioned in the last preceding Section for the purpose of sale, distribution, or public exhibition, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

294. Whoever sings, recites, or utters in or near any public place any obscene song, ballad, or words to the annoyance of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

The words of this section, which make it necessary that the place should be public, and that the act should be to the annoyance of others, seems to point to such open obscenity as would have been a nuisance at common law.

"It seems an established principle, that whatever openly outrages

decency, and is injurious to public morals, is a misdemeanour at common law" (2 Camp. 90. n.)

Accordingly to English law, such an act, even if committed in a place of public resort, was not indictable if only one person could have been annoyed by it, (Arch. 769) and the wording of the present section seems to support the same view.

An omnibus is a public place for this purpose, and so of course would a railway train be. (Arch. 769.)

CHAPTER XV.

OF OFFENCES RELATING TO RELIGION.

295. Whoever destroys, damages, or defiles any place of worship, or any object held sacred by any class of persons, with the intention of thereby insulting the religion of any class of persons, or with the knowledge that any class of persons is likely to consider such destruction, damage, or defilement as an insult to their religion, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Injuring or defiling a place of worship, with intent to insult the religion of any class.

296. Whoever voluntarily causes disturbance to any assembly lawfully engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Disturbing a religious assembly.

297. Whoever, with intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sepulture, or any place set apart for the

Trespassing on burial places, &c.

performance of funeral rites, or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

298. **Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person, or makes any gesture in the sight of that person, or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.**

Uttering words &c. with deliberate intent to wound the religious feelings of any person.

These sections are of so dangerous a character, that it is most necessary to bear in mind the general exceptions contained in ss. 76 - 80. I conceive that a missionary or teacher, *bonâ fide* pursuing his calling, could not be indicted for any offence he might give to others, nor of course could a magistrate, who felt it to be his duty to prevent or interrupt a religious procession. Nor a Municipal Commissioner or Engineer who dug up a burial ground, or threw down a temple, in the performance of some public work. Nor a person who did such an act upon ground which was lawfully his own, whatever might be the offence given thereby.

CHAPTER XVI.

OF OFFENCES AFFECTING THE HUMAN BODY.

OF OFFENCES AFFECTING LIFE.

299. **Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the know-**

Culpable homicide.

ledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Illustrations.

(a) A lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused. Z, believing the ground to be firm, treads on it, falls in and is killed. A has committed the offence of culpable homicide.

(b) A knows Z to be behind a bush. B does not know it. A, intending to cause, or knowing it to be likely to cause Z's death, induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence; but A has committed the offence of culpable homicide.

(c) A, by shooting at a fowl with intent to kill and steal it, kills B, who is behind a bush; A not knowing that he was there. Here, although A was doing an unlawful act, he was not guilty of culpable homicide, as he did not intend to kill B, or to cause death by doing an act that he knew was likely to cause death.

By s. 32 all words which refer to acts done are defined as extending also to illegal omissions.

Where the death arose, not from an act done, but from neglect to do something, as to supply with food, clothes, medicine, &c., it must be shown that it was the duty of the prisoner to do the act, by virtue of his position as parent, master, &c., that the child or apprentice was of such tender years as to be unable to supply himself; and that the defendant was in the actual possession of means to provide for him. Otherwise no crime at all is committed. (Arch. 517) Assuming these facts to be established, the offence will be murder, if the circumstances are such that the person must have been aware that the result would be death; otherwise only culpable homicide. For instance, if a woman left her child, a young infant, at a gentleman's door, or other place where it was likely to be found and taken care of, and the child died, it would only be culpable homicide. But if the child were left in a remote place, such as a barren heath, and death ensued, it would be murder. (Reg. v. Walters, C. & M. 164.) And so it was held by the F. U. that the desertion of a child by its mother does not amount to murder, nor even to an attempt at murder, unless the circumstances attending the desertion show that it is done with the intention of causing its death. (3 M. Dig 123, § 141) A decision which ought to be taken, as explained by the previous judgment, in order to be correct.

The crime of culpable homicide, as defined above, only exists in cases where the act is done with the intention of causing death, or with the knowledge that death is likely to ensue. No provision seems to be made for that most ordinary form of culpable homicide, known to the English law as manslaughter, where the death is unintentional, but arises from such a degree of negligence as the law deems to be criminal. (Reg. v. Hughes. 26 L. J. M. C. 202.) Such are the cases which occur constantly in England, where engine drivers are indicted for deaths caused by their carelessness in disregarding signals. Here there is

obviously no intention to cause death, or any accident at all. Such also are the common cases of accidents arising from gross carelessness in the use of fire-arms.

“ Thus if one fire a gun, though loaded with powder only, in the streets of a crowded city, and a passenger is killed by its bursting, or by the wadding, or by a piece of metal or stone, which has, unknown to the person firing, been placed in the gun, he is guilty of culpable homicide ; for to fire at all, in such a situation, was a reckless and dangerous act. The same rule holds if one fire a gun so near a high road as to endanger persons passing at the time, though it is done in pursuit of game only.” (Alison Cr. L. 114. see Arch. 527.)

It will be observed that the illustration (c) in the text gives no hint as to the situation of the bush, which may have been in the heart of a jungle, or on the side of the high road, for all that we are told about it. In the latter case the offence would be culpable homicide by the law both of England and Scotland, and it seems strange that it should not be expressly made so by this Code. The provisions of the previous chapter seem principally to refer to acts which endanger life, not to acts which take it away, and the maximum punishment, viz., six months imprisonment and fine, seems most inadequate to a serious case of negligence followed by death.

The neglect which causes death must as I have shown above (ante p. 157) be the personal neglect or default of the defendant himself. But where an Engineer left an engine in charge of a boy, who told him he could not manage it, and in consequence of its mismanagement a loss of life took place, this was held to be manslaughter ; for it was an act of personal misconduct on the part of the Engineer. (Reg. v. Lowe. 3 C. & K. 123.)

The same question often arises in cases of death by Medical treatment. Where a person, who had been in the habit of acting as a midwife, tore away part of the prolapsed *uterus*, supposing it to be a part of the *placenta*, and was indicted for murder, Lord Ellenborough C. J. said ;

“ There has not been a particle of evidence adduced which goes to convict the prisoner of the crime of murder, but still it is for you to consider whether the evidence goes as far as to make out a case of manslaughter. To substantiate that charge, the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance, or the most criminal inattention. One or the other of these is necessary to make him guilty of that criminal negligence and misconduct, which is essential to make out a case of manslaughter. It does not appear that in this case there was any want of attention on his part ; and from the evidence of the witnesses on his behalf, it appears that he had delivered many women at different times, and from this he must have had some degree of skill.” (1 Russ. 497.)

So where the prisoner, who was a publican and agent for the sale of Morison's pills, was indicted for manslaughter, by administering a large quantity of those pills to the deceased. Several medical men gave as their opinion that medicine of the violent character, of which the pills were composed, could not be administered to a person in the

state in which the deceased was without accelerating his death. Lord Lyndhurst, C. B. said,

“ I agree that in these cases there is no difference between a licensed physician or surgeon, and a person acting as physician or surgeon without a license. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter ; but if, where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one labouring under disease, and death ensues, in consequence of that dangerous remedy having been so administered, he is guilty of manslaughter.” (1 Russ. 504.)

And to the same effect were the remarks of Bayley B. in another case, where he said,

“ I consider that *rashness* will be sufficient to make it manslaughter. As for instance, if I have the tooth ache, and a person undertakes to cure it by administering laudanum, and says, ‘ I have no notion how much will be sufficient,’ but gives me a cup full, which immediately kills me. Such persons, acting with rashness, will, in my opinion, be guilty of manslaughter. With respect to what has been said about a willing mind in the patient, it must be remembered that a prosecution is for the public benefit, and the willingness of the patient cannot take away the offence against the public. To my mind it matters not whether a man has received a medical education or not ; the thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed, he has acted with a due degree of caution, or whether on the contrary, he has acted with gross and improper rashness, and want of caution. I have no hesitation in saying for your guidance, that if a man be guilty of gross negligence in attending to his patient, after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be liable to a conviction for manslaughter.” (1 Russ. 502.)

As to the observation of Bayley B. in the above passage, that “ the willingness of the patient cannot take away the offence to the public,” I may refer to the commentary on ss. 87—92. (ante pp. 47—49.) It will be observed that by s. 52, the words “ good faith” are defined as involving “ due care and attention.” Now wherever there has been due care and attention the result, however fatal, can never be culpable homicide. Therefore the law as laid down by Bayley B. will not be affected by those sections.

Explanation 1. A person who causes bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2. Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by

resorting to proper remedies and skilful treatment the death might have been prevented.

It is also murder where the prisoners have inflicted a wound which renders necessary a surgical operation, as for instance an amputation, and the party sinks under the effect of it. (3 M. Dig 127, § 174.) And conversely, if a man be wounded, and the wound turn to a gangrene or fever, for want of proper applications, or from neglect, and the man die of the gangrene or fever; or if it becomes fatal from the refusal of the party to submit to a surgical operation; in either case the crime of murder is complete, for it is the act of the prisoner which has brought the other into a position in which his death is natural and likely. But where the wound would not have caused death, but it is brought on by improper applications, this is not murder, for here the death starts from a completely new source. (Arch. 517, Mad. F. U. 355 of 1855.)

Explanation 3. The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

Causing the death of a child in the womb is punishable under s. 315.

300. Except in the cases hereinafter excepted, culpable homicide is murder, if the act
 Murder. by which the death is caused is done
 with the intention of causing death, or—

2ndly. If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

3rdly. If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or—

4thly. If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any

excuse for incurring the risk of causing death or such injury as aforesaid.

Illustrations.

(a) A shoots Z with the intention of killing him. Z dies in consequence. A commits murder.

(b) A, knowing that Z is labouring under such a disease that a blow is likely to cause his death, strikes him with the intention of causing bodily injury. Z dies in consequence of the blow. A is guilty of murder, although the blow might not have been sufficient in the ordinary course of nature to cause the death of a person in a sound state of health. But if A, not knowing that Z is labouring under any disease, gives him such a blow as would not in the ordinary course of nature kill a person in a sound state of health, here A, although he may intend to cause bodily injury, is not guilty of murder, if he did not intend to cause death, or such bodily injury as in the ordinary course of nature would cause death.

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here, A is guilty of murder, although he may not have intended to cause Z's death.

(d) A without any excuse fires a loaded cannon into a crowd of persons and kills one of them. A is guilty of murder, although he may not have had a premeditated design to kill any particular individual.

These words constitute an explanation of the rule that killing will be murder, when it is done with malice, express or implied.

Express malice is often proved by showing previous enmity, an expressed intention to injure, or preparations made for that purpose. But far less than that will be sufficient. As Bayley J., said on one occasion.

“Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse.” (Bromage v. Prosser, 4 B. & C. 255.)

And so in another case, Lord Campbell C. J. said,

“Malice, in the legal acceptation of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law, to the prejudice of another.” (9 Cl. & F. 321.)

This being so, the prosecutor is not bound to prove malice, or any facts beside the death. The law presumes every homicide to be murder, until the contrary appears, and it is for the defendant to give in evidence such facts and circumstances as may prove the homicide to be justifiable, or excusable, or that at most it only amounted to manslaughter. (Arch. 514.) Nor is this opposed to the well-known maxim, that every man is presumed to be innocent, till he is shown to be guilty. The law will assume that the prisoner is innocent of the death, till he is shown to have caused it, but then the presumption as to his intention is turned the other way.

Therefore homicide has been held to be murder, even where the prisoner had in words professed an intention not to cause death. As for instance in a case where,

“It turned out in evidence, that a father and son were both concerned in an assault, and the father having seized the deceased, and holding him fast, called to his son, “to come and pay well, but spare the life;” the son, with a cudgel, having beat the man so severely that he died, the father had sentence of death. So also in another case, where it appeared that the accused had discovered an abstraction by the deceased of a sum of money, with which she had been entrusted, and he had declared his resolution “to beat her so as just to leave life in her.” He beat her at intervals accordingly and the woman died next day, for which he was condemned and executed.” (Alison. Cr. L. 3.)

Exception 1. Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.

When culpable homicide is not murder.

The above exception is subject to the following provisoes :—

First. That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person.

Secondly. That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant.

Thirdly. That the provocation is not given by anything done in the lawful exercise of the right of private defence.

Explanation. Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder, is a question of fact.

Illustrations.

(a) A, under the influence of passion excited by a provocation given by Z, intentionally kills Y, Z's child. This is murder, inasmuch as the provocation was not given by the child, and the death of the child was not caused by accident or misfortune in doing an act caused by the provocation.

(b) Y gives grave and sudden provocation to A. A, on this provo-

ocation, fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z, who is near him but out of sight. A kills Z. Here A has not committed murder, but merely culpable homicide.

(c) A is lawfully arrested by Z, a bailiff. A is excited to sudden and violent passion by the arrest, and kills Z. This is murder, inasmuch as the provocation was given by a thing done by a public servant in the exercise of his powers.

(d) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words, and kills Z. This is murder.

(e) A attempts to pull Z's nose. Z, in the exercise of the right of private defence, lays hold of A to prevent him from doing so. A is moved to sudden and violent passion in consequence, and kills Z. This is murder, inasmuch as the provocation was given by a thing done in the exercise of the right of private defence.

(f) Z strikes B. B is by this provocation excited to violent rage. A, a by-stander, intending to take advantage of B's rage, and to cause him to kill Z, puts a knife into B's hand for that purpose. B kills Z with the knife. Here B may have committed only culpable homicide, but A is guilty of murder.

It is not to be supposed that any amount of provocation will reduce the offence of murder to culpable homicide. There must be some proportion between the provocation and the resentment. As explained below, "the provocation must be grave and sudden enough to prevent the offence from amounting to murder." The violence used must not be "in a cruel or unusual manner."

Where the prisoner, who had killed his wife, pleaded in his defence that she had administered some medicine to him, which caused a noise in his stomach when empty, he was sentenced to death. (3 M. Dig. 111, § 51.) And so it is laid down by Mr. Russell that,

"The most grievous words of reproach, contemptuous and insulting actions or gestures, or trespasses against lands or goods, will not free the party killing from the guilt of murder, if upon such provocation a deadly weapon was made use of, or an intent to kill, or to do some great bodily harm, was otherwise manifested. But if no such weapon were used, or intention manifested, and the party so provoked give the other a box on the ear, or strike him with a stick or other weapon not likely to kill, and kill him unluckily and against his intention, it will be only manslaughter." (1 Russ. 580.)

Hence, where a park-keeper, having found a boy stealing wood, tied him to a horse's tail, and dragged him along the park, and the boy died of the injuries he thereby received, this was held to be murder. So where two soldiers forced their way into a public house, when it was closed at night, and one killed the landlord who was struggling to get them out, this was held to be murder, because the landlord had a right to put them out of the house. (Arch. 523.)

On the other hand, where the provocation has been very violent, killing even with a deadly weapon, has been held to be merely manslaughter. Where, some provoking words being used by a soldier to a woman, she gave him a box on the ear, and the soldier immediately

gave her a blow with the pummel of his sword on the breast, and then ran after her, and stabbed her in the back, this was at first deemed murder : but it appearing afterwards, that the blow given to the soldier was with an iron patten, and drew a great deal of blood, the offence was holden to be only manslaughter. (Arch. 522)

It will be observed that the doctrine of Mahometan law which justifies the slaying of an adulterer, when caught by the husband in the very act, is not confirmed here. The rule will therefore be that which has always prevailed in the English and Scotch law, by which a death under such circumstances is considered as unlawful, but in consequence of the gravity of the provocation is treated as being only culpable homicide, and not murder. (Arch. 523. Alison Cr. L. 113.)

Lastly, in all cases where the plea of provocation is set up, it is essential to prove that the act was committed under its influence ;—not merely, it must be observed, under the effect of the resentment occasioned by the injury, but in the heat of blood which renders a man unfit to judge of the character of his acts, or their consequences. Even in the case of a detected adultery, if the injured husband kill the paramour deliberately, and upon revenge, after the fact and sufficient cooling time, this would undoubtedly be murder. (1 Russ. 525.) Where the murder was committed with a knife, which the prisoner had got after the blow was inflicted upon him by the deceased, and they had some conversation, and walked together before the stabbing by the prisoner, Tindal C. J. told the Jury that,

“The question for them was, whether the wound was given by the prisoner while smarting under a provocation so recent and so strong, that he might not be considered at the moment the master of his own understanding ; or whether there had been time for the blood to cool, and for reason to resume its seat before the wound was given. That in determining this question, the most favourable circumstance for the prisoner was the shortness of time between the original quarrel, and the stabbing ; but, on the other hand, the weapon was not at hand when the quarrel took place, but was sought for from the distance. It would be for them to say whether the prisoner had shown thought, contrivance and design, in the mode of possessing himself of the weapon, and again replacing it immediately after the blow was struck ; for the exercise of contrivance and design denoted rather the presence of judgment and reason, than of violent and ungovernable passion.” (1 Russ. 526 ;) the prisoner was found guilty of murder.

As to mistake, accident, legal justification, and self-defence, see ante pp. 32, 34, 27-34, 56-61.

Exception 2. Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any

intention of doing more harm than is necessary for the purpose of such defence.

Illustration.

Z attempts to horse-whip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horse-whipped, shoots Z dead. A has not committed murder, but only culpable homicide.

Exception 3. Culpable homicide is not murder if the offender, being a public servant, or aiding a public servant acting for the advancement of public justice, exceeds the powers given to him by law, and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant, and without ill-will towards the person whose death is caused.

Exception 4. Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation. It is immaterial in such cases which party offers the provocation or commits the first assault.

Exception 5. Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death, or takes the risk of death with his own consent.

Illustration.

A, by instigation, voluntarily causes Z, a person under eighteen years of age, to commit suicide. Here, on account of Z's youth he was incapable of giving consent to his own death; A has therefore abetted murder.

Hence a duel, fairly carried out, will now, if death results, only be culpable homicide. Formerly it would have been murder. (Arch. 520.) But if any unfair advantage were taken, as for instance if either party were to fire before the signal was given, or were to fire off more shots than were allowed, this would be murder, for in such a case a greater risk is imposed upon the other party than he had undertaken to bear.

301. If a person, by doing any thing which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been, if he had caused the death of the person whose death he intended or knew himself to be likely to cause.

Culpable homicide by causing the death of a person other than the person whose death was intended.

Accordingly where the prisoner intending to kill the husband of a woman, with whom he was carrying on an adulterous intrigue, way-laid him in the dusk, but by mistake killed a third party who came along the road, he was convicted of murder and hung. (3 M. Dig. 125, § 160, and See Mad F. U. 194 of 1851.)

By the common law of England it was necessary that death should follow within a year and a day after the stroke, or other cause of it. (1 Hale 428.) This rule is not retained in the present act. As a matter of evidence however it would possibly be acted on, as it is hardly fair to say that an injury has caused death, when the death does not supervene for upwards of a year. This is ample time in all ordinary cases, and the result of a different rule would be, that a party who had inflicted upon another an injury which permanently weakened his health, might be indicted for murder if the injured man died ten years afterwards.

Lord Hale lays it down as a rule, never to convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead, and he mentions a case in which a man was executed for the murder of another, who afterwards returned from sea. (Norton 428.) And accordingly, where a woman was indicted for the murder of her bastard child, and it appeared that she had been seen with the child at 6 P. M., and arrived at another place without it about 8 P. M., and the body of a child was found in a river, near which she must have passed, but it could not be identified as her child, and the evidence was rather the other way; it was held that she was entitled to an acquittal; the evidence rendered it probable that the child found was not her's, and with respect to that which really was her child, the prisoner could not by law be called upon, either to account for it, or to say where it really was, unless there was evidence to show that it was really dead. (1 Russ. 568.) And so it was held by the Madras F. U. in several cases reported, p. 251 of 1851, 257 of 1852, and 209 of 1854. In the last case Mr. J. Morehead said,

“Two men are said to have been murdered. 1st, For this act no cause is shown; 2d, no dead bodies have been discovered.”

“The bones produced before the Court, and which I presume are the

same said to have been pointed out by the 3d prisoner, are declared by the medical officer not to be human bones. It will thus be seen that no evidence as to the *corpus delicti* exists. It may be, that the parties alleged to have been murdered are not forthcoming, but further than this there is no evidence." (And see Mad. F. U. 107 of 1856.)

On the other hand convictions have been sustained, though the body was not found, where there was very strong direct evidence to the murder, or where the evidence, though it fell short of actual identification of the body, led almost conclusively to the belief that something found was the body.

"Thus, where the prisoner, a Mariner, was indicted for the murder of his Captain at sea, and a witness stated that the prisoner had proposed to kill the Captain, and that the witness being afterwards alarmed in the night by a violent noise, went upon deck, and there observed the prisoner take the Captain up and throw him overboard into the sea, and that he was not seen or heard of afterwards; and that near the place on the deck where the Captain was seen, a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood; the Court, though they admitted the general rule of law, left it to the Jury to say, upon the evidence, whether the deceased was not killed before his body was cast into the sea; and the Jury being of that opinion, the prisoner was convicted, and (the conviction being unanimously approved of by the Judges) was afterwards executed." (1 Russ. 567.)

So in the following case, decided at Bombay.

"The prisoner was convicted of murder on evidence which proved that he was last seen with the deceased, dragging him along by the hair, with a drawn sword in his hand; that about ten days afterwards a skeleton was found in the direction the prisoner was seen dragging the deceased, with the skull severed from the body, and some articles of wearing apparel were also found near the skeleton, which were identified as the property of the deceased; that the prisoner had absconded, and his mistress deposed that he admitted to her that he had killed the deceased." (3 M. Dig. 127, § 170)

And so in Madras, where a man was charged with the murder of his child, it appeared that he left his hut accompanied by her, that he reached his mother-in-law's but without her, and there made a violent attack upon several of the inmates.

"The prisoner, on the following day, delivered himself up to the Police, confessed his crime, and pointed out where the remains of his child, and the ornaments it had upon its body would be found. On inquiry they were found in the place indicated, but the time that had elapsed rendered it impossible to identify the bones, from which the flesh had been apparently devoured by wild beasts."

"The Court of F. U. confirmed the conviction, but remarked that the record would have been more complete, as to the bones discovered being those of the murdered child, had they been submitted to the inspection and examination of the Zillah Surgeon." (Mad. F. U. 275 of 1851.)

302. Whoever commits murder shall be punished with death, or transportation for life, and shall also be liable to fine.

It is hardly necessary to observe that no statute of-limitations exists

in criminal law. But where prisoners were convicted of murders, committed 19 and 13 years ago, the Court remitted the extreme penalty of the law, considering that it was not called for as a public example. (Mad. F. U. 196 of 1851, 226 of 1852.)

303. Punishment for murder by a life convict. Whoever being under sentence of transportation for life, commits murder, shall be punished with death.

304. Punishment for culpable homicide not amounting to murder. Whoever commits culpable homicide not amounting to murder, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death ; or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.

305. Abetment of suicide of child or insane person. If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide, shall be punished with death or transportation for life, or imprisonment for a term not exceeding ten years, and shall also be liable to fine.

306. Abetment of suicide. If any person commits suicide, whoever abets the commission of such suicide shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

307. Attempt to murder. Whoever does any act with such intention or knowledge and under such circumstances that if he by that act caused death he would be guilty of murder,

may extend to one year, and shall also be liable to fine.

This section, and the general section against attempts to commit a crime, which stands at the end of the code (s. 511), are very vague, since they neither explain what is an attempt, nor what is "an act done towards the commission of an offence." In one sense, a man attempts a thing whenever he sets about doing it. So any act which is one of the series by which the offence is ultimately to be carried out, and which is done for the purpose of carrying it out, may be said to be an act towards its commission. This however would lead to results too absurd to be intended. For instance, if a man intending to commit a burglary at Salem were to start by train from Madras, with the necessary implements in his pocket, would this be criminal under s. 511? If with the intention of committing suicide, he purchased a phial of prussic acid, would this be criminal under s. 309? If so the criminality would be just the same, though the very next hour he abandoned his intention, and returned to Madras by the next train, or devoted his prussic acid to the flavouring of puddings. I conceive that the attempt must mean something beyond the mere stage of preparation, and must involve an entrance upon the actual subject matter of the offence. That the attempt must have arrived at some act, which, if not prevented or stopped short, would in itself be an offence. So I imagine that the act done towards the offence must be either an illegal act, or at all events something which may, if something does not take place, lead of itself to injury. Take for instance the illustrations (c) and (d) to s. 307. The purchase and loading of the gun in one case, and the mixing of the poison in the other, are merely preparatory attempts, which of themselves can do no harm to any one. The actual crime is not yet commenced. But the firing of the gun at Z is an illegal act. So the placing the poisoned food on his table is, at the very least, an act which may, if not prevented, lead to fatal consequences. Both the illustrations appended to s. 511 are it will be observed instances of illegal acts. So I conceive that the mere purchase of prussic acid for the purpose of committing suicide would not be punishable under s. 309. But if the party were about to swallow the poison, and it was snatched from him, or if he did swallow it, but by medical skill was saved from death, in either case he would be punishable for the attempt.

310. Whoever at any time after the passing of this Act shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with murder, is a Thug.

Punishment. 311. Whoever is a Thug shall be punished with transportation for life, and shall also be liable to fine.

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO
UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS,
AND OF THE CONCEALMENT OF BIRTHS.

312. Whoever voluntarily causes a woman with child to miscarry, shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both ; and if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation. A woman who causes herself to miscarry is within the meaning of this Section.

313. Whoever commits the offence defined in the last preceding Section without the consent of the woman, whether the woman is quick with child or not, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

314. Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine ; and if the act is done without the consent of the woman, shall be punished either with transportation for life, or with the punishment above-mentioned.

Explanation. It is essential to this offence that the offender should know that the act is likely to cause death.

315. Whoever before the birth of any child does any act with the intention of thereby preventing that child from being born alive, or causing it to die after its birth, and does by such act prevent that child from being born alive, or causes it to die after its birth, shall, if such act be not caused in good faith for the purpose of saving the life of the mother, be punished with imprisonment of either description for a term which may extend to ten years, or with fine, or with both.

Act done with intent to prevent a child being born alive or to cause it to die after birth.

Under English law, if a child is born alive, but dies by reason of the potion or bruises which it received in the womb, from a person who administered the potion, or inflicted the bruises for the purpose of procuring a miscarriage, it would be murder, unless the act of procuring a miscarriage was, under the circumstances of the case, lawful. (Arch 517.)

316. Whoever does any act under such circumstances that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Causing death of a quick unborn child by an act amounting to culpable homicide.

Illustration.

A, knowing that he is likely to cause the death of a pregnant woman, does an act which, if it caused the death of the woman, would amount to culpable homicide. The woman is injured, but does not die; but the death of an unborn quick child with which she is pregnant is thereby caused. A is guilty of the offence defined in this Section.

317. Whoever being the father or mother of a child under the age of twelve years, or having the care of such child, shall expose or leave such child in any place with the intention of wholly abandoning such child, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Exposure and abandonment of a child under twelve years by parent, or person having care of it.

Explanation. This Section is not intended to prevent the trial of the offender for murder or culpable

homicide as the case may be, if the child die in consequence of the exposure.

318. Whoever by secretly burying or otherwise disposing of the dead body of a child, whether such child die before or after or during its birth, intentionally conceals or endeavours to conceal the birth of such child, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Concealment of birth by secret disposal of dead body.

OF HURT.

Hurt. 319. Whoever causes bodily pain, disease, or infirmity to any person is said to cause hurt.

Grievous hurt. 320. The following kinds of hurt only are designated as "grievous :"—

First. Emasculation.

Secondly. Permanent privation of the sight of either eye.

Thirdly. Permanent privation of the hearing of either ear.

Fourthly. Privation of any member or joint.

Fifthly. Destruction or permanent impairing of the powers of any member or joint.

Sixthly. Permanent disfiguration of the head or face.

Seventhly. Fracture or dislocation of a bone or tooth.

Eighthly. Any hurt which endangers life, or which causes the sufferer to be, during the space of twenty days, in severe bodily pain, or unable to follow his ordinary pursuits.

321. Whoever does any act with the intention of

Voluntarily causing hurt. thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt."

322. Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt."

Voluntarily causing grievous hurt.

Explanation. A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt if, intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

Illustration.

A, intending or knowing himself to be likely permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face, but which causes Z to suffer severe bodily pain for the space of twenty days. A has voluntarily caused grievous hurt.

I have already frequently drawn attention to the maxim that a man is assumed to intend the natural consequences of his acts. Where grievous hurt actually is inflicted, the *onus* of proving that it was not intended will lie upon the prisoner, and where the weapon used was such as necessarily must inflict grievous hurt, he will not be allowed to rebut this presumption. (See Ante pp. 70, 96.)

323. Whoever, except in the case provided for by Section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand Rupees, or with both.

Punishment for voluntarily causing hurt.

324. Whoever, except in the case provided for by Section 334, voluntarily causes hurt by means of any instrument for

Voluntarily causing hurt by danger.

ous weapons or means. shooting, stabbing, or cutting, or any instrument which, used as a weapon of offence, is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body to inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

325. Whoever, except in the case provided for by Section 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Punishment for voluntarily causing grievous hurt.

326. Whoever, except in the case provided for by Section 335, voluntarily causes grievous hurt by means of any instrument for shooting, stabbing, or cutting, or any instrument which, used as a weapon of offence is likely to cause death, or by means of fire or any heated substance, or by means of any poison or any corrosive substance, or by means of any explosive substance, or by means of any substance which it is deleterious to the human body in inhale, to swallow, or to receive into the blood, or by means of any animal, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing grievous hurt by dangerous weapons or means.

327. Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything

Voluntarily causing hurt to extort property or to constrain to an illegal act.

which is illegal or which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

328. Whoever administers to, or causes to be taken by any person, any poison or any stupefying, intoxicating, or unwholesome drug or other thing, with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence, or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Causing hurt by means of poison, &c., with intent to commit an offence.

329. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any property or valuable security, or of constraining the sufferer or any person interested in such sufferer to do anything which is illegal or which may facilitate the commission of an offence, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing grievous hurt to extort property, or to constrain to an illegal act.

330. Whoever voluntarily causes hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with impri-

Voluntarily causing hurt to extort confession, or to compel restoration of property.

sonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Illustrations.

(a) A, a police officer, tortures Z in order to induce Z to confess that he committed a crime. A is guilty of an offence under this Section.

(b) A, a police officer, tortures B to induce him to point out where certain stolen property is deposited. A is guilty of an offence under this Section.

(c) A, a revenue officer, tortures Z in order to compel him to pay certain arrears of revenue due from Z. A is guilty of an offence under this Section.

(d) A, a zemindar, tortures a ryot in order to compel him to pay his rent. A is guilty of an offence under this Section.

331. Whoever voluntarily causes grievous hurt for the purpose of extorting from the sufferer, or from any person interested in the sufferer, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the sufferer or any person interested in the sufferer to restore or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

332. Whoever voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant, from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

333. Whoever voluntarily causes grievous hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person or any other public servant from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by that person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Voluntarily causing grievous hurt to deter public servant from his duty.

334. Whoever voluntarily causes hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to five hundred Rupees, or with both.

Voluntarily causing hurt on provocation.

335. Whoever causes grievous hurt on grave and sudden provocation, if he neither intends nor knows himself to be likely to cause grievous hurt to any person other than the person who gave the provocation, shall be punished with imprisonment of either description for a term which may extend to four years, or with fine which may extend to two thousand Rupees, or with both.

Causing grievous hurt on provocation.

. *Explanation.* The last two Sections are subject to the same provisos as Exception 1 Section 300.

336. Whoever does any act so rashly or negligently as to endanger human life or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine

Punishment for act which endangers life or the personal safety of others.

which may extend to two hundred and fifty Rupees, or with both.

337. Whoever causes hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to five hundred Rupees, or with both.

Causing hurt by an act which endangers life or the personal safety of others.

338. Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand Rupees, or with both.

Causing grievous hurt by an act which endangers life or the personal safety of others.

WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT.

339. Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person.

Wrongful restraint.

Exception. The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this Section.

Illustration.

A obstructs a path along which Z has a right to pass, A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z.

340. Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond cer-

Wrongful confinement.

tain circumscribing limits, is said "wrongfully to confine" that person.

Illustrations.

(a) A causes Z to go within a walled space, and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall. A wrongfully confines Z.

(b) A places men with fire-arms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

341. Whoever wrongfully restrains any person shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred Rupees, or with both.

Punishment for wrongful restraint.

342. Whoever wrongfully confines any person shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand Rupees, or with both.

Punishment for wrongful confinement.

343. Whoever wrongfully confines any person for three days or more, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Wrongful confinement for three or more days.

344. Whoever wrongfully confines any person for ten days or more, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Wrongful confinement for ten or more days.

345. Whoever keeps any person in wrongful confinement, knowing that a writ for the liberation of that person has been duly issued, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to any term of imprisonment to which he may be liable under any other Section of this Code.

Wrongful confinement of person for whose liberation a writ has been issued.

346. Whoever wrongfully confines any person in such manner as to indicate an intention that the confinement of such person may not be known to any person interested in the person so confined, or to any public servant, or that the place of such confinement may not be known to or discovered by any such person or public servant as hereinbefore mentioned, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to any other punishment to which he may be liable for such wrongful confinement.

347. Whoever wrongfully confines any person for the purpose of extorting from the person confined, or from any person interested in the person confined, any property or valuable security, or of constraining the person confined, or any person interested in such person, to do anything illegal or to give any information which may facilitate the commission of an offence, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

348. Whoever wrongfully confines any person for the purpose of extorting from the person confined, or any person interested in the person confined, any confession or any information which may lead to the detection of an offence or misconduct, or for the purpose of constraining the person confined, or any person interested in the person confined, to restore, or to cause the restoration of any property or valuable security, or to satisfy any claim or demand, or to give information which may lead to the restoration of any property or valuable security, shall be punished with imprisonment

of either description for a term which may extend to three years, and shall also be liable to fine.

OF CRIMINAL FORCE AND ASSAULT.

349. A person is said to use force to another if
 Force. he causes motion, change of motion,
 or cessation of motion to that other,
 or if he causes to any substance such motion or
 change of motion or cessation of motion as brings
 that substance into contact with any part of that
 other's body, or with anything which that other is
 wearing or carrying, or with anything so situated
 that such contact affects that other's sense of feeling ;
 provided that the person causing the motion, or
 change of motion, or cessation of motion, causes
 that motion, change of motion, or cessation of motion
 in one of the three ways hereinafter described :

First.—By his own bodily power.

Secondly.—By disposing any substance in such a
 manner that the motion or change or cessation of
 motion takes place without any further act on his
 part or on the part of any other person.

Thirdly.—By inducing any animal to move, to
 change its motion, or to cease to move.

350. Whoever intentionally uses force to any
 Criminal force. person, without that person's consent,
 in order to the committing of any
 offence, or intending by the use of such force to
 cause, or knowing it to be likely that by the use of
 such force he will cause injury, fear, or annoyance
 to the person to whom the force is used, is said to
 use criminal force to that other.

Illustrations.

(a) Z is sitting in a moored boat on a river. A unfastens the moorings, and thus intentionally causes the boat to drift down the stream. Here A intentionally causes motion to Z, and he does this by disposing substances in such a manner that the motion is produced without any other act on any person's part. A has therefore intentionally used force to Z ; and if he has done so without Z's consent, in order to the

committing of any offence, or intending or knowing it to be likely that this use of force will cause injury, fear, or annoyance to Z, A has used criminal force to Z.

(b) Z is riding in a chariot. A lashes Z's horses, and thereby causes them to quicken their pace. Here A has caused change of motion to Z by inducing the animals to change their motion, A has therefore used force to Z; and if A has done this without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten, or annoy Z, A has committed criminal force to Z.

(c) Z is riding in a palanquin. A, intending to rob Z, seizes the pole and stops the palanquin. Here A has caused cessation of motion to Z, and he has done this by his own bodily power. A has therefore used force to Z; and as A has acted thus intentionally without Z's consent, in order to the commission of an offence, A has used criminal force to Z.

(d) A intentionally pushes against Z in the street. Here A has by his own bodily power moved his own person so as to bring it into contact with Z. He has therefore intentionally used force to Z, and if he has done so without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten, or annoy Z, he has used criminal force to Z.

(e) A throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with Z, or with Z's clothes, or with something carried by Z, or that it will strike water and dash up the water against Z's clothes or something carried by Z. Here, if the throwing of the stone produce the effect of causing any substance to come into contact with Z or Z's clothes, A has used force to Z; and if he did so without Z's consent, intending thereby to injure, frighten, or annoy Z, he has used criminal force to Z.

(f) A intentionally pulls up a woman's veil. Here A intentionally uses force to her; and if he does so without her consent, intending or knowing it to be likely that he may thereby injure, frighten, or annoy her, he has used criminal force to her.

(g) Z is bathing. A pours into the bath water which he knows to be boiling. Here A intentionally, by his own bodily power, causes such motion in the boiling water as brings that water into contact with Z, or with other water so situated that such contact must affect Z's sense of feeling; A has therefore intentionally used force to Z; and if he has done this without Z's consent intending or knowing it to be likely that he may thereby cause injury, fear, or annoyance to Z, A has used criminal force.

(h) A incites a dog to spring upon Z, without Z's consent. Here, if A intends to cause injury, fear, or annoyance to Z, he uses criminal force to Z.

351. Whoever makes any gesture or any preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation. Mere words do not amount to an

assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.

Illustrations.

(a) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.

(b) A begins to unloose the muzzle of a ferocious dog, intending or knowing it to be likely that he may thereby cause Z to believe that he is about to cause the dog to attack Z. A has committed an assault upon Z.

(c) A takes up a stick, saying to Z, "I will give you a beating." Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.

An assault is an attempt to commit a forcible crime against the person of another. Mere words can never amount to an assault, but any acts or gestures, which indicate such an attempt, with a present possibility of carrying out the intention, are sufficient. Striking at another with a stick, or the hand, though the blow does not reach his person; throwing anything at him, though it miss its aim, presenting a loaded gun, within the distance to which it will carry, are all assaults. But threatening to strike another, at such a distance that he cannot by possibility reach him, is not. Nor is the administering a deleterious drug an assault, though it was once ruled otherwise. (Arch. 513.)

Criminal Force is an assault fully completed. No violence is necessary, if the proceeding is in itself of a hostile, or insulting character.

"To beat, in the legal acceptation of the word, means not merely to strike forcibly with the hand, a stick, or the like, but includes every touching or laying hold (however trifling) of another's person or clothes, in an angry, revengeful, rude or insolent manner; as for instance, thrusting or pushing him in anger; holding him by the arm; spitting in his face; jostling him out of the way; striking a horse upon which he is riding, whereby he is thrown &c." (Ibid.)

352. Whoever assaults or uses criminal force to any person otherwise than on grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred Rupees, or with both.

Punishment for using criminal force otherwise than on grave provocation.

Explanation. Grave and sudden provocation will

not mitigate the punishment for an offence under this Section, if the provocation is sought or voluntarily provoked by the offender as an excuse for the offence—or

If the provocation is given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant—or

If the provocation is given by anything done in the lawful exercise of the right of private defence.

Whether the provocation was grave and sudden enough to mitigate the offence, is a question of fact.

See ante pp. 173—175. Nor will the act amount to criminal force, where it is such as the law permits. As for instance the moderate chastisement of a child by its parent, or a scholar by its teacher. (Arch. 544.) A master is not authorised to beat his servant. But a master is entitled to inflict moderate chastisement upon his apprentice, to whom he stands in the position of a parent. (Act 19 of 1850. s. 14.)

353. Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Using criminal force to deter a public servant from discharge of his duty.

354. Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Assault or use of criminal force to a woman with intent to outrage her modesty.

355. Whoever assaults or uses criminal force to any person, intending thereby to dishonor that person, otherwise than on

Assault or criminal force with intent

to dishonour a person, otherwise than on grave provocation. grave and sudden provocation given by that person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

156. Whoever assaults or uses criminal force to any person, in attempting to commit theft on any property which that person is then wearing or carrying, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Assault or criminal force in attempt to commit theft of property carried by a person.

357. Whoever assaults or uses criminal force to any person, in attempting wrongfully to confine that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand Rupees, or with both.

Assault or criminal force in attempting wrongfully to confine person.

358. Whoever assaults or uses criminal force to any person on grave and sudden provocation given by that person, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred Rupees, or with both.

Assaulting or using criminal force on grave provocation.

Explanation.—The last Section is subject to the same explanation as Section 352.

OF KIDNAPPING, ABDUCTION, SLAVERY, AND FORCED LABOR.

359. Kidnapping is of two kinds ; kidnapping from British India, and kidnapping from lawful guardianship.

Kidnapping.

360. Whoever conveys any person beyond the limits of British India without the consent of that person or of some person

Kidnapping from British India.

legally authorized to consent on behalf of that person, is said to kidnap that person from British India.

361. Whoever takes or entices any minor under Kidnapping from lawful guardianship. fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation. The words "lawful guardian" in this Section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception. This Section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

362. Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person. Abduction.

363. Whoever kidnaps any person from British India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Punishment for kidnapping.

364. Whoever kidnaps or abducts any person in order that such person may be murdered, or may be so disposed of as to be put in danger of being murdered, shall be punished with transportation for life, or Kidnapping or abducting in order to murder

rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations.

(a) A kidnaps Z from British India, intending or knowing it to be likely that Z may be sacrificed to an idol. A has committed the offence defined in this Section.

(b) A forcibly carries or entices B away from his home in order that B may be murdered. A has committed the offence defined in this Section.

365. Whoever kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Kidnapping or abducting with intent secretly and wrongfully to confine a person.

366. Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Kidnapping or abducting a woman to compel her marriage, &c.

367. Whoever kidnaps or abducts any person in order that such person may be subjected, or may be so disposed of as to be put in danger of being subjected to grievous hurt, or slavery, or to the unnatural lust of any person, or knowing it to be likely that such person will be so subjected or disposed of, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Kidnapping or abducting in order to subject a person to grievous hurt, slavery, &c.

368. Whoever, knowing that any person has

Wrongfully concealing or keeping in confinement a kidnapped person.

been kidnapped or has been abducted, wrongfully conceals or keeps such person in confinement shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge or for the same purpose as that with or for which he conceals or detains such person in confinement.

369. Whoever kidnaps or abducts any child under the age of ten years with the intention of taking dishonestly any moveable property from the person of such child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

370. Whoever imports, exports, removes, buys, sells, or disposes of any person as a slave, or accepts, receives, or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

371. Whoever habitually imports, exports, removes, buys, sells, traffics, or deals in slaves, shall be punished with transportation for life, or with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

372. Whoever sells, lets to hire, or otherwise disposes of any minor under the age of sixteen years, with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose, shall be punished with imprisonment of

either description for a term which may extend to ten years, and shall also be liable to fine.

373. Whoever buys, hires, or otherwise obtains possession of any minor under the age of sixteen years, with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Buying of any minor for purposes of prostitution.

If these two sections are vigorously applied to the relations and patrons of the dancing girl, and prostitute caste of India, half the population may be put into gaol whenever it is thought desirable. Even in Europe the consequences of making it criminal to have intercourse with a prostitute under sixteen would be most alarming. But in India, where a girl of that caste has probably been in the full swing of her trade for four years, the effect of s. 373 is quite appalling. It will be observed too that the consent of the female is perfectly immaterial, since even under s. 87 consent by a person under eighteen is ineffectual. Nor does the section involve the idea of removing her from the protection of any one who is willing to maintain her. It is sufficient if possession has been obtained by any means, which may be affection, reward, or the promise of support to one who is starving. If however the criminal supposes the woman to be above sixteen, this will be a mistake of fact which may entitle him to the protection of s. 79.

374. Whoever unlawfully compels any person to labor against the will of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Unlawful compulsory labor.

The word "labor" has not been defined, and therefore will apply either to mental or bodily labor, though probably the last species was principally contemplated by the framers of the Code. The word "unlawfully" applies both to the persons compelled and the means resorted to. It is not unlawful to compel a child, a scholar, or an apprentice to work, even by means of personal chastisement, when of a moderate nature. (Ante. p. 196.) It is unlawful to compel a servant, or a person who is under a contract to labor by means of personal violence, though it would be lawful to do so by moral compulsion, as threats of legal coercion. It would be unlawful to compel a person, who was not

under an obligation by contract, to do work against his will, whatever the species of compulsion might be. I conceive, however, that the compulsion employed must be such as amounts in law to duress, and must at least be as great as would vitiate a contract. For instance actual violence, or restraint, an illegal arrest, (*Duke de Cadaval v. Collins* 4 A. & E. 858,) an unlawful detainer of goods, (*Wakefield v. Newbon* 6 Q. B. 276,) a refusal to perform an act which the party employing the compulsion was legally bound to do. (*Traherne v. Gardner* 25 L. J. Q. B. 201.) Mere threats of personal enmity, hostile influence, withdrawal of favor, and the like would not be sufficient.

OF RAPE.

375. A man is said to commit "rape," who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:—

First. Against her will.

Secondly. Without her consent.

Thirdly. With her consent, when her consent has been obtained by putting her in fear of death or of hurt.

Fourthly. With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. With or without her consent, when she is under ten years of age.

Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception. Sexual intercourse by a man with his own wife, the wife not being under ten years of age is not rape.

376. Whoever commits rape shall be punished with transportation for life, or with imprisonment of either description for a

Punishment for
rape.

term which may extend to ten years, and shall also be liable to fine.

The essence of the offence of rape consists in its being committed against, or without, the consent of the female. Accordingly the offence is complete if committed when the woman is incapable of giving a consent, as for instance where she is under the influence of stupifying drugs, or insensible from drink, or from mental imbecility is unconscious of the nature of the act which is taking place. But the consent produced by mere animal instinct would be sufficient to prevent the act from constituting a rape. (*Reg. v. Fletcher* 28 L. J. M. C. 85.) Nor is it any excuse that she consented at first, if the act was afterwards committed against her will, or that she consented after the fact. Nor can it be set up as any defence that the woman was a common prostitute, or even that she was the concubine of the prisoner, if not legally united to him; for, however vicious her course of life, she is still entitled to the protection of the law, and may try to be virtuous, whenever she chooses (*Arch.* 585.)

The fourth clause of s. 375 is opposed to the decision of all the English authorities, who in several cases arrived at the conclusion that where a woman actually was a consenting party to the act, though under the influence of mistake, the essential ingredient in the offence was wanting. It is obvious that such an assertion, when put forward by a married woman, requires to be scrutinized most suspiciously before it is accepted as true. Where there has been intimacy between the prisoner and the female there will always be strong reason to suspect that the charge was set up to obviate the consequences of detection.

In the majority of cases, the only direct evidence of the rape, is that of the prosecutrix herself. Where this breaks down, or cannot be obtained, as where the female was too young to be sworn, or where she was deaf and dumb and could not have an oath administered to her, (*1. M. Dig.* 175, § 510—512) there is nothing for it but to acquit. Her evidence should always be received, not with distrust, but with caution, remembering that the charge is one easy to make and hard to refute. The first thing necessary to examine in support of her statement is, whether there is any indirect evidence that sexual connection took place. Upon this point it is most important to have the evidence of a Medical man, as to the state of the parts. In India such evidence is often unattainable, but it would certainly be a suspicious circumstance, if no female relation were produced to testify to marks of injury of the like. The next thing is to see, whether the connection, if it took place, was against her will. For this purpose all the surrounding circumstances should be carefully sifted. The character of the prosecutrix; her intimacy with the prisoner, and the amount of familiarity which she had formerly permitted him to indulge in; the place, in which the act took place, as showing that she might have obtained assistance; the distance at which other persons were passing by; any screams or cries, which were heard; her conduct, immediately after the outrage, and her appearance, and so forth. (*See Arch.* 586.)

There is one point, as to which the rules of evidence seem hardly satisfactory. It is as to the extent to which complaints made by the prosecutrix are admissible. The mere fact that she made a complaint of some outrage having been committed, is not only admissible, but always inquired after. Indeed it would in most cases be difficult to believe a charge of this nature, if the woman came calmly home, and told no one about it.

“In no case, however, can the particulars of the complaint (which includes the name of a person accused. (Arch. 586,) be disclosed by witnesses for the crown, either as original or confirmatory evidence, but the details of the statement can only be elicited by the prisoner's counsel by cross examination. It is difficult to see upon what principle this rule is founded, where the complaint is offered as confirmatory evidence; because if witnesses were allowed to relate all that the prosecutrix had said in making her original complaint, such evidence would furnish the best test of the accuracy of her recollection, when she was sworn to describe the same circumstances at the trial.” (1 Taylor, 374.)

We have seen that the badness of a woman's character is no excuse for violating her. It is however a very important element in deciding whether she was violated, or whether she voluntarily consented to the act. Hence the prisoner may always adduce evidence of her notorious want of chastity, or of her having had illicit intercourse with himself, or with other men; but it would seem that evidence of such particular facts cannot be given, unless the prosecutrix has been cross examined upon the point. Because in fairness to her, she ought to be allowed to deny the accusation, if false, or to explain any circumstances of suspicion. (Arch. 586.) Where it is necessary to acquit the prisoner of rape, he cannot be convicted of adultery, (1 M. Dig. 176. § 518; and 519;) but he may of an assault with intent to rape, (Mad. F. U. 261 of 1851.)

Although a husband cannot commit a rape upon his own wife, who is above 10 years of age, he may be indicted for aiding and abetting in a rape committed by others, a very disgusting instance of which occurred in the case of Lord Andley. (Arch. 585.)

By the English law, as mentioned in p. 38 there is an invincible presumption as to the impossibility of a rape being committed by a boy under fourteen. Here, probably, an earlier date would be fixed. Where a boy, only ten years old, was convicted by the Futwa, of rape upon a girl only three years old, the Court of N. A. viewed it as an attempt only, and punished it, as a misdemeanour, with one year's imprisonment. (1 M. Dig. 176, § 513.) He may, however, be convicted of aiding and abetting in a rape by others. (Arch. 585.)

OF UNNATURAL OFFENCES.

377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with transportation for life, or

Unnatural of-
fences.

person having for that purpose authority either expressed or implied.

Illustrations.

(a) A cuts down a tree on Z's ground, with the intention of dishonestly taking the tree out of Z's possession, without Z's consent. Here, as soon as A has severed the tree, in order to such taking, he has committed theft.

(b) A puts a bait for dogs in his pocket, and thus induces Z's dog to follow it. Here, if A's intention be dishonestly to take the dog out of Z's possession without Z's consent, A has committed theft as soon as Z's dog has begun to follow A.

(c) A meets a bullock carrying a box of treasure. He drives the bullock in a certain direction, in order that he may dishonestly take the treasure. As soon as the bullock begins to move, A has committed theft of the treasure.

(d) A, being Z's servant, and intrusted by Z with the care of Z's plate, dishonestly runs away with the plate, without Z's consent. A has committed theft.

(e) Z, going on a journey, entrusts his plate to A, the keeper of a warehouse, till Z shall return. A carries the plate to a goldsmith and sells it. Here the plate was not in Z's possession. It could not therefore be taken out of Z's possession, and A has not committed theft, though he may have committed criminal breach of trust.

(f) A finds a ring belonging to Z on a table in the house which Z occupies. Here the ring is in Z's possession, and if A dishonestly removes it, A commits theft.

(g) A finds a ring lying on the high-road, not in the possession of any person. A, by taking it, commits no theft, though he may commit criminal misappropriation of property.

(h) A sees a ring belonging to Z lying on a table in Z's house. Not venturing to misappropriate the ring immediately for fear of search and detection, A hides the ring in a place where it is highly improbable that it will ever be found by Z, with the intention of taking the ring from the hiding place and selling it when the loss is forgotten. Here A, at the time of first moving the ring, commits theft.

(i) A delivers his watch to Z, a jeweller, to be regulated. Z carries it to his shop. A, not owing to the jeweller any debt for which the jeweller might lawfully detain the watch as a security, enters the shop openly, takes his watch by force out of Z's hand, and carries it away. Here A, though he may have committed criminal trespass and assault, has not committed theft, inasmuch as what he did was not done dishonestly.

(j) If A owes money to Z for repairing the watch, and if Z retains the watch lawfully as a security for the debt, and A takes the watch out of Z's possession with the intention of depriving Z of the property as a security for his debt, he commits theft, inasmuch as he takes it dishonestly.

(k) Again, if A having pawned his watch to Z, takes it out of Z's possession without Z's consent, not having paid what he borrowed on the watch, he commits theft, though the watch is his own property, inasmuch as he takes it dishonestly.

(l) A takes an article belonging to Z out of Z's possession, without Z's consent, with the intention of keeping it until he obtains money from Z as a reward for its restoration. Here A takes dishonestly; A has therefore committed theft.

(m) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent, for the purpose merely of reading it, and with the intention of returning it. Here, it is probable that A may have conceived that he had Z's implied consent to use Z's book. If this was A's impression, A has not committed theft.

(n) A asks charity from Z's wife. She gives A money, food, and clothes, which A knows to belong to Z her husband. Here, it is probable that A may conceive that Z's wife is authorized to give away alms. If this was A's impression, A has not committed theft.

(See Reg. v Avery 28 L. J. M. C. 185.)

(o) A is the paramour of Z's wife. She gives A valuable property, which A knows to belong to her husband Z, and to be such property as she has not authority from Z to give. If A takes the property dishonestly, he commits theft.

(p) A in good faith, believing property belonging to Z to be A's own property, takes that property out of B's possession. Here, as A does not take dishonestly, he does not commit theft.

(See Reg. v. Berry 28 L. J. M. C. 70)

379. Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for theft.

The crime of theft is, with a single exception, composed of the same ingredients as that known to English law under the term Larceny. This will be seen by comparing the definition in the text with that quoted in Russell from East's Pleas of the Crown, where larceny is defined to be,

“The wrongful taking and carrying away by any person of the mere personal goods of another, from any place, with a felonious intention to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner.” (2 Russ. 2.)

The one point of difference between the two definitions is, that the Code makes every thing the subject of theft which is moveable, i. e. capable of being severed from its place. The English law however excluded from Larceny all matters.

“Which savour of the realty, and are, at the time they are taken, part of the freehold ; whether they be of the substance of the land, as lead, or other minerals ; or of the produce of the land, as trees, corn, grass, or other fruits ; or things affixed to the land, as buildings, and articles, such as lead &c. annexed to buildings. The severance and taking of things of this description was at common law, only a trespass.” (2 Russ. 62.)

In Scotland however the law was always on a more rational footing, and the principle was that,

“Theft may be committed of every inanimate thing, which is either moveable, or capable of being severed from that which is naturally or artificially attached to it.” (Alison. Cr. L. 278.)

So also in England it was laid down, that documents were not the subject of larceny, since they were merely valuable as evidencing a

right. (Arch. 267.) While by the Scotch law it was well settled that, "to carry off a bond, bill, promissory note, or writing of any description, is as much theft as to steal a horse or a bag of money." (Alison Cr. L. 279.) In both these points the Code has followed the Scotch in preference to the English law. (Sec s. 22.)

The removal must be done "dishonestly," which is defined by s. 24, as involving "the intention of causing wrongful gain to one person, or wrongful loss to another person." Therefore it is no theft where the articles are taken by mistake, or under a *bonâ fide* claim of right to possess them, however erroneous that claim may be.

A fortiori, there can be no conviction, where the circumstances show that there was no intention to deprive the party of his property. This was the case in a recent instance, where the Court of F. U. acquitted the prisoner. Mr. Strange, saying,

"The prisoner appears to have met the prosecutrix, when the latter was incapacitated by intoxication, and to have secured her cloth by placing it under the care of the 1st witness. There is no evidence that he removed the cloth from the prosecutrix feloniously, nor that he had any design of appropriating it to himself. I cannot therefore see that any robbery has been committed." (Mad. F. U 168 of 1858.)

It must not be supposed however that a theft can be got rid of simply by returning the goods. This may be evidence of an original intention not to keep them, which will be very narrowly scrutinised, but if once taken so as to amount to larceny, no subsequent restoration will purge the offence. (Arch. 274.) Still less can a party evade punishment by alleging a general wish to restore the property, should it prove convenient. An illustration of this occurred in a very recent case.

"The prisoner, with whom a plate-chest, full of plate, and securely fastened, was deposited for safe custody, broke it open, took out the plate and pledged it for a sum, which he was unable to repay. The jury found him guilty of stealing the plate, but recommended him to mercy, on the ground that they believed he intended ultimately to return the property—Held, that the conviction was perfectly good, as the recommendation was not inconsistent with the verdict of guilty."

"Lord Campbell, C. J. said—To constitute larceny there must be an intention to appropriate a chattel, and exercise an entire dominion over it. If it be taken with the intention of making a temporary use of it only, and then of letting the owner have it again, there is no larceny, but only a trespass. But here there was abundant evidence to warrant the Jury in finding as they have found, that the prisoner stole the plate. I am not aware that what a Jury may say in recommending a prisoner to mercy is to be taken as any part of the verdict. But if it be, all that the Jury here say is, that the prisoner intended ultimately to return the plate, and not that at the time he took it he had any such intention." (Reg. Trebilcock. 27, L. J. M. C. 103.)

Where the intention permanently to deprive the owner of his property is established, it makes no difference in the prisoner's guilt that the act was not intended to procure any personal benefit to himself. No one can justify a theft on the Robin Hood principle, of taking from the rich to give to the poor. In one case a man was indicted for

horse-stealing, whereupon his companion broke into the prosecutor's stable took out another horse, drove it into a coal pit and so killed it, with the view of suggesting that a similar accident had happened to the first horse. He was found guilty of stealing, though he had never intended to make any other use of the animal. (Arch. 275.)

Again, the taking must be from some person who has a distinct property in the goods, which entitles him to hold them against the prisoner. Hence if a wife carry away, and convert to her own use the goods of her husband, this is no larceny, for husband and wife are one person in law. (Arch. 276.) And conversely it has been held, that a Hindu husband cannot be convicted of robbing his wife, the wife, according to the Hindu law, being completely under the control of her husband. (3 M. Dig. 129, § 185.) Nor can a man be turned into a thief for regaining possession of his own property, held by one who has no right to it; nor can a joint tenant, as for instance the member of a Hindu undivided family, be indicted for larceny of the family goods, since he has just as good a right to them as any one else. (Arch. 276.) Of course it would be very different when the holder of the goods had some interest in them, which authorised him to retain them against the owner. If I pawn my watch, it would be larceny to take it away from the pawn broker's shop without repaying the loan. And so it would be, if the effect of the taking were to charge the holder with its price; as when a member of a benefit society entered the room of the person, with whom a box containing the funds of the society was deposited, and took and carried it away; this was held to be larceny, the bailee being answerable to the society for the funds. (Ibid.)

A question occasionally arises with regard to the position of a person who finds, and appropriates property. The rule of law on this subject has been recently pronounced to be, "that if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny; but if he takes them with the like intent, though lost or reasonably supposed to be lost, but reasonably believing the owner can be found, it is larceny." (Arch. 277.)

Accordingly if a person were to keep for himself property so marked as to give him the clue to its owner; or if a tailor were to keep money found in clothes which he had been given to mend, or the driver of a vehicle were to keep goods left in it by a person whom he could trace, this would be larceny. (Arch. 277.)

In the vast majority of cases where a theft is charged, the property has been taken from the owner clandestinely and without his consent. Sometimes, however, it happens that the possession of the article has been voluntarily resigned by the proprietor, and the very difficult question then arises, whether the person, to whom it has been so resigned, will become a thief in consequence of any subsequent dealing with it?

It is evident how important this question is, since any mistake upon the subject might result in an indictment against a person who lost a borrowed book, and then denied all knowledge of the loan ; or who bought goods, and then refused either to pay for or return them.

A solution of all such doubts will generally be obtained by remembering, that the essence of theft consists in its being a dishonest or criminal, taking from the possession of the owner. Consequently if the taking is not criminal, when the possession is changed, there is no theft. The cases then will resolve themselves into four classes, two of which are theft and two are not.

1. By s. 27 property is said to be in a person's possession, when it is the possession of his wife, clerk, or servant, even though the clerk or servant be only employed temporarily, or on a particular occasion.

For instance, if I entrust my horse to my coachman, or plate and wine to my butler, my possession of them is never altered. I merely hold them by another hand. Instead of shutting them up in a stable or room, I put a human lock and key over them, but my right is never affected. Consequently if my servant sells my horse, drinks my wine, or pawns my plate, this is theft, because he takes them directly out of my possession, criminally and without my leave. And so it has been held in numbers of cases where servants appropriated money, goods, cheques, bills of exchange, &c., which had been given to them by their master for use or custody. (Arch. 285, 287.)

The case is exactly the same where one gives the mere manual possession of goods to another, but in such a way as not to part with his dominion over them. For instance, the hotel keeper who allows his guest to use his furniture or spoons, gives him no other right over them, and of course it would be just as much theft to take the plate out of a hotel, as to carry it away from a friend's house. (Arch. 287, 288.)

The Scotch law went even further, for it held that,

“ If goods are delivered to a stranger or carrier for a special and particular purpose, independent of any transfer of property, as to be conveyed to a particular place, or subjected to a particular operation, the abstraction of them by the person entrusted is theft.” (Alison. Ci. L. 252.)

Under the present Code such offences would be punishable as breaches of trust under s. 405. And so I conceive it would be even in the case of a clerk or servant, where the master never had any possession of the property except through the means of his servant. For instance, if a bill collector were to apply to his own use money which he had received on account of his master, this would be a breach of trust under s. 408, not a theft under s. 378.

If the clerk or servant is authorized to dispose of his master's property, and does so, but applies the proceeds to his own use, he cannot be indicted for theft of the goods, for the removal of them out of his master's possession was not wrongful ; but he will be liable for the

misappropriation of the money, under s. 403. (Reg. v. Betts L. J. M. C. 69.)

2. Again, the owner may not only give up the possession of his goods, but also intend to part with all right and dominion over them, in the event of a particular condition being complied with, *but in no other event*. Now if a person, intending from the first to trick the owner out of his property, were to get possession of it without complying with the condition, this would be theft. For instance, in one case, the prisoner agreed to discount a bill for the prosecutor, and the bill was given to him for that purpose; he told the prosecutor that if he then sent a person with him to his lodgings, he would give him the amount, deducting the discount and commission; a person was sent accordingly, but on reaching the lodgings, the prisoner left the messenger there, and went out, on pretence of getting the money, but never returned; the Jury found that the prisoner obtained possession of the bill with intent to steal it, and that the prosecutor did not mean to part with his property in the bill, before he should have received the money for it; it was held that this warranted a conviction for larceny. (Arch. 279.) So where the prisoner prevailed upon a tradesman to take goods to a particular place under pretence that the price would then be paid for them, and afterwards, induced him to leave the goods in the care of a third person, from whom the defendant got the goods without paying the price; the tradesman swore that he did not intend to part with the goods until they were paid for, and the Jury found that the prisoner from the first intended to get the goods without paying for them; this was held to be larceny. (Ibid.) So where a party presented himself at a Post Office, and asked for a watch which was there, falsely representing himself to be the person to whom it was addressed, and so obtained it, this was held to be larceny, because the Post Office Clerk intended to give it up to no one but the rightful owner. (Reg. v. Kay, 26, L. J. M. C. 119.) So, in a recent case before the Supreme Court, it appeared that the prisoner obtained goods from the Railway Company by presenting a forged pass. The Peon was authorised to deliver them to any holder of a genuine pass, but to no one else, and he believed that the prisoner was such a person. On proof of these facts he was convicted of larceny. (Reg. v. Aurokeasawmy, 4th Madras Sessions, 1858.)

3. Where a party has obtained the possession of any chattel, *bonâ fide* and without fraud, *and is not a servant of the original owner*, no subsequent appropriation of the article, or malpractices in reference to it, can make him guilty of theft. And this by virtue of its definition; because the taking, the change of possession, was not originally criminal. Hence, where goods are delivered to a man upon trust, or taken by him with the owner's consent, he is not guilty of theft by afterwards converting them to his own use. Where the defendant saved some of the prosecutor's goods from a fire which happened in his house, and took them home to her own lodgings, but the next morning she concealed them, and denied having them in her possession; the jury finding that she took them originally merely from a desire of

saving them for, and returning to the prosecutor, and that she had no evil intention till afterwards; the Judges held that it was a mere breach of trust and not felony. (Arch. 283.) So if I lend B a horse, and he ride away with it; or I send goods by a carrier, and he converts them to his own use; or I deliver a watch to a tradesman to repair, and he sell it; or I entrust money, goods or Company's Paper to my agent, and he appropriates them; in none of these cases has there been any theft, because the original taking was *bonâ fide* and without fraud. (Arch. 284.)

But in order to obtain the benefit of this rule, two things are necessary, First, the goods must have been obtained *bonâ fide* in the first instance; for if A obtain goods, or receive them, harbouring at the time an intention wrongfully to convert them to his own use, it is theft; thus, where the defendant was employed to drive sheep to a fair, but instead of driving them to the fair, he drove them in a contrary direction, and the jury were of opinion that at the time he received them, he intended to appropriate them; this was decided to be larceny. (Arch. 284.) Secondly, the goods must have been obtained rightfully. For even though they were obtained in the first instance without a criminal intent, yet if the possession was acquired by a trespass, the subsequent fraudulent appropriation of them, during the continuance of the same transaction, will be a theft. As where a man, driving a flock of sheep from a field, drove with them a sheep belonging to another person, without knowing that he had done so, but afterwards, when he had discovered the fact, sold that sheep and appropriated the proceeds, he was held to be rightly convicted of larceny. (Arch. 285.) For here he had never got possession with consent of the owner.

Cases of this sort however will always be indictable either under s. 403 or 405.

4. The last class of cases arises out of the principle, "that if the owner part with the property, that is, the right of dominion over the thing taken, as well as the possession, there can be no theft in the taking, however fraudulent the means by which such delivery was procured." (2 Russ. 24.) Where goods are sold upon credit, the purchaser cannot be indicted for theft, though the goods are never paid for, and though in fact he never intended to pay for them. So, where the defendant bought a horse at a fair of the prosecutor, to whom he was known, and having mounted the horse, said to the prosecutor that he would return immediately and pay him, to which the prosecutor answered, "very well," and the prisoner rode the horse away, and never returned; this was held to be no theft, because the property as well as the possession was parted with. And in this respect the English harmonises with the Scotch law, both being agreed,

"That if the property in the goods taken has been parted with by the owner in consequence of false representations, the crime is not theft but swindling." (Abson Cr. L. 261.)

Such cases will now be indictable under s. 415 as cheating.

Further, the crime of larceny will not be complete without what is called, an *asportation*, or carrying away of the article. The principle of this rule is very obvious, viz., that a mere intention to commit a crime does not constitute the crime, and as the essence of theft consists in an unlawful taking away, it must be shown that something was done towards carrying out that offence. It is not necessary to prove that the goods were removed out of their owner's reach. Any removal from the spot in which they are, however small, will be sufficient, provided the party accused have, for an instant at least, the entire and absolute possession of them. For instance the offence was held to be complete in cases where the prisoner had taken goods out of a chest, and laid them on the floor, but was surprised before he could escape with them. And so, where he had removed a cask from one end of a waggon to the other. (Arch. 288.) But the contrary was held where the property was merely altered in position, without any attempt at removal—as where the defendant merely set a package on end, in the place where it lay, for the purpose of cutting open the side of it to get out the contents, and was detected before he had accomplished his purpose. (Arch. 289.) Nor is even an actual removal sufficient, if the prisoner has never had the article in his power; as for instance, where he attempted to carry it off, but was unable on account of its being chained to the counter. (Arch. 289.)

Lastly, it may be remarked that in many cases, the only evidence of a theft arises from the fact of the stolen property being found in the prisoner's possession. Upon this point, the following quotations, cited in Norton on Evidence, (p. 290. n.) deserve attention.

“It may be laid down generally, that wherever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent on that other to prove how he came by it; otherwise the presumption is that he obtained it feloniously. This, like every other presumption, is strengthened, weakened, or rebutted, by concomitant circumstances, too numerous in the nature of the thing to be detailed. It will be sufficient to allude to some of the most prominent; such as, the length of time which has elapsed between the loss of the property and the finding it again; either as it may furnish more or less doubt of the identity of it, or as it may have changed hands oftener in the mean time; or as it may increase the difficulty to the prisoner of accounting how he came by it; in all which considerations that of the nature of the property must generally be mingled. So the probability of the prisoner's having been near the spot from whence the property was supposed to be taken at the time: as well as his conduct during the whole transaction, both before, and after the discovery are material ingredients in the investigation. But the bare circumstance of finding in one's possession property of the same kind which another has lost, unless that other can from marks or other circumstances satisfy the Court and jury of the identity of it, is not in general sufficient evidence of the goods having been feloniously obtained. Though, where the fact is very recent, so as to afford reasonable presumption that the property could not have been acquired in any other manner, the Court are warranted in concluding it is the same, unless the prisoner can prove the contrary. Thus a man being found coming out of another's barn; and upon search, corn being found upon him of the same kind with what was in the barn, is pregnant evidence of guilt.

“But in order to raise this presumption legitimately the possession of the stolen property should be clearly traced to the accused, and be exclusive

as well as recent. The finding it on his person, for instance, or in a locked-up house, room, or box of which he kept the key, would be a fair ground for calling on him for his defence ; but if the articles stolen were only found lying in a house or room in which he lived jointly with others equally capable with himself of having committed the theft, or an open box to which others had access, no definite presumption of his guilt could be made. An exception is said to exist where the accused is the owner of the house in which stolen property is found, who, it is argued, must be presumed to have such control over it as to prevent anything coming in or being taken out without his sanction. As a foundation for evil responsibility this reasoning may be correct ; but to conclude the master of a house guilty of felony, on the double presumption, first, that stolen goods found in the house were placed there by him or with his connivance, and secondly, that he was the thief who stole them, and there are no corroborating circumstances, is certainly treading on the very verge of artificial conviction."

380. Whoever commits theft in any building, tent, or vessel, which building, tent, or vessel is used as a human dwelling, or for the custody of property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Theft in dwelling house, &c.

381. Whoever, being a clerk or servant, or being employed in the capacity of a clerk or servant, commits theft in respect of any property in the possession of his master or employer, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Theft by clerk or servant of property in possession of master.

382. Whoever commits theft, having made preparation for causing death or hurt or restraint, or fear of death or of hurt or of restraint, to any person, in order to the committing of such theft, or in order to the effecting of his escape after the committing of such theft, or in order to the retaining of property taken by such theft, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Illustrations.

(a) A commits theft on property in Z's possession ; and, while committing this theft, he has a loaded pistol under his garment, having

provided this pistol for the purpose of hurting Z in case Z should resist, A has committed the offence defined in this Section.

(b) A picks Z's pocket, having posted several of his companions near him, in order that they may restrain Z, if Z should perceive what is passing and should resist, or should attempt to apprehend A. A has committed the offence defined in the Section.

383. Whoever intentionally puts any person in
Extortion. fear of any injury to that person or to
 any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into a valuable security, commits "extortion."

Illustrations.

(a) A threatens to publish a defamatory libel concerning Z, unless Z gives him money. He thus induces Z to give him money. A has committed extortion.

(b) A threatens Z that he will keep Z's child in wrongful confinement, unless Z will sign and deliver to A a promissory note binding Z to pay certain monies to A. Z signs and delivers the note. A has committed extortion.

(c) A threatens to send club-men to plough up Z's field, unless Z will sign and deliver to B a bond binding Z under a penalty to deliver certain produce to B, and thereby induces Z to sign and deliver the bond. A has committed extortion.

(d) A, by putting Z in fear of grievous hurt, dishonestly induces Z to sign or affix his seal to a blank paper, and deliver it to A. Z signs and delivers the paper to A. Here, as the paper so signed may be converted into a valuable security, A has committed extortion.

384. Whoever commits extortion shall be punished
Punishment for extortion. ed with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Extortion under certain circumstances will become robbery. (Post. s. 390.) The offence under this Code seems to include some cases which would have been treated as robbery under English law, and others which would not have been punishable under the English law, though they would under the Scotch system.

Under the English law the offence of robbery was equally completed, although the actual delivery of the thing taken was the act of the party robbed, provided that delivery arose from his being put in fear. (Arch. 348.) But there were some sorts of fear which the English law did not consider as sufficient to justify a person in yielding to; therefore it was held that the fear of injury to character was not such an in-

timidation as would amount to robbery, unless in the single case of threatening to accuse of an unnatural offence. (1 Russ. 884. 885.) The offence of Extortion under s. 388 seems to embrace two classes of cases, first, every threat of prospective injury, of whatever nature; and secondly, every threat of immediate injury, provided the injury apprehended is not death, hurt, or wrongful restraint.

Where the injury is prospective, the offence appears to be the same as that known to the Scotch law under the name of Oppression. Mr. Alison in treating of robbery says,

“But if the threat be of a future or contingent danger, and such as, by the interposition of the law, or by other means, may be averted, the crime is not to be considered as robbery, but as oppression, which is a crime *Sui generis*, of a very serious kind; more especially if in consequence of such threats, the money be delivered not immediately, but *ex intervallo*, as by sending it by letter, placing it under a stone designed by the criminal, or the like. In such cases the crime is not considered robbery any more than if it had been obtained under the terror of an incendiary letter.” (Crim. L. 232.)

I conceive that the offence will equally be extortion, though the injury threatened is one which the party employing the menace would be justified in resorting to, provided the threat is used as a means of obtaining an undue advantage. It is lawful to bring a criminal to justice, or to expose a rogue, but it is extortion to wring from his fears of detention any profit which he would not otherwise be willing to bestow.

Money &c. obtained by a threat of injury to property, will be extortion, whether the threat be of present or future injury, and whether there be an immediate power of carrying the threat into execution or not. (Arch. 350.)

The act however must be done dishonestly, (see s. 24) and therefore if a person *bonâ fide* believes himself to be entitled to the property in question, the crime will not have been completed.

385. Whoever, in order to the committing of extortion, puts any person in fear or attempts to put any person in fear of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Putting person in fear of injury in order to commit extortion.

386. Whoever commits extortion by putting any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Extortion by putting a person in fear of death or grievous hurt.

387. Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of death or of grievous hurt to that person or to any other, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Putting person in fear of death or of grievous hurt, in order to commit extortion.

388. Whoever commits extortion by putting any person in fear of an accusation against that person or any other, of having committed or attempted to commit any offence punishable with death, or with transportation for life, or with imprisonment for a term which may extend to ten years, or of having attempted to induce any other person to commit such offence, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if the offence be one punishable under Section 377, may be punished with transportation for life.

Extortion by threat of accusation of an offence punishable with death or transportation &c.

389. Whoever, in order to the committing of extortion, puts or attempts to put any person in fear of an accusation against that person or any other, of having committed or attempted to commit, an offence punishable with death or with transportation for life, or with imprisonment for a term which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if the offence be punishable under Section 377, may be punished with transportation for life.

Putting person in fear of accusation of offence, in order to commit extortion.

OF ROBBERY AND DACOITY.

Robbery

390. In all robbery there is either theft or extortion.

Theft is "robbery," if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt or of instant wrongful restraint.

Extortion is "robbery," if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation.—The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

Illustrations.

(a) A holds Z down, and fraudulently takes Z's money and jewels from Z's clothes, without Z's consent. Here A has committed theft, and, in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

(b) A meets Z on the high road, shows a pistol, and demands Z's purse. Z, in consequence, surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. A has therefore committed robbery.

(c) A meets Z and Z's child on the high road. A takes the child, and threatens to fling it down a precipice, unless Z delivers his purse. Z, in consequence, delivers his purse. Here A has extorted the purse from Z, by causing Z to be in fear of instant hurt to the child who is there present. A has therefore committed robbery on Z.

(d) A obtains property from Z by saying—"Your child is in the hands of my gang, and will be put to death unless you send us ten thousand Rupees." This is extortion, and punishable as such; but it is not robbery, unless Z is put in fear of the instant death of his child.

Robbery as defined in s. 390 consists of a completed theft, or a completed extortion, with some additional circumstances. Every case which is robbery under this section would have been robbery under English law, but the converse does not appear to be true. The defi-

dition of robbery under both English and Scotch law was a theft by violence or putting in fear. (Arch. 348. Alison Cr. L. 227.) Therefore it was held to be robbery in one case, where it appeared that the prisoner snatched at a sword while it was hanging at a Gentleman's side, whereupon the latter instantly laid tight hold of the scabbard, which caused a struggle between them, in which the prisoner got possession of the sword, and took it away. (1 Russ. 875.) But under the above section the violence must amount to a causing, or attempting to cause death, or hurt, (sec s. 319) or wrongful restraint, (sec s. 339) or the fear of such. Apprehension of injury to property, or character will not amount to robbery, though it will be Extortion under s. 383.

Where the property is forcibly taken away from the owner under the above circumstances, the offence will be theft turned into robbery. Where however the owner is prevailed upon himself to surrender his property, then it will be the crime of extortion aggravated into robbery.

In no case will the offence of robbery have been committed, where the article is taken away by a sudden snatch, although it be violently wrested from the possession, if no attempts have been made to subdue the strength, or overawe the will. (Alison Cr. L. 236.) And so it was held in three cases in England, in one of which the hat and wig of a gentleman were snatched from his head in the street ; in another, an umbrella was suddenly snatched out of the hand of a woman as she was walking along ; and in a third, a watch was picked, with considerable force, out of a watch pocket. (1 Russ. 587.)

In order to constitute robbery, there must be an act of theft or extortion completed, and therefore the accused must have had such a possession of the property as would constitute the above crimes ; but a merely momentary possession is sufficient, and the crime is completed though the property is given back immediately. Hence in one case where

“ It was found that the prisoner stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down, or he would shoot him. The prosecutor laid the bed on the ground ; but before the prisoner could take it up so as to remove it from the spot where it lay, he was apprehended. The Judges were of opinion that the offence was not completed, and he was discharged.” (1 Leach. 322.)

Of course in a similar case under the present Code he could be converted of an attempt to rob under s. 511.

“ So if A, without drawing his weapon, requires B to deliver his purse, who does deliver it, and A finding but two shillings in it, gives it him again, this is a taking by robbery. But if A have his purse tied to his girdle, B assaults him to rob him, and in struggling the girdle breaks, and the purse falls to the ground, this is no robbery, because no taking.” (1. Hale 533.)

As in the case of theft or extortion, so in the compound crime of robbery, the act must be done dishonestly ; (see s. 24) and therefore if a person *bonâ fide* believing that property in the personal possession of another belongs to himself, takes that property away from such person with menaces and violence, this is not robbery ; and it is a

question of fact, whether the prisoner did or did not act under such *bona fide* belief. (1 Russ. 872.)

391. When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting, or aiding, is said to commit "dacoity."

392. Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

393. Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

394. If any person, in committing or in attempting to commit robbery, voluntarily causing hurt in committing robbery, or voluntarily causes hurt, such person, and any other person, jointly concerned in committing or attempting to commit such robbery, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

395. Whoever commits dacoity shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

396. If any one of five or more persons, who are

Dacoity with murder. jointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or transportation for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

397. If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

Robbery or dacoity, with attempt to cause death or grievous hurt.

398. If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

Attempt to commit robbery or dacoity when armed with deadly weapon.

399. Whoever makes any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Making preparation to commit dacoity.

400. Whoever, at any time after the passing of this Act, shall belong to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

Punishment for belonging to a gang of dacoits.

401. Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of thugs or dacoits, shall be punished with rigorous

Punishment for belonging to a wandering gang of thieves.

imprisonment for a term which may extend to seven years, and shall also be liable to fine.

402. Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Assembling for purpose of committing dacoity.

OF CRIMINAL MISAPPROPRIATION OF PROPERTY.

403. Whoever dishonestly misappropriates or converts to his own use any moveable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Dishonest misappropriation of property.

Illustrations.

(a) A takes property belonging to Z out of Z's possession, in good faith believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this Section.

(b) A, being on friendly terms with Z, goes into Z's library in Z's absence, and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But if A afterwards sells the book for his own benefit, he is guilty of an offence under this Section.

(c) A and B being joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it. But if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this Section.

Explanation 1. A dishonest misappropriation for a time only is a misappropriation within the meaning of this Section.

Illustration.

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, pledges it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this Section.

Explanation 2. A person who finds property not in the possession of any other person, and takes such

property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner, and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means, or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it: it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found.

Illustrations.

(a) A finds a Rupee on the high road, not knowing to whom the Rupee belongs. A picks up the Rupee. Here A has not committed the offence defined in this Section.

(b) A finds a letter on the road, containing a bank note. From the direction and contents of the letter he learns to whom the note belongs. He appropriates the note. He is guilty of an offence under this Section.

(c) A finds a cheque payable to bearer. He can form no conjecture as to the person who has lost the cheque. But the name of the person, who has drawn the cheque, appears. A knows that this person can direct him to the person in whose favor the cheque was drawn. A appropriates the cheque without attempting to discover the owner. He is guilty of an offence under this Section.

(d) A sees Z drop his purse with money in it. A picks up the purse with the intention of restoring it to Z, but afterwards appropriates it to his own use. A has committed an offence under this Section.

(e) A finds a purse with money, not knowing to whom it belongs; he afterwards discovers that it belongs to Z, and appropriates it to his own use. A is guilty of an offence under this Section.

(f) A finds a valuable ring, not knowing to whom it belongs. A sells it immediately without attempting to discover the owner. A is guilty of an offence under this Section.

This section is intended to provide for certain acts which would not be criminal under other heads. Theft involves an act criminal at the moment it first took place; it also involves taking a thing out of the possession of the owner. Criminal misappropriation takes place when the possession has been rightfully come by, but where by a subsequent change of intention, or from the knowledge of some new fact, with

which the party was not previously acquainted, the retaining becomes wrongful and fraudulent. Criminal breach of trust can only exist where some relation of trust exists between the parties, but under the present head, all that is necessary is, that the prisoner should convert to his own use property which he knows is not his own, not believing himself to be authorised to do so. Cheating, like theft, presupposes a fraudulent intention at the time the possession of the property was charged, which, as we have seen, is not an ingredient in the present offence.

404. Whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession, of any person legally entitled to such possession shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Dishonest misappropriation of property possessed by a deceased person at the time of his death.

verts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession, of any

person legally entitled to such possession shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration.

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this Section.

OF CRIMINAL BREACH OF TRUST.

405. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."

Criminal breach of trust.

with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust."

Illustrations.

(a) A being executor to the will of a deceased person, dishonestly

disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.

(b) A is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse room. A dishonestly sells the goods. A has committed criminal breach of trust.

(c) A, residing in Calcutta, is agent for Z residing at Delhi. There is an express or implied contract between A and Z that all sums remitted by Z to A shall be invested by A according to Z's direction. Z remits a lac of Rupees to A, with directions to A to invest the same in Company's paper. A dishonestly disobeys the directions, and employs the money in his own business. A has committed criminal breach of trust.

(d) But if A, in the last illustration, not dishonestly but in good faith, believing that it will be more for Z's advantage to hold shares in the Bank of Bengal, disobeys Z's directions, and buys shares in the Bank of Bengal for Z, instead of buying Company's paper, here, though Z should suffer loss, and should be entitled to bring a civil action against A on account of that loss, yet A, not having acted dishonestly, has not committed criminal breach of trust.

(e) A, a revenue officer, is entrusted with public money, and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money. A has committed criminal breach of trust.

(f) A, a carrier, is entrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

406. Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

The two ingredients in the offence of Criminal Breach of Trust are first an original trust, and secondly, a dishonest misapplication of the trust property.

A trust has been defined by Lord Coke, as "a confidence reposed in some other." (Cited Lewin. Trusts, 15) therefore where there is no original confidence there is no trust, and a misappropriation, if punishable at all, will be so under s. 403.

"It is a confidence reposed in some other; not in some other than the author of the trust, for a person may convert himself into a trustee, but in some other than the *cestui que trust*, or object of the trust; for a man cannot be said to hold upon trust for himself." (Lewin, Ibid.)

In general there can be no doubt either as to the existence of the trust or the criminal character of the act by which that trust is violated. Where a clerk intercepts the money he has received on its way to his master, where a banker sells the securities he has taken into deposit from his customer, where a guardian applies to his own use the

rents he has collected for his ward, the only difficulty is to prove the fact. Sometimes, however, trusts are created silently, by mere implication of law, and without even the knowledge of the trustee, so that it may be quite a discovery to him when he first learns that he is a trustee. Sometimes too the trust is voluntarily created by the trustee, and he may fairly think that it is not binding on him any longer than he chooses to submit to it. In either of these cases an undoubted breach of trust may arise, though it would be very unfair to treat the matter as a criminal offence.

In some cases a trust is raised by implication of law in consequence of facts arising after the date of the original transaction. For instance, the endorsee of a bill of exchange is entitled to sue all the parties to, the bill on his own account, and without any trust for any other person. But if he were paid the amount of the bill by the drawer, this would not bar him in his action against the acceptor, though any sum which he might receive from the acceptor would be held by him as trustee for the drawer who had made the payment. (*Jones v. Broadhurst* 9 C. B. 174, 185.) Again a trust is sometimes implied from a constructive knowledge of facts, of which the trustee is in reality wholly ignorant. For instance, if an estate is bound by a mortgage, a charge for the benefit of children, a lien for the purchase money, or the like, and is transferred without any consideration, then the alienee will be bound by the trust, "whether he had notice of it or not; for though he had no actual notice, yet the Court will imply it against him where he paid no consideration." (*Lewin. Trusts*, 724.) And although a purchaser for valuable consideration will only be bound where he has had notice of the trust, still Equity assumes that he has had notice, if he has been made acquainted with something which ought to have led him to search for an instrument, in which the trust was mentioned (*Ibid* 224.) Lastly, even with full knowledge of all the facts, it is often a very difficult question to decide, whether there is a trust or an absolute gift. For instance, where property is given to a person by words which would convey an absolute interest, but phrases are added expressive of a wish, hope, or entreaty that the property may be applied in a particular way, it is frequently a very nice matter to decide whether such phrases create a binding trust, or may be disregarded altogether. (*Lewin. Trusts*, 167.)

I conceive that no universal rule can be laid down, as to whether the breach of an implied trust is criminally indictable. Every case will in my opinion resolve itself into a question of fact; did the party know that he was in fact holding the property under a trust, and did he wilfully violate that trust, intending thereby to defraud.

The second point which I suggested above, related to cases where a person had by his own act made himself a trustee for some one else. Where this was done for a valuable consideration, as for instance, where an insolvent debtor undertook to continue his trade for the benefit of his creditors, and to render them an account of his profits, any wilful violation of the trust would be as clearly criminal, as if they had put

him into their own business as agent. But it might be different where the trust was a voluntary one. Equity will not compel any one to make himself a trustee for another without consideration for so doing, but where he has fully completed the creation of the trust, then it treats the property as actually changed. As Lord Eldon said in such a case,

“It is clear that this Court will not assist a volunteer; yet *if the act is completed*, though voluntary, the Court will act upon it. It has been decided, that, *upon an agreement* to transfer Stock this Court will not interpose; *but if the party has declared himself to be the trustee of the Stock*, it becomes the property of the cestui que trust without more, and the Court will act upon it.” (cited Lewin. Trusts. 83.)

On the other hand in another case Sir J. Wigram laid down the law with greater caution, saying;

“In the case of a formal declaration by the legal or even beneficial owner of property, declaring himself in terms the trustee of that property for a volunteer, the Court might not be bound to look beyond the mere declaration. If the owner of property having the legal interest in himself, were to execute an instrument by which he declared himself a trustee for another, *and had disclosed that instrument to the cestui que trust*, and afterwards *acted upon it*, that might perhaps be sufficient.” (cited *Ibid.* 84.)

I conceive that the principle laid down by Sir J. Wigram is the only one that could be safely acted upon in criminal cases. Suppose a merchant intending to provide for his infant child were to direct his banker to open an account in the name of the child, and to transfer a portion of his funds into that account. This would according to decided cases amount to an executed trust. But I conceive that no indictment could be maintained against him, if he got that account cancelled in a few days after, in order to apply the money to his own use upon some sudden pressure. Of course it might be very different, where the trust had been communicated to the party intended to be benefited, so as to lead him to act upon the belief that the property was his own. Here again it would be impossible to lay down any general rule. Perhaps the nearest approach to such a rule would be to say, that where a party violates a trust to which he has voluntarily subjected himself, the circumstances must be such as to **disclose** a moral as well as a legal fraud.

The general evidence of an embezzlement consists in proof of the receipt of money, which is not accounted for, or whose receipt is denied. Under the former Act 13 of 1850, s. 11 proof of a gross deficiency in the accounts of any trustee or public servant was held to be evidence of the offence charged, until explained. But of course no crime would have been committed where the trustee took the money, *bonâ fide* believing that he was entitled to it, or intending really to advance the interests of the party entitled, and supposing that his act would be ratified when known.

407. Whoever, being entrusted with property as

Criminal breach of trust by carrier, &c a carrier, wharfinger, or warehouse-keeper, commits criminal breach of trust in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

408. Whoever, being a clerk or servant, or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

409. Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust in respect of that property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

OF THE RECEIVING OF STOLEN PROPERTY.

410. Property the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated, or in respect of which the offence of criminal breach of trust has been committed, is designated as "stolen property." But if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

411. Whoever dishonestly receives or retains any

Dishonestly receiving stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

In indictments under this section, the first requisite will be to show that the property was "stolen," within the terms of s. 410. This must be proved by exactly the same evidence as would be requisite if the principal offender were on his trial. Nor can the conviction of such principal be used against the receiver as evidence of the crime having been committed, for he was no party to it, and had no power to cross-examine the witnesses, (1. Russ. 43) and it would still be perfectly competent to him to prove the innocence of the convicted thief. (Post. 365) And so

"Where two persons were indicted together, one for stealing and the other for receiving, and the principal pleaded guilty, Wood B. refused to allow the plea of guilty to establish the fact of the stealing by the principal as against the receiver." (1 Russ. 43.)

Not only must it be shown that the property was originally "stolen property," but also that it continued in that state at the time of the receipt. In one case, goods had been stolen, and when the thief was detected they were taken from him, and then restored by the owner's consent, that he might sell them to a person who had been in the habit of buying his booty. When the latter was indicted as a receiver, it was held that he could not be convicted, inasmuch as at the time of the receipt the goods were not *stolen* goods. (Arch. 367, and see Mad. F. U. 238 of 1851.)

So also, the goods received must be the identical goods which were stolen, and not something for which they had been sold or exchanged. Where A stole six notes for £100, and changed them into notes for £20, some of which he gave to B, it was ruled that B could not be convicted of receiving, as he had not received the notes which were stolen. (Arch. 367.)

Again there must be a receipt of the goods. This is in general sufficiently proved by showing that they are in the possession of the accused. But this cannot be laid down as a universal rule. It would always be open to him to show that he was not aware of their being there, or that the place of their deposit was one to which others had as free access as himself. (See. Ante p. 34.) And though there be proof of a criminal intent to receive, and a knowledge that the goods were stolen, if the *exclusive* possession still remain in the thief, a conviction for receiving cannot be sustained. (Arch. 366) For instance, if a jeweller were apprehended in the act of bargaining with a thief for a stolen watch, the offence would not be complete till the purchase was concluded. But where the prisoner has received the property knowing

it to be stolen, whether for the purpose of assisting the thief, or for the purpose of concealment, it is equally a crime, although he gains no profit or advantage by the receipt. (2 Russ. 247)

To the same effect is the following ruling of the Court of N. A.

“A conviction of receipt of stolen property can only be sustained where there is proof of the personal possession of such property by a prisoner, as by having the property in his own hands under his personal charge, or within his house, with his consent, and with a knowledge on his part of its having been obtained by theft or robbery. When proof of personal possession in some of these modes is wanting, there may be ground for a conviction of being accessory after the fact to a theft or robbery, but not for that of the receipt or possession of plundered property.” (3 M. Dig. 113, § 62)

Lastly, and chiefly, a guilty knowledge must be shown. Mere recent possession of the stolen property is not alone sufficient, as such possession (where it proves any thing) is evidence of stealing and not of receiving. (2 Russ 247, See Ante p. 213.) This knowledge may be proved by the evidence of the principal felon, produced as a witness for the crown, (his confession would not be any evidence, Arch. 202,) or circumstantially, as by showing that the defendant bought them very much under their value, or denied being in possession of them, or the like. So also instances of receiving other goods, stolen from the same person, by the same thief are admissible, as it is very unlikely that a succession of such transactions could be carried on without suspicion being raised. (Arch. 367.) But this latter sort of proof is not to be extended. Accordingly where evidence was offered that the prisoner had received different articles, stolen from different owners, at different times, by different thieves, it was decided that it was not admissible. The presumption would be too weak to be of any value; probably evidence of the same sort might be adduced against every tradesman who purchases second hand goods. (Arch. 183.)

“Every person who receives any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained or converted, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, may be dealt with, indicted, and punished in any place in which he shall have, or shall have had, any such property in his possession, or in any place, in which the party guilty of the principal felony or misdemeanor may by law be tried, or in the place where he actually received such property.” (Act XVI of 1851.)

Stolen property, recovered and produced before the Magistrates, Criminal or Sessions Judges, may be restored to the lawful owners. (Reg. VII. of 1802, § 39, cl. 3.) The enactment for the Supreme Courts contains a limitation to the effect, “that if it shall appear before any award or order made, that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had by

any felony or misdemeanor been stolen, taken, obtained or converted as aforesaid, in such case the court shall not award or order the restitution of such security. (9 Geo. IV. c. 74, § 110.) This statute is of course not binding upon Mofussil Courts, but its provisions are so obviously equitable, that they would probably take it as their guide, especially since Reg. VII of 1802, only provides that property *may be* restored, not that it *shall be*, as directed by the English Act.

The above enactments refer to property stolen under the narrower acceptation of the word which formerly prevailed, viz. property which had been the subject of larceny. But the same principle would I have no doubt be extended to any property of which its owner was deprived by an act which made it "stolen property."

Under the law both of England and Scotland,

"A wife cannot be indicted for receiving or concealing the stolen goods brought in by her husband, unless she make a trade of the crime, and has taken a part in disproving of the stolen goods." (Alison Crim. 338. Reg. v. Wardroper 29 L. J. M. C. 116.)

There is nothing in this Code to protect the wife under such circumstances, (see ante p. 32) but I conceive it would require very strong evidence of actual participation in the crime to render a conviction against the wife satisfactory, since her subordinate position in the house makes the mere presence of the goods no evidence whatever against her.

412. Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe to have been transferred by the commission of dacoity, or dishonestly receives from a person whom he knows or has reason to believe to belong, or to have belonged to a gang of dacoits, property which he knows or has reason to believe to have been stolen, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

413. Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

It is difficult to say what sort of evidence will be admissible, and sufficient, to procure a conviction under this Section. At the very least two acts of receiving or dealing in stolen property must be proved or presumed. And these acts must be at some little distance of time, otherwise they could not be taken as establishing an habit. Where a man had been several times actually convicted, this would of course be sufficient, and the previous convictions would be the best evidence against him, since having been himself a party, he could not dispute them. Previous convictions need not be proved by production of the record. It is sufficient if the fact be certified by the clerk of the Court, or other officer having the custody of the records of the Court where the conviction took place, or his Deputy. (Act XV of 1852, s. 9.) Where there have been no convictions, the acts which are relied on as evidencing a habit must in general be proved, just as if each were the subject of a separate indictment. Sometimes this might not be absolutely necessary. If it could be shown that a man kept a shop which was frequented by persons who were, and who must have been known by him to be thieves; if the nature of the goods which he purchased, the price which he paid, the precautions with which the goods were bought, kept or disposed of; the contrivances employed in the premises for concealment, for rapid exit, and for preventing entrance, and other similar circumstances gave strong evidence of the general nature of the trade pursued, even a single instance of receiving brought home for the first time might be sufficient to warrant a conviction. But it would always be necessary to watch such evidence very narrowly.

414. Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

I imagine that this section is intended to apply to cases where there has not been such a possession as would support an indictment against the party, as a receiver, under s. 411. Where there has been such a possession the offence of receiving will be complete,

“ Even though the goods be retained for the shortest time, or though the object be not permanent possession, but temporary concealment.” (Alison Crim. L. 333.)

OF CHEATING.

415. Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to

Cheating.

any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do any thing which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, is said to "cheat."

Explanation. A dishonest concealment of facts is a deception within the meaning of this Section.

Illustrations.

(a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.

(b) A, by putting a counterfeit mark on an article intentionally deceives Z into a belief that this article was made by a certain celebrated manufacturer, and thus dishonestly induces Z to buy and pay for the article. A cheats.

(c) A, by exhibiting to Z a false sample of an article, intentionally deceives Z into believing that the article corresponds with the sample, and thereby dishonestly induces Z to buy and pay for the article. A cheats.

(d) A, by tendering in payment for an article, a bill on a house with which A keeps no money, and by which A expects that the bill will be dishonored, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats.

(e) A, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend money. A cheats.

(f) A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him, and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.

(g) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

(h) A intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

(i) A sells and conveys an estate to B. A knowing that in consequence of such sale he has no right to the property, sells or mortgages the same to Z without disclosing the fact of the previous sale and conveyance to B, and receives the purchase or mortgage money from Z. A cheats.

416. A person is said to "cheat by personation,"

if he cheats by pretending to be some other person, or by knowingly substi-

Cheat by personation.

tuting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation. The offence is committed whether the individual personated is a real or imaginary person.

Illustrations.

- (a) A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.
 (b) A cheats by pretending to be B, a person who is deceased. A cheats by personation.

417. Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Punishment for cheating.

It may be laid down as a general rule, that wherever a person fraudulently represents as an *existing* fact, that which is not an existing fact, and so gets money, &c., that constitutes the offence of cheating. (Arch. 388.) Where the foreman of a manufactory, who was in the habit of receiving from his master money to pay the workmen, obtained from him, by means of false written accounts of the wages earned by the men, more than the men had earned, or he had paid them, the Judges held it to be within the Act. They said that all cases where the false pretence creates the credit are within the Statute; and here the defendant would not have obtained the excess above what was really due to the workmen, were it not for the false account he had delivered to his master. (Arch. 389.) And in a very similar case in Madras the prisoner was convicted, where it appeared that he had obtained money from his employers, the Railway Company, by furnishing pay abstracts which contained the names of a number of fictitious coolies, and drawing wages on their account. (Reg. v. Longhurst 4th Sessions, 1858.) So, obtaining money by false statements of the name and circumstances of the defendant or any other person, in a begging letter, is a criminal offence. (Arch. 389.)

Under the English law a false statement as to a future fact did not constitute the offence of cheating. Therefore, a pretence that the party would do an act which he did not mean to do, as for instance a pretence that he would pay for goods on delivery, was not indictable. (Arch. 392.) And so it was laid down in Scotland that, "the most extensive fraud committed by merely ordering goods on credit, and not paying for them, without any false representation, did not fall under this species of crime." (Alison. Crim. L. 362) This is not the case under the present Code, as appear from illustrations (f) and (g) in both of which a false pretence as to an intention is held to con-

stitute the crime. This may create a great deal of difficulty. Wherever a contract is entered into, each party leads the other to believe that he intends to perform his own part. If he subsequently fails, there will be nothing to prevent an indictment being laid under this section, and the only question will be, whether at the time of making the contract he intended to carry it out. In my opinion, the only safe rule to lay down will be, that mere breach of contract is not even *prima facie* evidence of an original fraudulent intention. It will lie upon the prosecution to establish this intention affirmatively, as for instance, in the case of a borrower, that he was hopelessly insolvent when he contracted the loan; in the case of a contract to deliver goods, that the person never had the means to deliver them, and never took any steps to procure them. It must be recollected, that where an act is in itself innocent, but may become unlawful by being done with a particular intention, or under particular circumstances, the presumption of innocence prevails, till the facts which destroy it are proved. (See ante pp. 49, 96.)

A very common difficulty that arises on indictments for cheating is where the false statement is made in the progress of a sale. Sellers are so apt to ascribe an extravagant value, and fictitious qualities to their own wares, that almost every purchase might form the subject of an indictment, if praises of an article, which turn out to be false, could be charged as a crime. On the other hand if a man gets my money by professing to give me one article, when he really gives me another, as in the case of the wooden nutmegs which Yankee pedlars are said to vend, this is as heinous a fraud as any which we have mentioned. The difficulty is to draw the line. This will be best done by a few examples of both sorts of cases.

In the *Queen v. Sherwood*, (26 L. J. M. C. 81) the prisoner having contracted to sell the prosecutrix a load of coals at 7*d.* per Cwt. delivered to her a load of coals which he knew weighed only 14 Cwt., but which he stated to her contained 18 Cwt., and he produced a ticket showing such to be the weight, which he said he had himself made out when the coal was weighed. She thereupon paid him the price as for 18 Cwt., which was 2*s.* 4*d.* more than was due. Cockburn C. J. said,

“That representation as to the excess of 4 Cwt. is equivalent to his selling 4 Cwt. of coals, when there were no coals at all, as in the case put during the argument of a man selling coals, said to be in a covered waggon, when in fact there were no coals there. In my opinion the prisoner was properly convicted.” (This case over-rules the conflicting decision in *Reg. v. Reed*. Arch. 390.)

In the *Queen v. Roebuck* a party obtained an advance of money from a pawn broker on a chain, which he pretended to be silver, but which he knew not to be silver but of an inferior metal. He was convicted. Lord Campbell, C. J. said,

“The chain not being silver, and not being the article which it was represented to be, the case comes clearly upon principle within the Act of Parliament respecting false pretences. It is like the case where a man passes

a flash note as a real note. There is, as here, some little value in the article given, but no real value." (25 L. J. M. C. 101.)

And a similar decision was given, where the prisoner by falsely pretending to the prosecutor that he had built a house on certain lands, and by depositing with the prosecutor the lease of the land as a security, induced the prosecutor to advance him money. (Reg. v. Burgon, 25 L. J. M. C. 105.)

In all these cases the party cheated did not get the thing which he expected, nor even a thing of the same sort. It was different in two other cases, which run very close to each other. In the Queen v. Abbott, (1 Den. C. C. 273) the prisoner had induced the prosecutor to buy a cheese, pretending that the good tasters which he produced were part of it, when in fact the cheese was of very inferior quality. The conviction was decided to be good by all the Judges upon consideration, and was affirmed in the two cases last cited. On the other hand, where the prisoner induced a pawn broker to advance him money upon some spoons, which he presented as silver-plated spoons, which had as much silver on them as "Elkington's A," (a known class of plated spoon) and that the foundations were of the best material; the spoons were plated with silver, but were, to the prisoner's knowledge, of very inferior quality, and not worth the money advanced upon them;—it was held that the conviction was bad. Lord Campbell, C. J. said,

"Here the statement made by the prisoner resolves itself into a mere representation of the quality of the things sold. We must also bear in mind that the articles sold were of the species which they were represented to be, because they were spoons with silver on them, and the purchaser obtained those spoons, though the quality was not what it was represented to be. Now it seems that it never could have been the intention of the legislature to make it an indictable offence for the seller to exaggerate the quality of the goods he was selling, any more than it would be an indictable offence for the purchaser during the bargain to depreciate their quality, and so that they were not equal to what they really were, and so to induce the seller to part with the goods at a lower price."

And as Cockburn, C. J. remarked,

"Had the prisoner represented these spoons as Elkington's manufacture, when in point of fact they were not, and he knew it, it would have been an entirely different thing. But here, by way of vaunting the thing he is selling, the prisoner represents the spoons as equal in quality to a particular manufacture. That makes all the difference between this case and the cases referred to."

Lastly we may quote the observations of Erle J. who said,

"Looking at all the cases we have been considering, those that have been the subject of the greatest comment seem to me to fall within the principle, that where the *substance* of the contract is falsely represented, and by reason of that the money is obtained, the indictment is good. Where the ring was sold, as in the Queen v. Ball, and the chain, as in the Queen v. Roebuck, it was to be a silver ring and a silver chain. Silver was of the substance of the contract. In the Queen v. Abbott the substance of that contract was not cheese of any quality, but a cheese of the particular quality shown by the taster. In the Queen v. Kenrick, the fact that brought that case within the definition was, that the man asserted that the horses had been the property of a lady, deceased, were now the property of her sister, and had never

belonged to a horse dealer, and were quiet to drive. The purchaser wanted the horses for a lady of his family, and the essence of that contract was, that they were horses which had been the property of a lady who had driven them. It was a false assertion of an existing fact. This appears to me not to be a right conviction, because it is not an affirming of a definite triable fact to say that the goods are equal to Elkington's A, but the affirmation is of what is mere matter of opinion, and falls within the category of untrue praise of the article intended to be bought." (Reg. v. Bryan, 26 L. J. M. C. 84.)

It is not necessary that the pretence should be in words; the conduct and acts of the party will be sufficient without any verbal representation. Thus, if a party obtain goods from another, upon giving him in payment his cheque upon a banker, with whom in fact he has no account, this is a false pretence within the meaning of the act. And similarly where a man assumed the name of another, to whom money was required to be paid by genuine instrument. So, where a person at Oxford, who was not a member of the university, went, for the purpose of fraudulently obtaining credit, wearing a commoner's gown and cap, and obtained goods, this was held a sufficient false pretence, though nothing passed in words. (Arch 391, 392.)

Again, the money must have been obtained by means of the false pretence. And therefore, as laid down above by Erle J., the statement must be as to something which is of the substance of the contract; for if it were a mere unimportant and irrelevant assertion, it could not be assumed that it had been an operating inducement. So also the statement must have been believed, otherwise it clearly could not have had any weight with the party to whom it was addressed. In a recent case it appeared that the prisoner had knowingly over-stated the amount of work he had done, with a view to get more than his proper amount of wages. The prosecutor paid him the money, knowing his statement to be untrue. On appeal Cockburn, C. J. said,

"The conviction cannot be supported. Here the prosecutor knew that the pretence was false. The question in this case is, what is the motive operating on the mind of the prosecutor to induce him to make this payment? If it is a belief in the prisoner's false statement, the offence of obtaining money under false pretences is made out; but it is not so, if, as in this case, the motive be a mere desire to entrap the prisoner without such belief." (Reg. v. Mills 26, L. J. M. C. 79.)

Lastly, the false pretence must be used with a view to defraud. This will in general be assumed from the fact that a fraud was effected. On the other hand, a case might be imagined where it could be shown that the party merely intended a practical joke, or had some collateral object in view, but no intention of cheating any one. In one case the following curious state of facts appeared. The prosecutor owed the prisoner's master a sum of money, of which the latter could not obtain payment, and the prisoner, in order to secure to his master the means of paying himself, had gone to the prosecutor's wife in his absence, and told her that his master had bought of her husband two sacks of malt, and had sent him to fetch them away, upon which she delivered them up. Coleridge J. told the Jury,

"Although *prima facie* every one must be taken to have intended the

natural consequence of his own act, yet if, in this case, you are satisfied that the prisoner did not intend to defraud the prosecutor, but only to put it in his master's power to compel him to pay a just debt, it will be your duty to find him not guilty. It is not sufficient that the prisoner knowingly stated that which was false, and thereby obtained the malt. You must be satisfied that the prisoner at the time intended to defraud the prosecutor." (2 Russ. 312.)

This *dictum* was a good deal relied on in a recent case at Madras, the Queen v. Longhurst, alluded to before. (p. 234.) There the prisoner had confessed the fact that he had introduced an overcharge for coolies, and obtained money thereby. He attempted however to set up as a defence, that he had paid certain money out of his own pocket on a contract for goods supplied to the Railway Company—that through a mistake in his accounts he had omitted to charge it at the proper time, and that afterwards, being afraid of incurring blame for this irregularity, he had adopted this indirect way of reimbursing himself. Hence no fraud was practised upon his employers, the only result of the false pretence being, that they had paid money for one thing which was really due for another. Bittleston J. refused to receive the evidence, on the ground that it could form no defence. On the above case being cited, he distinguished it on two grounds. First, that in the case quoted, the debt was admitted to be a just one, whereas here it had never been even brought to the knowledge of the Railway Company. Secondly, that in the former case it did not appear that the prisoner ever intended to deprive the owner permanently of his malt, but merely to detain it temporarily, as a means of putting the screw upon him, to make him pay. (Reg. v. Longhurst 4th Sessions 1858.) The latter, I conceived to be the true ground.

In a very recent case the defendant was indicted for obtaining a carriage from the prosecutor by a false pretence. He admitted the fact, but said that the prosecutor owed him money, and that he got the carriage in order to compel payment. Bittleston J. in charging the jury, said,

"I advise you not to convict unless you are satisfied that the prisoner obtained the property intending absolutely to apply it to his own use. If you think he did not obtain it with the intention of keeping it, but of putting a screw upon the prosecutor to make him pay the money due by him, then I think he is not guilty of the offence. The prosecutor admits that there was a debt due, and there is evidence of an arbitration between them as to a money dispute. If you think it was merely a trick resorted to for the purpose of pressure, then I recommend you to acquit. It is very dangerous to convict upon a criminal charge, where the case comes merely to a matter of civil dispute." (Reg. v. Sheik Ahmed. 4th Sessions, 1860. Madras.)

418. Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound, either by law, or

Cheating with knowledge that wrongful loss may be thereby caused to a person whose

interest the offender is bound to protect.

by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

This section would apply to cases of cheating by a guardian, trustee, solicitor, or agent, by the Manager of a Hindu family, or the Karnaven of a tarwaad in Malabar.

419. Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Punishment for cheating by personation.

420. Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter, or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Cheating and dishonestly inducing a delivery of property.

OF FRAUDULENT DEEDS AND DISPOSITIONS OF PROPERTY.

421. Whoever dishonestly or fraudulently removes, conceals, or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors.

422. Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being

Dishonestly or fraudulently pre-

venting from being made available for his creditors a debt or demand due to the offender.

made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

It is difficult to see the distinction between these sections and ss. 206, 209. (See Ante. p. 120.) The words in s. 206 which refer to the "distribution of property according to law among creditors," seem to relate to the procedure in Insolvency, which is the only case in which property is so distributed. Their effect may be to render criminal what is known in Bankruptcy by the term fraudulent preference. The policy of the Bankrupt and Insolvent laws is to insure to every creditor a proportional share of his debtors estate. Therefore

Any conveyance to a creditor by a trader, of his whole property, or of the whole with an exception merely nominal, in consideration of a bygone and pre-existing debt, though not fraudulent under the statute of Elizabeth, (see ante. p. 121) is fraudulent under the bankrupt act, and an act of bankruptcy. And a transfer by a trader of part of his property to a creditor, in consideration of a bygone and pre-existing debt, though not fraudulent within the statute of Elizabeth, is fraudulent, and an act of bankruptcy, if made voluntarily, and in contemplation of bankruptcy; or if it otherwise have the effect of defeating or delaying creditors." (1 Sm. L. C. 16)

423. Whoever dishonestly or fraudulently signs, executes, or becomes a party to any deed or instrument which purports to transfer or subject to any charge any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or charge, or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Dishonest or fraudulent execution of deed of transfer containing a false statement of consideration.

Two ingredients are required to make up the offence in this section. First a fraudulent intention, and secondly a false statement as to the consideration for the document or the person in whose favor it is to operate. The mere fact that an assignment has been taken in the name of a person not really interested, will not be sufficient. Such transactions, known in Bengal as *Benamie* transactions (see G. M. I. A. 53) have nothing necessarily fraudulent. But if a debtor were to purchase an estate in the name of another, for the purpose of shielding it from his creditors; or if the manager of a Hindu family, assigning the family property without any necessity, were to insert in the deed a

statement, that the assignment was made to pay the government dues, or to discharge an ancestral debt, this would be such a fraudulent falsehood as would bring his act within s. 423.

424. Whoever dishonestly or fraudulently conceals or removes any property of himself or any other person, or dishonestly or fraudulently assists in the concealment or removal thereof, or dishonestly releases any demand or claim to which he is entitled, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Dishonest or fraudulent removal or concealment of property.

Such acts as the removal by a tenant of his furniture or crops, to avoid a distress for rent; or a release of a debt by one of several executors, partners, or joint-creditors, to the injury of the others, and without their consent, would come within this section.

OF MISCHIEF.

425. Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously, commits "mischief."

Mischief.

Explanation 1. It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2. Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations.

(a) A voluntarily burns a valuable security belonging to Z, intending to cause wrongful loss to Z. A has committed mischief.

(b) A introduces water into an ice house belonging to Z, and thus

causes the ice to melt, intending wrongful loss to Z. A has committed mischief.

(c) A voluntarily throws into a river a ring belonging to Z, with the intention of thereby causing wrongful loss to Z. A has committed mischief

(d) A, knowing that his effects are about to be taken in execution in order to satisfy a debt due from him to Z, destroys those effects, with the intention of thereby preventing Z from obtaining satisfaction of the debt, and of thus causing damage to Z. A has committed mischief.

(e) A, having insured a ship, voluntarily causes the same to be cast way, with the intention of causing damage to the underwriters. A has committed mischief.

(f) A causes a ship to be cast away, intending thereby to cause damage to Z, who has lent money on bottomry on the ship. A has committed mischief.

(g) A, having joint property with Z in a horse, shoots the horse, intending thereby to cause wrongful loss to Z. A has committed mischief.

(h) A causes cattle to enter upon a field belonging to Z, intending to cause and knowing that he is likely to cause damage to Z's crop. A has committed mischief.

426. Whoever commits mischief shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

Punishment for committing mischief.

427. Whoever commits mischief and thereby causes loss or damage to the amount of fifty Rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Committing mischief and thereby causing damage to the amount of 50 Rupees.

428. Whoever commits mischief by killing, poisoning, maiming, or rendering useless, any animal or animals of the value of ten Rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Mischief by killing or maiming any animal of the value of ten Rupees.

429. Whoever commits mischief by killing, poisoning, maiming, or rendering useless, any elephant, camel, horse, mule, buffalo, bull, cow, or ox, whatever may be the value thereof, or any other

Mischief by killing or maiming cattle, &c., or any animal of the value of 50 Rupees.

animal of the value of fifty Rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

430. Whoever commits mischief by doing any act which causes or which he knows to be likely to cause a diminution of the supply of water for agricultural purposes, or for food or drink for human beings or for animals which are property, or for cleanliness, or for carrying on any manufacture, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Mischief by injury to works of irrigation or by wrongfully diverting water.

431. Whoever commits mischief by doing any act which renders or which he knows to be likely to render any public road, bridge, navigable river, or navigable channel natural or artificial, impassable or less safe for travelling or conveying property, shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

Mischief by injury to public road, bridge, or river.

432. Whoever commits mischief by doing any act which causes or which he knows to be likely to cause an inundation or an obstruction to any public drainage attended with injury or damage, shall be punished with imprisonment of either description for a term which may extend to five years or with fine, or with both.

Mischief by causing inundation or obstruction to public drainage attended with damage.

433. Whoever commits mischief by destroying or moving any light-house or other light used as a sea-mark, or any sea-mark or buoy or other thing placed as a guide for navigators, or by any act which renders any such light-house, useful a light-house or sea-mark, or by exhibiting false lights.

Mischief by destroying or moving or rendering less useful a light-house or sea-mark, or by exhibiting false lights.

sea-mark, buoy, or other such thing as aforesaid less useful as a guide for navigators, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

434. Whoever commits mischief by destroying or moving any land-mark fixed by the authority of a public servant, or by any act which renders such land-mark less useful as such, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Mischief by destroying or moving &c. a land-mark fixed by public authority.

435. Whoever commits mischief by fire or any explosive substance, intending to cause or knowing it to be likely that he will thereby cause damage to any property to the amount of one hundred Rupees or upwards, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Mischief by fire or explosive substance with intent to cause damage to amount of 100 Rupees.

436. Whoever commits mischief by fire or any explosive substance, intending to cause or knowing it to be likely that he will thereby cause the destruction of any building which is ordinarily used as a place of worship or as a human dwelling or as a place for the custody of property, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Mischief by fire or explosive substance with intent to destroy a house. &c.

437. Whoever commits mischief to any decked vessel or any vessel of a burden of twenty tons or upwards, intending to destroy or render unsafe or knowing it to be likely that he will thereby destroy or render unsafe, that vessel,

Mischief with intent to destroy or make unsafe decked vessel or a vessel of 20 tons burden.

shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

438. Whoever commits or attempts to commit, by fire or any explosive substance, such mischief as is described in the last preceding Section, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Punishment for the mischief described in the last Section when committed by fire or any explosive substance.

439. Whoever intentionally runs any vessel aground or ashore, intending to commit theft of any property contained therein or to dishonestly misappropriate any such property, or with intent that such theft or misappropriation of property may be committed, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Punishment for intentionally running vessel aground or ashore with intent to commit theft, &c.

440. Whoever commits mischief, having made preparation for causing to any person death or hurt or wrongful restraint, or fear of death or of hurt or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Mischief committed after preparation made for causing death or hurt.

OF CRIMINAL TRESPASS.

441. Whoever enters into or upon property in the possession of another, with intent to commit an offence or to intimidate, insult, or annoy any person in possession of such property; or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult, or annoy any such per-

Criminal trespass.

son, or with intent to commit an offence, is said to commit criminal trespass.

This section is singularly vague. Suppose a person goes to pay a visit to a friend, in order to retail a piece of scandal, which would come under the section as to Defamation, is this Criminal Trespass? According to the definition it is, for he enters into property which is in the possession of another, with intent to commit an offence. Again, if a thief goes to the house of a Receiver, for the purpose of parting with his booty, and does so; here he is committing an offence, namely abetting the crime of the Receiver, but is he also committing a Criminal Trespass? I conceive that the section must be limited to cases where the entry is in itself part of the unlawful act, and is, either expressly or impliedly, against the will of the owner of the property. For instance, suppose a man were to go upon the premises of another with intent to steal his money, to abduct his daughter, to lame his horse, or the like, here the entry would be inseparably connected with the offence aimed at, and would be against the will of the owner. And so, according to English law, where an entry upon property was *primâ facie* legal, by virtue of an authority given by law, but that authority was abused, the party became a trespasser *ab initio*. Therefore if a man were to enter a hotel, as he has a perfect right to do, and then proceeded to break the chairs, or to beat the landlord, this would make his original entry unlawful and himself a trespasser. But where the original entry has been by the permission of the owner of the property, there a subsequent wrongful act may become a separate offence but will not have the effect of converting the original entry into trespass.

“And the reason of this difference is, that in the case of a general authority or licence of law, the law judges by the subsequent act *quo animo*, or to what intent he entered. But when the party gives an authority or licence himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or licence.” (Six Carpenters’ case 1 Sm. L. C. 112.)

Of course an authority to enter may be revoked, either expressly or by implication. No authority to remain can be assumed to last after the person who was authorised to enter for one purpose, proceeds to employ his opportunity in the commission of an offence for which he has not got the permission of the owner of the property. Therefore if a guest were to proceed to pick the lock of his entertainer’s desk, for the purpose of taking his money, this would be an “unlawful remaining in the house with intent to commit an offence,” and therefore would be “house-trespass.” But if he employed himself, in conjunction with the proprietor, in illicit coining, this would be indictable as a substantive offence, but the mere continuance in the house could not be called “an unlawful remaining” in it, since of itself it was not unlawful.

The words “intimidate” and “insult” refer of course to such criminal acts as are provided for by ss. 503, 504; the word “annoy” is not defined in the Code. The expression by its own force merely

conveys the idea of a certain discomposing effect upon the mind, without any relation to the legality or otherwise of the discomposing cause. Nothing can be more annoying than to be repeatedly dunned for a debt which it is out of our power to pay. The word here must however refer to acts of illegal annoyance, and probably conveys no more than the two words which precede it.

442. Whoever commits criminal trespass, by entering into or remaining in any building, tent, or vessel used as a human dwelling, or any building used as a place for worship or as a place for the custody of property, is said to commit "house-trespass."

House-trespass.

Explanation. The introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass.

"According to English law, an entry is complete, even where no part of the body has introduced, if any instrument has been put inside for a criminal purpose; as, for instance, a hook inserted to draw out goods or a pistol to demand money. And the principle is obviously a sound one. (Arch. 407 Alton. Crim. L. 289.) But if a man assault a house, or even break a hole in it, and before entry the owner fling his money to the thief, this would not constitute the offence of house-trespass." (Arch. 408.)

443. Whoever commits house-trespass, having taken precautions to conceal such house-trespass from some person who has a right to exclude or eject the trespasser from the building, tent, or vessel which is the subject of the trespass, is said to commit "lurking house-trespass."

Lurking house-trespass.

444. Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit "lurking house-trespass by night."

Lurking house-trespass by night.

445. A person is said to commit "house-breaking," who commits house-trespass if he effects his entrance into the house or any part of it in any of the six ways hereinafter described; or if, being in the house or any part of it for the purpose of committing an offence, or having committed an offence therein, he quits the house or

House-breaking.

any part of it in any of such six ways, that is to say :—

First. If he enters or quits through a passage made by himself, or by any abetter of the house-trespass, in order to the committing of the house-trespass.

Secondly. If he enters or quits through any passage not intended by any person, other than himself or an abetter of the offence, for human entrance ; or through any passage to which he has obtained access by scaling or climbing over any wall or building.

Thirdly. If he enters or quits through any passage which he or any abetter of the house-trespass has opened, in order to the committing of the house-trespass, by any means by which that passage was not intended by the occupier of the house to be opened.

Fourthly. If he enters or quits by opening any lock in order to the committing of the house-trespass, or in order to the quitting of the house after a house-trespass.

Fifthly. If he effects his entrance or departure by using criminal force or committing an assault or by threatening any person with assault.

The English law went even further than this, and held that it was a constructive breaking, where the offender, with criminal intent, obtained admission by some artifice or trick, for the purpose of effecting it. As for instance, if a man knock at a door, and upon its being opened, rush in ; or upon pretence of taking lodgings enter the house, and then fall upon the landlord and rob him ; or procure a constable to gain admittance in order to search for criminals, and then bind the constable, and rob the house ; all these entries were held to amount to breaking, for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process. (Arch. 406.)

Even if a party has got admission into a house through an open door, it will still be house-breaking, should he afterwards break or unlock any inner door, for the purpose of entering any other room. But the mere breaking open of a box or chest would not constitute this offence, (Arch. 407) though it would be punishable under s. 461.

Sixthly. If he enters or quits by any passage which he knows to have been fastened against such entrance or departure, and to have been unfastened by himself or by an abettor of the house-trespass.

Explanation. Any out-house or building occupied with a house and between which and such house there is an immediate internal communication, is part of the house within the meaning of this Section.

Illustrations.

(a) A commits house-trespass by making a hole through the wall of Z's house, and putting his hand through the aperture. This is house-breaking

(b) A commits house-trespass by creeping into a ship at a port-hole between decks. This is house-breaking

(c) A commits house-trespass by entering Z's house through a window. This is house-breaking

(d) A commits house-trespass by entering Z's house through the door, having opened a door which was fastened. This is house-breaking.

(e) A commits house-trespass by entering Z's house through the door, having lifted a latch by putting a wire through a hole in the door. This is house-breaking.

(f) A finds the key of Z's house door, which Z had lost, and commits house-trespass by entering Z's house, having opened the door with that key. This is house-breaking.

(g) Z is standing in his door-way. A forces a passage by knocking Z down, and commits house-trespass by entering the house. This is house-breaking.

(h) Z, the door-keeper of Y, is standing in Y's door-way, A commits house-trespass by entering the house, having deterred Z from opposing him by threatening to beat him. This is house-breaking.

446. Whoever commits house-breaking after sunset and before sunrise, is said to commit, "house-breaking by night."

447. Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to five hundred Rupees, or with both.

448. Whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand Rupees, or with both.

449. Whoever commits house-trespass in order to the committing of any offence punishable with death, shall be punished with transportation for life, or with rigorous imprisonment for a term not exceeding ten years, and shall also be liable to fine.

House-trespass in order to the commission of an offence punishable with death.

450. Whoever commits house-trespass in order to the committing of any offence punishable with transportation for life, shall be punished with imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

House-trespass in order to the commission of an offence punishable with transportation for life.

451. Whoever commits house-trespass in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine ; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to seven years.

House-trespass in order to the commission of an offence punishable with imprisonment.

452. Whoever commits house-trespass, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

House-trespass after preparation made for causing hurt to any person.

453. Whoever commits lurking house-trespass or house-breaking shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

Punishment for lurking house-trespass or house-breaking.

454. Whoever commits lurking house-trespass or house-breaking in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine ;

Lurking house-trespass or house-breaking in order to the commission of an offence punishable with imprisonment.

and if the offence intended to be committed is theft, the term of the imprisonment may be extended to ten years.

455. Whoever commits lurking house-trespass or house-breaking having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Lurking house-trespass or house-breaking after preparation made for causing hurt to any person.

of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

456. Whoever commits lurking house-trespass by night or house-breaking by night, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

Punishment for lurking house-trespass or house-breaking by night.

also be liable to fine.

457. Whoever commits lurking house-trespass by night or house-breaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine ; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years.

Lurking house-trespass or house-breaking by night, in order to the commission of an offence punishable with imprisonment.

also be liable to fine ; and if the offence intended to be committed is theft, the term of the imprisonment may be extended to fourteen years.

458. Whoever commits lurking house-trespass by

Lurking house-trespass or house-breaking by night, after preparation made for causing hurt to any person.

night or house-breaking by night, having made preparation for causing hurt to any person, or for assaulting any person, or for wrongfully restraining any person, or for putting any person in fear of hurt or of assault or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

459. Whoever, whilst committing lurking house-trespass or house-breaking causes grievous hurt to any person, or attempts

Grievous hurt caused whilst committing lurking house-trespass or house-breaking.

to cause death or grievous hurt to any person, shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

460. If, at the time of the committing of lurking house-trespass by night or house-breaking by night, any person guilty

All persons jointly concerned in house-breaking, &c., to be punishable for death, or grievous hurt caused by one of their number.

of such offence shall voluntarily cause or attempt to cause death or grievous hurt to any person, every person jointly concerned in committing such lurking house-trespass by night or house-breaking by night, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

461. Whoever dishonestly or with intent to commit mischief, breaks open or unfastens

Dishonestly breaking open any closed receptacle containing or supposed to contain property.

any closed receptacle which contains or which he believes to contain property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

462. Whoever, being entrusted with any closed

Punishment for same offence when committed by person entrusted with custody.

receptacle which contains or which he believes to contain property, without having authority to open the same, dishonestly, or with intent to commit mischief, breaks open or unfastens that receptacle, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

CHAPTER XVIII.

OF OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY-MARKS.

463. Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

To constitute an indictable offence, the act must be fraudulent and injurious. Writing a spurious invitation to dinner might be very culpable as a hoax, but would not be a fraud upon any one. It is not however required, in order to constitute in point of law an intent to defraud, that the person committing the offence should have had present in his mind an intention to defraud a particular person, if the consequences of the act would necessarily, or possibly, be to defraud any person: but there must at all events be a possibility of some person being defrauded by the forgery. (Per Cresswell *J. Reg. v. Marcus* 2 C. & K. 356.) In one case the facts were, that the prisoner having tendered a security bond on plain paper, was directed to furnish it on a stamp. He then copied the bond, including the names of the witnesses, on paper of the proper value, and got the surety to sign it with his own hand. Held, that his copying the names of the witnesses, without any fraudulent intent, did not amount to forgery. (1 M. Dig. 148 § 268.)

Where several forge different parts of an instrument, all are guilty as principals. And so it is, where several concur in employing another to make a forged instrument, knowing its nature. (Arch. 469.)

Making a false document. 464. A person is said to make a false document.

First.—Who dishonestly or fraudulently makes, signs, seals, or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed, or executed by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, or executed, or at a time at which he knows that it was not made, signed, sealed, or executed ; or

According to Scotch law,

“ No point of law is better established than that, how artfully or completely soever the forgery may have been executed, it cannot be made the subject of trial or punishment, unless it is also uttered or put to use ” (Alison. Crim. L. 401)

“ But, while this is quite clear in the hand, it is not the less material to observe on the other, that the great danger of this crime has established a rigorous construction, in the matter of the uttering against the prisoner. It is sufficient, therefore, to complete the crime, if the forged instrument have been uttered, that is presented in payment or made the foundation of a claim, though no advantage whatever was gained from the act, nay, though it was challenged immediately as a forgery, and returned to the prisoner.” (Alison. Crim. L. 402.)

It will be observed that the present Code says nothing about uttering or passing off. The *fraudulent* making is sufficient. A sound construction of the word “ fraudulent ” will probably effect all that is useful in the Scotch doctrine. I do not conceive that a man could ever be convicted of forgery, simply upon finding locked up in his desk a document bearing a fabricated signature. It might be that he never intended to use it, or that he intended to use it in some future event which had never occurred, but as long as the document was designedly kept inoperative, the fabrication could not be said to be fraudulent. No fraud can be said to have taken place, till the moment has arrived at which the document is allowed to have an injurious effect. So far the Scotch law seems to me to be sound. The error of the doctrine enunciated above, appears to lie in making a fresh *act* of the forger necessary, in order to complete his offence. Suppose that A is bound as surety to B for the debt of C. A anticipating the possibility of a default by C, opens the desk in which his bond is kept and substitutes another name for his own. This would clearly be forgery, even though C paid the debt next day, and the document was never required, for the fraud is accomplished the moment the document is so altered that it would be valueless, if wanted. But if instead of altering the surety bond, A had forged a release to himself from B, in order to have it ready in case he were sued upon his bond, and if this document were

found in his possession after B had discharged the debt, I conceive that no indictment for forgery could be maintained; for in this case, no fraud whatever had been accomplished by the mere fabrication of the instrument. The fraud would only be completed when the instrument was made use of. In short the real test seems to me to be supplied by the English definition, that "a forgery is the fraudulent making or alteration of a writing to the prejudice of another man's right." (2 Russ. 318.) It is evident that in the former case there was a right prejudiced, viz., the right to have a legal security in its original form; in the latter case no right was prejudiced, till the forged release was produced.

Secondly.—Who, without lawful authority, dishonestly or fraudulently by cancellation or otherwise alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Not only the fabrication and false making of the whole of a written instrument, but a fraudulent insertion, alteration, or erasure, even of a letter, in any material part of a true instrument, whereby a new operation is given to it, will amount to forgery; and this, although it be afterwards executed by another person ignorant of the deceit (2 Russ. 319.) And individuals falsifying their own book of accounts, and producing them in evidence before a Court of Justice, were held by the Bombay F. U. to have committed forgery. (3 M. Dig. 122 § 138.)

The instrument must appear upon the face of it to have been made to resemble a true instrument of the denomination mentioned in the indictment, so as to be capable of deceiving persons using ordinary observation, according to their means of knowledge, although not perhaps those scientifically acquainted with such instruments. For instance a bill of exchange or a country bank note, which is incomplete for want of a signature, is not the subject of an indictment for forgery. (Arch. 471.) Obviously not, for till signed it was merely a bit of unmeaning paper. Nor I conceive could a man be convicted for forging a Madras Bank note, if the instrument was printed on a piece of common country paper, and wanted the effigy of Sir Thomas Munro, and the other well known characteristics of such notes. Such an instrument would not even purport to be a note of the Madras Bank. But where, upon an indictment for forging a bank note, there appeared to be no water mark in the forged note, and the word "pounds" was omitted in the body of it, the conviction was held good. (Ibid.) For such defects might well escape an unpractised eye.

Thirdly.—Who dishonestly or fraudulently causes any person to sign, seal, execute, or alter a document, knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of

deception practised upon him he does not know the contents of the document or the nature of the alteration.

Illustrations.

(a) A has a letter of credit upon B for Rupees 10,000, written by Z. A, in order to defraud B, adds a cypher to the 10,000, and makes the sum 100,000, intending that it may be believed by B that Z so wrote the letter. A has committed forgery.

(b) A, without Z's authority, affixes Z's seal to a document purporting to be a conveyance of an estate from Z to A, with the intention of selling the estate to B, and thereby of obtaining from B the purchase money. A has committed forgery.

(c) A picks up a cheque on a Banker signed by B, payable to bearer, but without any sum having been inserted in the cheque. A fraudulently fills up the cheque by inserting the sum of ten thousand Rupees. A commits forgery.

(d) A leaves with B, his agent, a cheque on a Banker, signed by A, without inserting the sum payable, and authorizes B to fill up the cheque by inserting a sum not exceeding ten thousand Rupees for the purpose of making certain payments. B fraudulently fills up the cheque by inserting the sum of twenty thousand Rupees. B commits forgery.

(e) A draws a Bill of Exchange on himself in the name of B without B's authority, intending to discount it as a genuine Bill with a Banker and intending to take up the Bill on its maturity. Here, as A draws the Bill with intent to deceive the Banker by leading him to suppose that he had the security of B, and thereby to discount the Bill, A is guilty of forgery.

(f) Z's will contains these words—"I direct that all my remaining property be equally divided between A, B, and C." A dishonestly scratches out B's name, intending that it may be believed that the whole was left to himself and C. A has committed forgery.

(g) A endorses a Government Promissory Note and makes it payable to Z, or his order, by writing on the Bill the words "Pay to Z, or his order" and signing the endorsement, B dishonestly erases the words "pay to Z or his order" and thereby converts the special endorsement into a blank endorsement. B commits forgery.

(h) A sells and conveys an estate to Z. A afterwards, in order to defraud Z of his estate, executes a conveyance of the same estate to B, dated six months earlier than the date of the conveyance to Z, intending it to be believed that he had conveyed the estate to B before he conveyed it to Z. A has committed forgery.

(i) Z dictates his will to A. A intentionally writes down a different legatee from the legatee named by Z, and by representing to Z that he has prepared the will according to his instructions, induces Z to sign the will. A has committed forgery.

(j) A writes a letter and signs it with B's name without B's authority, certifying that A is a man of good character and in distressed circumstances from unforeseen misfortune, intending by means of such letter to obtain alms from Z and other persons. Here, as A made a false document in order to induce Z to part with property, A has committed forgery.

(k) A without B's authority writes a letter and signs it in B's name, certifying to A's character, intending thereby to obtain employment

under Z. A has committed forgery, inasmuch as he intended to deceive Z by the forged certificate, and thereby to induce Z to enter into an expressed or implied contract for service.

Explanation 1. A man's signature of his own name may amount to forgery

Illustrations.

(a) A signs his own name to a Bill of Exchange, intending that it may be believed that the Bill was drawn by another person of the same name. A has committed forgery.

(b) A writes the word "accepted" on a piece of paper and signs it with Z's name, in order that B may afterwards write on the paper a Bill of Exchange drawn by B upon Z, and negotiate the Bill as though it had been accepted by Z. A is guilty of forgery; and if B knowing the fact draws the Bill upon the paper pursuant to A's intention, B is also guilty of forgery.

(c) A picks up a Bill of Exchange payable to the order of a different person of the same name. A endorses the Bill in his own name, intending to cause it to be believed that it was endorsed by the person to whose order it was payable: here A has committed forgery.

(d) A purchases an estate sold under execution of a decree against B. B, after the seizure of the estate, in collusion with Z, executes a lease of the estate to Z at a nominal rent and for a long period, and dates the lease six months prior to the seizure with intent to defraud A and to cause it to be believed that the lease was granted before the seizure. B, though he executes the lease in his own name, commits forgery, by antedating it.

(e) A, a trader, in anticipation of insolvency, lodges effects with B for A's benefit, and with intent to defraud his creditors, and in order to give a color to the transaction, writes a Promissory Note binding himself to pay to B a sum for value received, and antedates the note, intending that it may be believed to have been made before A was on the point of insolvency. A has committed forgery under the first head of the definition.

Explanation 2. The making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person intending it to be believed that the document was made by the person in his lifetime, may amount to forgery.

Illustration.

A draws a Bill of Exchange upon a fictitious person, and fraudulently accepts the Bill in the name of such fictitious person with intent to negotiate it. A commits forgery.

465. Whoever commits forgery shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Punishment for forgery.

466. Whoever forges a document, purporting to be a record or proceeding of or in a Court of Justice, or a Register of Birth, Baptism, Marriage, or Burial, or a Register kept by a public servant as such, or a certificate or document purporting to be made by a public servant in his official capacity, or an authority to institute or defend a suit, or to take any proceedings therein, or to confess judgment, or a power of attorney, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

467. Whoever forges a document which purports to be a valuable security, or a will, or an authority to adopt a son, or which purports to give authority to any person to make or transfer any valuable security, or to receive the principal, interest, or dividends thereon, or to receive or deliver any money, moveable property, or valuable security, or any document purporting to be an acquittance or receipt acknowledging the payment of money, or an acquittance or receipt for the delivery of any moveable property or valuable security, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

468. Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

469. Whoever commits forgery, intending that the document forged shall harm the reputation of any party, or knowing that it is likely to be used for that

Forgery of a record of a Court of Justice, or of a public Register of Births, &c.

Forgery of a valuable security or will.

Forgery for the purpose of cheating.

Forgery for the purpose of harming the reputation of any person.

purpose, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

“A forged document.” 470. A false document made wholly or in part by forgery is designated “a forged document.”

Using as genuine a forged document. 471. Whoever fraudulently or dishonestly uses as genuine any document which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

Making or possessing a counterfeit seal, plate, &c., with intent to commit a forgery punishable under Section 467. 472. Whoever makes or counterfeits any seal, plate, or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under Section 467, or with such intent has in his possession any such seal, plate, or other instrument, knowing the same to be counterfeit, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Making or possessing a counterfeit seal, plate, &c., with intent to commit a forgery punishable otherwise. 473. Whoever makes or counterfeits any seal, plate, or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under any Section of this Chapter other than Section 467, or with such intent has in his possession any such seal, plate, or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

474. Whoever has in his possession any document,

Having possession of a valuable security or will known to be forged with intent to use it as genuine.

knowing the same to be forged, and intending that the same shall fraudulently or dishonestly be used as genuine, shall, if the document is one of the description mentioned in Section 466, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine ; and if the document is one of the description mentioned in Section 467, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

The intention to make a fraudulent use of the forged document is an essential element in this offence. This intention can seldom be directly proved. Where the forged document is capable of being fraudulently used, and is found in the possession of a person who is interested in making a fraudulent use of it, I conceive that a conviction would be warranted, unless the defendant accounted for his possession of the instrument. Suppose, for instance, that a forged release were to be found in the possession of a debtor, or a forged will or conveyance in the possession of a claimant to an estate, this would be sufficient to throw upon him the burthen of showing that he came innocently by the document. But where he accounts for his possession of the instrument in a manner which is equally consistent with his knowledge or ignorance of its fraudulent character, there the presumption of innocence will arise again. For instance, the mere fact that the purchaser of an estate is in possession of title deeds, some of which are shown to be forgeries, would be no evidence whatever of his guilt ; for in the absence of evidence as to their origin, the natural inference is that they were handed to him by the vendor, as constituting the title, and if so, the proper presumption would be that he took them innocently. (See *Mad. S. U. Dec.* p. 62 of 1859.)

As to what constitutes possession, see *Ante* p. 143.

475. Whoever counterfeits upon or in the substance of any material any device or mark used for the purpose of authenticating any document described in Section 467, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged

Counterfeiting a device or mark used for authenticating documents described in Section 467, or possessing counterfeit marked material.

or thereafter to be forged on such material, or who with such intent has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

476. Counterfeiting a device or mark used for authenticating documents other than those described in Section 467, or possessing counterfeit marked material. Whoever counterfeits upon or in the substance of any material any device or mark used for the purpose of authenticating any document other than the documents described in Section 467, intending that such device or mark shall be used for the purpose of giving the appearance of authenticity to any document then forged or thereafter to be forged on such material, or who with such intent has in his possession any material upon or in the substance of which any such device or mark has been counterfeited, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

477. Fraudulent, cancellation, destruction, &c., of a will. Whoever fraudulently or dishonestly, or with intent to cause damage or injury to the public or to any person, cancels, destroys, or defaces, or attempts to cancel, destroy, or deface, or secretes or attempts to secrete, any document which is or purports to be a will, or an authority to adopt a son, or any valuable security, or commits mischief in respect to such document, shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

OF TRADE AND PROPERTY-MARKS.

478. Trade-mark. A mark used for denoting that goods have been made or manufactured by a particular person or at a particular time

or place, or that they are of a particular quality, is called a trade-mark.

479. A mark used for denoting that moveable property belongs to a particular person, is called a property-mark.

480. Whoever marks any goods, or any case, package, or other receptacle containing goods, or uses any case, package, or other receptacle with any mark thereon, with the intention of causing it to be believed that the goods so marked, or any goods contained in any such case, package, or receptacle so marked; were made or manufactured by any person by whom they were not made or manufactured, or that they were made or manufactured at any time or place at which they were not made or manufactured, or that they are of a particular quality of which they are not, is said to use a false trade-mark.

The intention to cause a false belief will always be inferred, where the false mark is affixed under circumstances which would naturally lead to that belief. If a shopkeeper were to impress the brand of "Rodgers, Sheffield" upon an iron knife from Birmingham, no further evidence would be necessary to show that he meant to create a false impression as to its maker and origin. This is peculiarly one of those cases in which the act itself being *prima facie* improper, the burthen of proving that it was done under circumstances which might make it innocent, would lie upon the defendant. (See Ante. p. 49, 96.)

This section does not include false statements as to quantity. Therefore the fraud which was exposed some time ago of marking reels of cotton as if they contained 300 yards, when they really only contained 250, would pass unpunished. If however, such reels were sold to any person as containing the quantity marked upon them, this would be the offence of cheating under s. 415.

481. Whoever marks any moveable property or goods, or any case, package, or other receptacle containing moveable property or goods, or uses any case, package, or other receptacle having any mark thereon, with the intention of causing it to be believed that the property or goods so marked, or any property or goods contained in any case, package, or other re-

ceptacle so marked belong to a person to whom they do not belong, is said to use a false property-mark.

482. Whoever uses any false trade-mark or any false property-mark with intent to deceive or injure any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Punishment for using a false trade or property-mark with intent to deceive or injure any person.

The deception referred to in this section must, I suppose, be such a deceit as amounts to a fraud or breach of legal obligation. Otherwise a host, who wished to combine ostentation with economy, by giving his guests gooseberry out of bottles with a champagne label, might be indicted for the trick. If however the landlord of a hotel, who is paid for his wine on its supposed quality, were to do the same, there would be a legal fraud, which would be criminal under s. 482.

It will not be necessary to show an intention to deceive or injure any particular person, if such deceit or injury would be the natural consequence of the use of the false mark under the circumstances in question. Nor would it be necessary to show that any one was, in point of fact, deceived. Indeed in general where the deceit had been carried into effect against any person, the more serious offence of cheating would have been committed.

483. Whoever, with intent to cause damage or injury to the public or to any person, knowingly counterfeits any trade or property-mark used by any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Counterfeiting a trade or property-mark used by another, with intent to cause damage or injury.

484. Whoever, with intent to cause damage or injury to the public or to any person, knowingly counterfeits any property-mark used by a public servant, or any mark used by a public servant to denote that any property has been manufactured by a particular person or at a particular time or place, or that the same is of a particular quality, or has passed through a particular office, or that it is entitled to

Counterfeiting a property-mark used by a public servant, or any mark used by him to denote the manufacture, quality, &c., of any property.

any exemption, or uses as genuine any such mark knowing the same to be counterfeit, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.

485. Whoever makes or has in his possession any die, plate, or other instrument for the purpose of making or counterfeiting any public or private property or trade-mark, with intent to use the same for the purpose of counterfeiting such property or trade-mark, or has in his possession any such property or trade-mark with intent that the same shall be used for the purpose of denoting that any goods or merchandize were made or manufactured by any particular person or firm by whom they were not made, or at a time or place at which they were not made, or that they are of a particular quality of which they are not, or that they belong to a person to whom they do not belong, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

486. Whoever sells any goods with a counterfeit property or trade-mark whether public or private, affixed to or impressed upon the same, or upon any case, wrapper, or receptacle in which such goods are packed or contained, knowing that such mark is forged or counterfeit, or that the same has been affixed to or impressed upon any goods or merchandize not manufactured or*made by the person or at the time or place indicated by such mark, or that they are not of the quality indicated by such mark, with intent to deceive, injure, or damage any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Fraudulent making or having possession of any die, plate, or other instrument for counterfeiting any public or private property or trade-mark.

Knowingly selling goods marked with a counterfeit property or trade-mark.

487. **Whoever fraudulently makes any false mark upon any package or receptacle containing goods, with intent to cause any public servant or any other person to believe that such package or receptacle contains goods which it does not contain, or that it does not contain goods which it does contain, or that the goods contained in such package or receptacle are of a nature or quality different from the real nature or quality thereof, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.**

Fraudulently making a false mark upon any package or receptacle containing goods.

488. **Whoever fraudulently makes use of any such false mark with the intent last aforesaid, knowing such mark to be false, shall be punished in the manner mentioned in the last preceding Section.**

Punishment for making use of any such false mark.

489. **Whoever removes, destroys, or defaces any property-mark, intending or knowing it to be likely that he may thereby cause injury to any person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.**

Defacing any property-mark with intent to cause injury.

CHAPTER XIX.

OF THE CRIMINAL BREACH OF CONTRACTS OF SERVICE.

490. **Whoever, being bound by a lawful contract to render his personal service in conveying or conducting any person or any property from one place to another place, or to act as servant to any person during a voyage or journey, or to guard any person**

Breach of contract of service during a voyage or journey.

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or property during a voyage or journey, voluntarily omits so to do, except in the case of illness or ill-treatment, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred Rupees, or with both.

(a) A, a palanquin bearer being bound by legal contract to carry Z from one place to another, runs away in the middle of the stage. A has committed the offence defined in this Section.

(b) A, a coolie, being bound by lawful contract to carry Z's baggage from one place to another, throws the baggage away. A has committed the offence defined in this Section.

(c) A, a proprietor of bullocks, being bound by legal contract to convey goods on his bullocks from one place to another, illegally omits to do so. A has committed the offence defined in this Section.

(d) A, by unlawful means, compels B, a coolie, to carry his baggage. B in the course of the journey puts down the baggage and runs away. Here, as B was not lawfully bound to carry the baggage, he has not committed any offence.

The first question under this and the two succeeding sections will be, whether the contract was one by which the defendant was legally bound. Putting cases of compulsion aside, the only doubt which is likely to arise upon this point is where the undertaking has been gratuitous. The law upon this point is long settled, viz. : that a party who engages gratuitously to perform a service cannot be compelled to undertake it at all. But if he do enter upon the performance of the task, he is bound to complete it. Since a new consideration arises from the very fact that by undertaking the duty, he has induced the other to rely upon his performance of it, and to entrust him with its discharge. (1 Sm. L. C. 162-165.)

In a recent case an action was brought against the Stewards of a race course, whose services were unpaid, for negligence in performing them. Jervis C. J. in giving Judgment said ;

“ The rule is well laid down in Smith's Mercantile Law, p 112, where it is said, ‘ that there is a difference between the principal's rights against a remunerated and against an unremunerated agent. The former having once engaged, may be compelled to proceed to the task which he has undertaken; the latter cannot, for this promise to do so being induced by no consideration, the rule *ex nudo pacto non oritur actio* applies. But if he do commence his task, and afterwards be guilty of misconduct in performing it, he will, though unremunerated, be liable for the damage so occasioned; since, by entering upon the business, he has prevented the employment of some better qualified person. This passage applies to principal and agent, but the reasoning is applicable here.” (Balfe v. West 22 L. J. C. P. 175.)

The only grounds upon which an excuse is admitted under this section are in the case of illness or ill-treatment, though in s. 492 a

further exception is introduced in favor of any other "reasonable excuse." A servant would therefore be liable who ran away on a journey at the approach of a tiger, or who refused to go on board a ship in a hurricane, or to remain in a district where cholera was raging.

A refusal to pay wages actually due would not come under the head of ill-treatment but would operate as a severance of the contract. But no refusal to give an advance would justify a servant in breaking off his engagement, unless such advance formed part of the contract.

The word "voluntarily" will protect the servant in cases where he has been prevented carrying out his engagement by accident, fraud, mistake, or superior force. It will be necessary to show that he broke his engagement, intending to do so at the time.

Explanation. It is not necessary to this offence that the contract should be made with the person for whom the service is to be performed. It is sufficient if the contract is legally made with any person, either expressly or impliedly, by the person who is to perform the service.

Illustration.

A contracts with a Dak Company to drive his carriage for a month. B employs the Dak Company to convey him on a journey, and during the month the Company supplies B with a carriage which is driven by A. A in the course of the journey voluntarily leaves the carriage. Here, although A did not contract with B, A is guilty of an offence under this Section.

491. Whoever, being bound by a lawful contract to attend on or to supply the wants of any person who by reason of youth, or of unsoundness of mind, or of a disease or bodily weakness, is helpless or incapable of providing for his own safety or of supplying his own wants, voluntarily omits so to do, shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to two hundred Rupees, or with both.

Breach of contract to attend on and supply the wants of helpless persons.

This section is still more remarkable than the preceding, as it contains no exception whatever, not even illness or ill-treatment. The latter may perhaps have been designedly omitted, lest a bearer might plead as an excuse for abandoning his infant charge, that the latter had boxed his ears or kicked his shins. But why is illness not allowed? It may be suggested, that a person does not voluntarily omit

that which he omits in consequence of illness. But, if so, why was the term introduced into s. 490 ?

492. Whoever, being bound by lawful contract in writing to work for another person as an artificer, workman, or laborer, for a period not more than three years, at any place within British India to which by virtue of the contract he has been or is to be conveyed at the expense of such other, voluntarily deserts the service of that other during the continuance of his contract, or without reasonable cause refuses to perform the service which he has contracted to perform, such service being reasonable and proper service, shall be punished with imprisonment of either description for a term not exceeding one month, or with fine not exceeding double the amount of such expense, or with both ; unless the employer has ill-treated him or neglected to perform the contract on his part.

This section only applies to cases where the service is to be performed at some place different from that in which the defendant resided at the time the contract was made. Further, it only applies to cases of written contracts, and therefore the party can only be charged for breach of something contained in the writing. Oral evidence will be admissible to explain the meaning, or to identify the object of the contract, but not to add to or vary its terms. (1. Sm. L. C. 228.)

It will be observed that by this section it is required that the *contract*, not merely the particular thing which the defendant promised to do, should be in writing, otherwise no prosecution can be instituted for its breach. Similarly the English Statute of Fraud provides that in case of certain contracts no action should be allowed " unless the agreement upon which such action shall be brought, or some note or memorandum thereof shall be in writing." Upon this Statute it has been long ruled that, " the term *agreement* comprehends contracting parties, a consideration, and a promise ; all these must therefore appear in the writing." (Smith Merc. L. 443. Holmes v. Mitchell 28 L. J. C. P. 301, Williams v. Lake 29 L. J. Q. B. 1.) As Mr. Justice Grose said in the leading case upon the subject, (Wain v. Warlters 5 East. 19.)

" What is required to be in writing is the agreement, not the promise. Now the agreement is that which is to show what each party is to do or perform, and by which both parties are to be bound, and this is required to be in writing. If it were only necessary to show what one of them was to do, it would be sufficient to state the promise made by the defendant

who was to be charged with it. But if we were to adopt this construction, it would be the means of letting in those very frauds and perjuries which it was the object of the statute to prevent, for, without the parol evidence, the defendant cannot be charged upon the written contract, for want of a consideration in law to support it."

In the present Code the word used is *contract*, not *agreement*. But the meaning of the words is identical. And the policy of both sections is obviously the same. The object of requiring the contract to be in writing, is to put its terms beyond dispute, and to enable the Court to be certain whether it has been broken or not. If the names of the contracting parties were omitted, it might be that the defendant had never been bound at all, or that he had been bound to a different person, and had fulfilled his engagement with him. So if the consideration for his promise were left out, it might be that the contract was without consideration, or that it was made upon an illegal or immoral consideration, in any of which cases it would be invalid, or else it might be, that the contract was originally valid, but that the non-performance by the employer of his part of the agreement had given the defendant a reasonable excuse for refusing to perform it. The only way of avoiding such uncertainties is to make the writing an embodiment of the entire agreement.

The contract must be in writing, but not necessarily in one writing.

"Provided the agreement be reduced to writing, it matters not out of how many different papers it is to be collected, so long as they can be sufficiently connected in sense. But this connexion in sense must appear upon the documents themselves, for parol evidence is not admissible for the purpose of connecting them" (1 Sm. L. C. 230)

Therefore if one letter contained an offer of a particular service on particular terms, and this offer were accepted by a letter which referred to the previous one, either expressly or by necessary inference, this would constitute a sufficient contract in writing. But it would be otherwise if the second document merely said, "I will accept your offer," without any thing to show what offer was meant.

The section speaks of the party "being bound by lawful contract in writing," which shows that the contract itself must have been a written one. In this respect it differs from the Statute of Frauds, which was equally satisfied whether the agreement, or only a note or memorandum thereof, was in writing. Under the English Statute the writing is only necessary to evidence the contract, not to constitute it. (1 Sm. L. C. 231.) Under this section the writing seems itself to be the contract.

Nothing is said of a signature. But as the defendant is to be "lawfully bound by a contract in writing," I conceive that the writing must contain something which, independently of oral evidence, will show that he had actually become bound, as for instance his signature or mark. But where a contract began in the defendant's own hand writing, "I A. B. agree &c," this was held to be a sufficient signature, even under the Statute of Frauds which requires one, although a blank

had been left at the bottom of the memorandum. (Knight v. Crookford, 1 Esp. 190.) But if from the form of the document it should appear that a future signature had been contemplated, but never appended, as for instance where the instrument ended "as witness our hands," the mere insertion of the defendant's name, in the body of the document even in his own hand writing, would not be a sufficient proof that he had become finally bound, unless there were some subsequent recognition of it as complete. Still less, where such an instrument was not in the defendant's writing at all. (Hubert v. Treherne, 3 M. & G. 743, 753)

Although the names of both parties must appear in the contract, it is only necessary that the party against whom it is enforced should have signed it, or should appear to be bound thereby. For the object of the section is to protect the person against whom it is enforced, and where he has signed it, he cannot be subject to any fraud even though the other party has not signed it. (1 Sm. L. C. 231) And on the same principle, an offer in writing made by the person sought to be charged, followed by a verbal acceptance of the other party will be sufficient. (Smith v. Neale, 26 L. J. C. P. 143) But the converse would not hold true, for there would be nothing in writing to show that the defendant had ever been bound.

CHAPTER XX.

OF OFFENCES RELATING TO MARRIAGE.

493. Every man who by deceit causes any woman who is not lawfully married to him, to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

494. Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exception.—The Section does not extend to any

person whose marriage, with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted, of the real state of facts so far as the same are within his or her knowledge.

495. Whoever commits the offence defined in the last preceding Section having concealed from the person with whom the subsequent marriage is contracted the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Same offence with concealment of the former marriage from the person with whom subsequent marriage is contracted.

496. Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Marriage ceremony gone through with fraudulent intent without lawful marriage.

497. Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In

Adultery.

such case the wife shall not be punishable as an abettor.

This section is an utter innovation upon the English Criminal law, and while it introduces half of the Mahometan law, by punishing the adulterer, annuls the other half, by allowing the adulteress to go free. It certainly is a startling thing to contemplate the effects of a law which would have consigned Warren Hastings, Charles Fox, and the Duke of Wellington to gaol for five years. That any criminal law will prevent the commission of moral offences, as long as the moral tone of society remains unchanged, is clearly hopeless. Where the offender is high in rank, and filling an important part in the community, one or other of two results will follow. Either the law will not be enforced against him, or its application will cause an amount of injury utterly disproportioned to the benefit it can effect. Could the law be applied to a Commander-in-Chief of India, and, if not, ought it to be applied to the youngest Ensign? The effect of this, and all similar legislation against moral offences is simply to persecute a few feeble sinners, and to let the wealthy, and powerful pass unscathed.

Nor is it easy to see why one only of the guilty pair should be selected for scourging. As regards her husband, the woman is clearly the guiltier of the two, for she has taken vows of fidelity to him, and received benefits from him, which her paramour has not. It may indeed be said, that she has merely yielded to the active temptation of the man. But any one with any knowledge of the world is aware that this is not the case. In the vast majority of cases there is no temptation on either side, but each walks blindly down a path which terminates suddenly in a pitfall. Where any temptation is employed, it is much oftener a question of age, than of sex, from whose part the temptation springs. The Mahometan law made no such distinction. It treated each as equally guilty and equally punishable. The relaxation on this point will probably be at least as distasteful to the Oriental mind, as the innovation on the other point will be alarming to the European.

498. Whoever takes or entices away any woman who is, and whom he knows or has reason to believe to be the wife of any other man from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals, or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Enticing or taking away or detaining with a criminal intent a married woman.

CHAPTER XXI.

OF DEFAMATION.

499. Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person, intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Defamation.

Explanation 1. It may amount to defamation to impute any thing to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2. It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3. An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4. No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

Illustrations.

(a) A says—"Z is an honest man ; he never stole B's watch" ; intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it fall within one of the Exceptions.

(b) A is asked who stole B's watch. A points to Z, intending to cause it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the Exceptions.

(c) A draws a picture of Z running away with B's watch, intending it to be believed that Z stole B's watch. This is defamation, unless it fall within one of the Exceptions.

This section is a tremendous advance upon the English Criminal Law. Under the latter system, mere words, not reduced to writing, will not support an indictment, unless they tend to produce some public injury, as by being seditious, or grossly immoral; or by being uttered to a Magistrate in the execution of his duty, which brings the administration of justice into contempt; or by being spoken as a challenge to fight a duel, which leads to a breach of the peace. (Arch. 723.) The law in respect to written defamation was stricter, though hardly even so strict as the present section, and yet the practical enforcing of it has been found to be wholly impossible. Even at civil law, oral defamation was not actionable, unless it charged the plaintiff with an offence punishable at law, or imputed to him some contagious disorder which would exclude him from Society, or ascribed to him misconduct or incapacity in his trade or profession, or unless some *special* damage could be shown to have arisen from it. (Broom Com 762.) Under the present Code, however, any random dameritable sarcasm may be treasured up and made the subject of an indictment. It is obvious too what fatal facility for malicious charges such a law as this will produce. It will only be necessary to get one or two witnesses to swear to the use of a disparaging remark. Contradiction will be impossible, corroboration will be unnecessary, and as the charge implies nothing morally degrading, the shield of character, which in so many cases is the best protection against false accusations, will be worthless. It is not too much to say that if the law of defamation as laid down in this Code were to be carried out, the whole population of India would appear monthly at the dock.

The languages of s. 499, which speaks of words spoken or *intended* to be read, and of making or publishing an imputation, would seem at first to imply that an imputation not actually divulged might be indictable, so that the mere finding of a letter in a man's desk might make him criminally liable. This however is not in my opinion the meaning of the clause. The definition contemplates two classes of people, those who produce slander, and those who promulgate the slander of others. But in neither case is there any slander at all, till the defamatory words have been communicated to some one else, or at all events placed in course of communication, so as to be beyond the control of the party using them. Hence the mere writing of a libel is no offence, for it may never be known to any one but the writer, and till it is known, it is no more an imputation against any person than it was while the thoughts remained in his own breast. But the mere delivering over, or parting with the libel, with the intent to scandalise another, is such as uttering or publishing of the defamatory matter as makes the offence complete. Accordingly the fact of posting a letter

amounts to a publishing, and it makes no difference whether the letter was open or sealed. (Reg. v. Burdett, 1 B. & A. 143, 144.)

The act must be done with the knowledge or intention to harm, or the knowledge that harm would follow. No evidence will be required upon this point, where the words are themselves defamatory. As Holroyd, J. remarked, in the case of Reg. v. Harvey, (2 B. & C. 267.)

“If the matter published was in itself mischievous to the public, the very act of publishing is *prima facie* evidence to show that it was done *malò animo*; for when a publication having such an injurious tendency is proved, it is intended to have been done with a malicious intention; because the principle of law is, that a party must always be taken to intend those things and those effects which naturally grow out of the act done. If, therefore, the effects naturally flowing from the act of publishing the libellous matter in this case were mischievous to the public, it follows, that the Judge was bound to tell the jury that malice was, by law, to be inferred; and that having been proved, which, according to the principles of law, made the inference of malice necessary, the *onus* of rebutting that inference was cast upon the defendant.”

Malice, however, may be disproved by the defendant. He may show that the words do not in fairness bear the meaning put upon them; or that they are explained, and cleared from their invidious construction by some other part of the same writing. And for this purpose the whole of the document, whatever it may be, must be read together. (Arch. 636.)

The language of explanation which renders possible the defamation of William the Conqueror or Akbar Khan is also a great and curious innovation upon previous law. The words “intended to be hurtful to the feelings of his family” must, here, I conceive, be interpreted more strictly than similar expressions would in general be. *Prima facie*, whatever is hurtful to a person’s feelings, would be taken as intended to be so. Therefore Lord Macaulay’s History might have been made the subject of indictment by the descendants of William Penn, or Lord Brougham’s sketch of George IV by any of the present Royal Family. I fancy these words must be taken as meaning an express and primary intention, as distinguished from a legal and implied intention. It would be indictable to rake up the vices of a dead man for the purpose of deliberately insulting his family, but no statements, however injurious, would be criminal, if made in the course of a bona fide history or biography, whose subject was dead.

First Exception. It is not defamation to impute any thing which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Imputation of any truth which the public good requires to be made or published.

The truth of an accusation will not always be in itself a sufficient

defence. Private life ought to be sacred, and where no advantage is to be derived from publishing abroad the vices of another, the fact that those vices exist will not justify the act. But there are certain cases in which a man's private sins are a matter of public concern. It would be lawful to publish the infidel opinions of a clergyman, though not of a physician; the adulterous practices of a physician, though not of a barrister. There are matters in which the private vice becomes material, as affecting the discharge of a public duty. This section however is wholly unnecessary, since it is included in the Ninth Exception. Every case protected under the First will also be protected under the Ninth Exception, but not *vice versa*, since under the former clause the truth of the imputation must be established, which is not necessary under the latter.

Second Exception. It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no further.

Here again the law as laid down by the Code differs from the English criminal law, though, on this occasion, on the side of lenity. By English law, you might criticise the acts of a public servant, but you might not disparage his character; you might say that particular conduct was unwise, impolitic, or illegal; but you might not say that the official behaved corruptly, maliciously, or treasonably. As Lord Ellenborough, C. J. said in the case of *Rex. v. Lambert* (cited 1 Russ. 235.)

“If a person who admits the wisdom and virtues of his Majesty, laments that in the exercise of these he has taken an unfortunate and erroneous view of the interests of his dominions, I am not prepared to say that this tends to degrade His Majesty, or to alienate the affections of his subjects. I am not prepared to say that this is libellous. But it must be with perfect decency and respect, and without any imputation of bad motives. Go one step further; and say or insinuate that His Majesty acts from any partial or corrupt views, or with an intention to favor or oppress any individual or class of men, and it would become most libellous.”

And so in another case the same Judge remarked,

“It has been observed, that it is the right of the British subject to exhibit the folly or imbecility of the members of the Government. But, gentlemen, we must confine ourselves within limits. If in so doing, individual feelings are violated, there the line of interdiction begins, and the offence becomes the subject of penal visitation.” (1 Russ. 238.)

Under the present Code, however, any language which rested upon inferences drawn from public acts would be privileged.

The words “in good faith” are defined by s. 52, (Ante p. 18) as involving due care and attention.

Third Exception. It is not defamation to express

Conduct of any person touching any public question. in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no farther.

Illustration.

It is not defamation in A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such a meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Fourth Exception. It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any such proceedings.

Publication of reports of proceedings of Courts of Justice.

It is not necessary that every thing should be given *verbatim*, that every word of the evidence, of the speeches, and of the Judge's charge should be inserted, if the report is substantially fair and correct. (Hoare v. Silverlock 9 C. B. 20. Andrews v. Chapman 3 C. & K. 286.) But it is plain that a mere one-sided version, as for instance, giving the speech for the prosecution and not that for the defence, the examination, but not the cross-examination, would not come under this rule. And accordingly, where the report contained merely a short summary of facts, and then gave the speech of the defendant's counsel, containing some obnoxious remarks, a plea that the libel was, 'in substance a true and accurate report of the trial,' was held insufficient; as it appeared upon the face of the declaration, that the libel did not contain a true and accurate report of the trial, since it neither detailed the speech of the counsel for the plaintiff, nor the evidence, nor even the whole of the speech of the counsel for the defendant. (Per Littledale J. Flint v. Pike 4 B. & C. 432.)

This privilege does not extend to reports of the proceedings at Public Meetings. This was so decided in a very recent case, (Davidson v. Duncan. 26 L. J. Q. B. 104,) where Lord Campbell, C. J. remarked,

"At such meetings there may be a great number of things spoken, which are perfectly relevant, but are highly injurious to the character of others, and if a fair report of such statements is justifiable, in what condition would the injured party be, as he would have no opportunity of vindicating his character? We have no right to extend this privilege beyond what is already established. All we have to do, is to see whether, as the law now stands, a party who is calumniated in this manner is without remedy; and I think he is not."

Explanation. A Justice of the Peace or other

Officer holding an inquiry in open Court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above Section.

This is a relaxation of English law, which did not sanction the reporting of preliminary or *ex parte* proceedings, such as those before a Coroner, Magistrate, Commissioner or the like. Practically, however, every newspaper in England is full of such reports, and no one ever thinks of indicting them.

Fifth Exception. It is not defamation to express in good faith any opinion whatever respecting the merits of any case, Civil or Criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness, or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no farther.

Merits of a case decided in a Court of Justice; or conduct of witnesses and others concerned therein.

Illustrations.

(a) A says - "I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest." A is within this Exception if he says this in good faith; inasmuch as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no farther.

(b) But if A says—"I do not believe what Z asserted at that trial, because I know him to be a man without veracity;"—A is not within this exception, inasmuch as the opinion which he expresses of Z's character, is an opinion not founded on Z's conduct as a witness.

This section appears principally to aim at opinions expressed upon a case after its decision. It will also include language used during the progress of a case in reference to persons mixed up in the discussion. Under this head will come the privilege of Counsel, to whom the greatest latitude is allowed in the conduct of a cause. As Holroyd J. observed in an action against Sir James Scarlett;

"No action is maintainable against the party, nor consequently against the Counsel, who is in a similar situation, for words spoken in a course of justice. If they be fair comments upon the evidence, and be relevant to the matter in issue, then, unless express malice be shown, the occasion justifies them. If, however, it be proved that they were not spoken *bonâ fide*, or express malice be shown, then they may be actionable. At least our judgment, in the present case, does not decide that they would not be so." (Hodgson v. Scarlett, 1 B. & A. 246.)

An attorney acting as a counsel is similarly privileged, (Mackay v. Ford 29 L. J. Ex. 404) and a Vakeel in the Mofussil would come under the same rule.

The privilege of witnesses at a trial is even stronger, because they

only speak in reply to questions put to them, which they cannot refuse to answer, and since there is an express remedy by indictment for perjury if they say any thing material, which they know to be untrue. Hence it has been held that even an action for damages will not be against a witness for any thing he said in his evidence, even though the statement be false and defamatory, and uttered maliciously, and without reasonable and probable cause for believing it to be true, and though the plaintiff has suffered damage in consequence of it. One result, as Jervis C. J. pointed out,

“ Would be this, that in a civil suit you would be trying a witness for perjury on the evidence of one witness, which you cannot do in a criminal proceeding without the evidence of two.” (Revis v Smith 25 L. J. C. P. 195)

Precisely the same principle would apply to an indictment for defamation.

Nor can any words, however defamatory and libellous in themselves, be made the ground of an indictment, when used in an affidavit made in any judicial proceeding, or in a defence made by a party to a suit. (Henderson v. Broomhead, 23 L. J. Ex. 360, 1 B. & A. 240, 244)

Sixth Exception. It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no farther.

Explanation. A performance may be submitted to the judgment of the public expressly or by acts on the part of the author which imply such submission to the judgment of the public.

Illustrations.

(a) A person who publishes a book, submits that book to the judgment of the public.

(b) A person who makes a speech in public, submits that speech to the judgment of the public.

(c) An actor or singer who appears on a public stage, submits his acting or singing to the judgment of the public.

(d) A says of a book published by Z — “ Z’s book is foolish, Z must be a weak man. Z’s book is indecent, Z must be a man of impure mind.” A is within this exception, if he says this in good faith, inasmuch as the opinion which he expresses of Z respects Z’s character only so far as it appears in Z’s book, and no farther.

(e) But if A says — “ I am not surprised that Z’s book is foolish and indecent, for he is a weak man and a libertine ” A is not within this exception, inasmuch as the opinion which he expresses of Z’s character is an opinion not founded on Z’s book.

Seventh Exception. It is not defamation in a person having over another any authority, either conferred by law, or arising out of a lawful contract made with that other, to pass in good faith any censure on the conduct of that other in matters to which such lawful authority relates.

Censure passed in good faith by a person having lawful authority over another.

Illustrations.

A Judge censuring in good faith the conduct of a witness, or of an officer of the Court ; a head of a department censuring in good faith those who are under his orders ; a parent censuring in good faith a child in the presence of other children ; a schoolmaster, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils ; a master censuring a servant in good faith for remissness in service ; a banker censuring in good faith the cashier of his Bank for the conduct of such cashier as such cashier—are within this exception.

Eighth Exception. It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject matter of accusation.

Accusation preferred in good faith to a duly authorized person.

If A in good faith accuses Z before a Magistrate, if A in good faith complains of the conduct of Z, a servant, to Z's master ; if A in good faith complains of the conduct of Z, a child, to Z's father—A is within this exception.

On the same principle

“ It was held that a letter addressed to Government, complaining of an alleged grievance, apparently true, and praying redress, and written *bonâ fide*, though containing injurious imputations on the plaintiff which he might not deserve, was not the subject matter of an action, the circumstances rebutting the presumption of malice.” (1 M. Dig. 203, § 1.)

Ninth Exception. It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interests of the person making it, or of any other person, or for the public good.

Imputation made in good faith by a person for the protection of his interests.

Illustrations.

(a) A shopkeeper says to B, who manages his business—“ Sell nothing to Z unless he pays you ready money, for I have no opinion of

his honesty." A is within the exception, if he has made this imputation on Z in good faith for the protection of his own interests.

(b) A, a Magistrate, in making a report to his superior officer, casts an imputation on the character of Z. Here, if the imputation is made in good faith and for the public good, A is within the exception.

Tenth Exception. It is not defamation to convey a caution, in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

Caution intended for the good of the person to whom it is conveyed or for the public good.

There are many occasions in private life, in which it is absolutely necessary to give one's opinion freely of others, in a manner which may be very injurious to them. As Lord Ellenborough, C. J. said, in a case which has already been frequently referred to. (*Hodgson v. Scarlett.*)

"The law privileges many communications, which otherwise might be considered as calumnious, and become the subject of an action. In the case of master and servant, the convenience of mankind requires that what is said in fair communication between man and man, upon the subject of character, should be privileged, if made *bonâ fide*, and without malice. If, however, the party giving the character, knows what he says to be untrue, that may deprive him of the protection which the law throws around such communications." (1 B. & A. 240)

And so

"Words spoken *bonâ fide*, by way of moral advice, are privileged; as if a man write to a father, advising him to have better regard to his children, and using scandalous words, it is only reformatory, and shall not be intended to be a libel. But if, in such a case, the publication should be in a newspaper, though the pretence should be reformation, it would be libellous." (*Roscoe*, 438.)

For in the latter case, the injury done by spreading the evil report, is greater than the object in view requires. And it is well to observe, that the privilege extended to all such communications, goes no further than necessity involves. That which it may be quite justifiable to say or write to particular persons, will become libellous if spread abroad to the world. Even in the case of a member of Parliament, who publishes an amended version of his speech, he is liable for that, though he might have spoken the same words in his place with impunity. . (*R. v. Fleet*, 1 B. & A. 384.)

500. Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Punishment for defamation.

501. Whoever prints or engraves any matter,

Printing or engraving matter known to be defamatory. knowing or having good reason to believe that such matter is defamatory of any person, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

502. Whoever sells or offers for sale any printed or engraved substance containing defamatory matter, knowing that it contains such matter, shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Sale of printed or engraved substance containing defamatory matter.

CHAPTER XXII.

OF CRIMINAL INTIMIDATION, INSULT, AND ANNOYANCE.

503. Whoever threatens another with any injury to his person, reputation, or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Criminal intimidation.

The word injury is defined by s. 44 (Ante p. 17) as denoting any harm *illegally* caused to another. Therefore it will not be an offence to threaten another with an action or indictment, which might lawfully be preferred against him.

Explanation.—A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this Section.

Illustration.

A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.

504. Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Intentional insult with intent to provoke a breach of the peace.

505. Whoever circulates or publishes any statement, rumour, or report which he knows to be false, with intent to cause any officer, soldier, or sailor in the Army or Navy of the Queen to mutiny, or with intent to cause fear or alarm to the public, and thereby to induce any person to commit an offence against the State or against the public tranquillity, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

506. Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both; and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or transportation, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Punishment for criminal intimidation.

If threat be to cause death of grievous hurt, &c.

507. Whoever commits the offence of criminal intimidation by an anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat

Criminal intimidation by an anonymous communication.

comes, shall be punished with imprisonment of their description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding Section.

508. Whoever voluntarily causes or attempts to cause any person to do any thing which that person is not legally bound to do, or to omit to do any thing which he is legally entitled to do, by inducing or attempting to induce that person to believe that he or any person in whom he is interested will become or will be rendered by some act of the offender an object of divine displeasure if he does not do the thing which it is the object of the offender to cause him to do, or if he does the thing which it is the object of the offender to cause him to omit, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Act caused by inducing a person to believe that he will be rendered an object of the divine displeasure.

Illustrations.

(a) A sits dhurna at Z's door with the intention of causing it to be believed that by so sitting he renders Z an object of divine displeasure. A has committed the offence defined in this Section.

(b) A threatens Z that unless Z performs a certain act, A will kill one of A's own children, under such circumstances that the killing would be believed to render Z an object of divine displeasure. A has committed the offence defined in this Section.

The words "by some act of the offender" must be read with the verb "become," as well as with the verb "be rendered"; otherwise the eloquence of a preacher who draws a double contribution at a charity sermon, by exciting the spiritual fears of his congregation, would be criminal. It would be criminal for a clergyman to curse an offender from the altar, as used occasionally to be done in Ireland, within my memory.

509. Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman, shall be

Word or gesture intended to insult the modesty of a woman.

punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

This section assumes the modesty of the woman, and an intention to insult it, therefore no offence will have been committed where the woman is of a profession or character which negatives the existence of scrupulousness. Nor I conceive would there be any offence, even though the woman were virtuous, if under the circumstances of the case the man *bonâ fide* and reasonably believed that his advances would be well received, and would lead to ulterior results. For in such a case his intention would be, not to insult, but to solicit or excite. It is obvious too that each case must be judged of according to the degree of intimacy, and the rank of life of the parties. That which would be an insult to the modesty of a lady might be none in the case of her Ayah.

What is an "intrusion upon the privacy of a woman"? In the case of a Mahometan, or a Hindu female of rank probably any chamber in which she is may be considered a place of privacy. With a European this would not be so, unless in rooms to which males have no implied right of admission. But where the only overt act consists in such an intrusion, how is the intention to insult her modesty to be evidenced, or may it be assumed? I fancy it may be assumed where the intrusion is so unlawful, and takes place under such circumstances that no other intention is fairly conceivable; as for instance, if a man were to gain admission to a lady's sleeping apartment, under circumstances which negatived an intention to steal. In other cases the intention would have to be proved by independent facts, as for instance his conduct while there.

510. Whoever, in a state of intoxication, appears in any public place, or in any place
Misconduct in public by a drunken person. which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to ten Rupees, or with both.

CHAPTER XXIII.

OF ATTEMPTS TO COMMIT OFFENCES.

511. Whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause
Punishment for attempting to com-

mit offences punishable with transportation or imprisonment.

such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall where no express provision is made by this Code for the punishment of such attempt, be punished with transportation or imprisonment of any description provided for the offence, for a term of transportation or imprisonment which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

Illustrations.

(a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this Section.

(b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket: A is guilty under this Section.

See the remarks upon this Section Ante p. 181.

BOOK II.

CRIMINAL PLEADING.

I. Indictments.

1. Form of.
2. Joinder of Offences.
3. Joinder of Defendants.

II. Demurrer.

III. Pleas.

1. Want of Jurisdiction.
2. Not Guilty.
3. Previous Acquittal.
4. Previous Conviction.

The object of an indictment is to inform the Judge of the offence which he has to try, and the prisoner of the charge which he has to meet. It is necessary therefore that the indictment should upon its face contain such statements as amount to a criminal offence, otherwise the indictment might be fully proved, and yet no crime be established. No necessary ingredient can be supplied by evidence, if it has not been alleged in the indictment, for if such looseness were allowed the prisoner would be convicted, not upon the facts with which he had been charged, but upon something additional to them. (Arch. 43, Reg. v. Richmond, I. C. and K. 240) Accordingly in a recent case before the Supreme Court, where the prisoners were indicted under 9 Geo. IV. c. 74. s. 69, which makes it an offence to decoy children from their parents by force or fraud, and the indictment contained no allegation that either force or fraud had been employed, it was held that no conviction could be had. (Reg. v. Habeeb Sah, 2nd Madras Sessions, 1860) A further reason is, that if no such accuracy were required, the Court of Appeal would be unable to ascertain by an inspection of the record whether any conviction could legally ensue, and whether the punishment awarded was warranted by the crime. Not only must *an* offence be alleged, but *the particular* offence must be stated, otherwise the indictment will not inform the prisoner of the charge against him with sufficient accuracy to put him upon his guard. It is not sufficient to assert that he robbed, cheated or defamed. It is necessary to state whom he robbed, and how he cheated, and what defamatory words he used. As Lord Ellenborough, C. J. said, (Reg. v. Stevens, 5 East. 258.)

“Every indictment, or information, ought to contain a complete description of such facts or circumstances as constitute the crime, without inconsistency or repugnance; and, except in particular cases, where precise tech-

nical expressions are required to be used, there is no rule that other words shall be employed, than such as are in ordinary use."

Where the offence consists simply in the act, it never was held necessary to state the means by which the act was committed. For instance, in an indictment for robbery, housebreaking, or theft, it is needless to state the particular means by which the house was broken, the prosecutor compelled to give up his money, or the property fraudulently obtained. It is sufficient to state generally that the prisoner broke and entered the house, robbed the prosecutor, or stole the money; for if he did so, the specific means are immaterial. (Stark. Pl. 87.)

But where the offence is only indictable if committed under certain circumstances, or by particular means, those circumstances and means must be set out, in order to enable the Court to see if they constitute a charge for which the prisoner ought to be put upon his defence. It is not every fraud, false statement, or false writing which is indictable, and therefore it is not sufficient to say generally that a person cheated, gave false evidence, or committed forgery, without showing what were the acts which he did, which are alleged to make out the crime. (Stark. Pl. 88.)

The English law of criminal pleading, which prevails in the Supreme Courts, was so strict in requiring fulness of statement, and accuracy of proof that absurd failures of justice constantly occurred. For instance describing a person as Tabart, who turned out to be Tarbert, or Shutliff, who proved to be Shirtliff, was held to be an irremediable defect. So in the celebrated case of Lord Cardigan's duel, the whole charge broke down, because it was found impossible to prove that a particular person possessed the flowing name of Harvey Augustus Garnett Phipps Tucker, by which he had been incautiously described in the indictment. So in a case of murder it was held to be insufficient to say that the wound was given about the breast, or about the navel, or on the side or arm, without saying which arm or side! (Stark. Pl. 86.)

Such niceties have never been allowed in Mofussil practice, and are not likely to be introduced now. The Criminal Procedure Code (s. 164) provides "that the charge shall describe the imputed offence as nearly as possible in the language of the Penal Code," and the specimens which are given in Chapter XII contain no details except such as are absolutely necessary. It is further provided, (s. 174) that "it shall be competent to the Court at any stage of the trial to amend or alter the charge." Even where a conviction has taken place,

"If the Sudder Court shall be of opinion that the facts charged, or those of which the accused is found guilty do not answer to the legal definition of an offence, it shall annul the conviction, and may order a new trial upon an amended charge." (Chap. XX. s. 286.)

The same difficulties are provided against, though not to such an extent, in the Supreme Courts, by enactments which limit the statements necessary in an indictment, and give the Court power of amendment. By Act 16 of 1852, s. 21 it is provided that,

No indictment for any offence shall be held insufficient for want of

What defects shall not vitiate an indictment.

the averment of any matter necessary to be proved, nor for the omission of the words "as appears by the record," or of the words "with force and arms," or of the words "against the peace," nor for the insertion of the words "against the form of the statute," or vice versa, nor for that any person mentioned in the indictment is designated by a name of office, or other descriptive appellation, instead of his proper name, nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, nor for a want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil, in any case where the value or price, of the amount of damage, injury, or spoil, is not of the essence of the offence

By s. 1 of the same Act it is further provided that,

From and after the coming of this Act into operation, whenever on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits to order such indictment to be amended, according to the proof, by some officers of the court or other person both in that part of the indictment where such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another Jury, as such court shall think reasonable.

The Court may amend certain variances not material to the merits of the case, and by which the defendant cannot be prejudiced in his offence, and may either proceed with or postpone the trial to be had before the same or another Jury.

This section provides for variances which appear on the trial, and are amended at the trial. No such amendments can be made after verdict, to defeat a motion in arrest of judgment. Where such an amendment after verdict took place, the Court of appeal directed the record to be restored to its original state, and (the indictment being bad without the amendment) a verdict of not guilty to be entered. (Arch. 181)

Nor does the Act authorise an absolute omission in the indictment to be filled up. Accordingly in the case of Habeeb Sah, referred to Ante p. 287, the court held that it could not direct the record to be amended by inserting the words "by force" or "by fraud." It is obvious that such an amendment would have charged the prisoner with doing that which the Grand Jury had never presented that he had done.

There are various special provisions in the Criminal law Amendment Act (16 of 1852) relating to particular indictments, which will be referred to in the Precedents applicable to each case.

In some cases it is expressly provided by the Criminal Amendment Act, that a prisoner may be convicted of one offence on an indictment which charges him with another. For instance a clerk or servant indicted for embezzlement may be convicted of larceny, if the facts proved constitute that offence, and *vice versa* (Act 16 of 1852, s. 13.) So a person charged with committing an offence, may be found guilty of an attempt to commit it, (*ibid.* s. 9) and a person charged with robbery may be convicted of an assault with intent to rob. (*ibid.* s. 11.) So no person who is indicted for a misdemeanour shall be acquitted if the facts proved establish a felony; though it is competent to the Court to discharge the jury from giving any verdict upon the minor charge, and to direct an indictment for the more heinous. (*ibid.* s. 12.) The distinction between felony and misdemeanour is now abolished, but I conceive that the policy of this section will still continue in force.

Where an act is made criminal, unless in certain excepted cases, the well settled rule has been, that,

“ If there be any exception contained in the same clause of the act which creates the offence, the indictment must show, negatively, that the defendant, or the subject of the indictment, does not come within the exception. If however the exception or proviso be in a subsequent clause or statute, or although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is in that case matter of defence for the opposite party, and need not be negated in the pleading.” (Arch 53.)

This distinction is maintained by the Criminal Procedure Code, (Chap. XII. ss 165-167) which provides that the absence of all such circumstances as are contained in the General Exceptions shall be assumed, and that the charge need not assert their absence, nor need evidence be given to negative them, but that if any such exist it shall be for the accused to establish the fact. But

“ Where the Chapter and Section itself referred to in the charge contains an exception, not being one of such General Exceptions, the charge shall not be understood to assume the absence of circumstances constituting such exception, so contained in the Chapter and Section, without a distinct denial of such circumstances.”

The necessity of negating such exceptions does not always carry with it an obligation to support this negative assertion by evidence. Formerly this seems to have been the case.

“ But the correct rule upon the subject seems to be, that, in cases where the subject of such averment relates to the defendant, personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant, as matter of defence; but on the other hand, if the subject of the averment do not relate personally to the defendant, or be not peculiarly within his knowledge, but either relate peculiarly to the prosecutor, or be peculiarly within his knowledge, or at least be as much within his knowledge as within the knowledge of the defendant, the prosecutor must prove the negative.” (Arch. 183.)

For instance it will be necessary for a party who wishes to excuse himself for an act of apparent defamation to show, affirmatively, that he comes within the exceptions in s. 499. A person indicted under s. 245 for taking Coining tools out of a mint will have to show his lawful authority for doing so, though the offence consists in doing it "without lawful authority." But where an act of culpable homicide, committed under grave provocation is charged as murder, it will be necessary for the prosecution to establish some one of the three provisos which take the case out of exception 1 of s. 300.

. 2 JOINDER OF OFFENCES.

Only one crime should be charged in the same Court. Therefore it would be improper to charge the same defendant with assaulting A and stealing from B in the same Court. Sometimes however one act affects different people; as for instance the same writing may be defamatory of a dozen different persons, and may be charged as such. So different acts may be so united in point of time as to be all one transaction, for instance an assault upon several persons. Or again one transaction may in its progress involve different crimes, of which one is merely a step to the other; as for instance, breaking into a house, and stealing therein, or beating a man, and taking away his purse. In all these cases the acts may be charged in a single count. (Arch. 54.)

The ground upon which a joinder of several crimes in one charge is forbidden, is on account of the inconvenience which it would cause to the prisoner in his charge. Therefore it seems that such a Count is good after judgment. (Ibid.)

The practice was different as to charging different offences in different Courts. The general rule was that different felonies should not be charged in the same indictment, on account of the embarrassment resulting to the prisoner, but different misdemeanors might be so charged, provided the judgment upon all was the same. (Arch. 60, 62.) The distinction between the two classes of crimes now has ceased, and therefore the Courts will probably allow the joinder, unless in cases where there would be some real disadvantage to the prisoner. The great convenience of allowing several offences to be tried together has been recognised by several express enactments. Act 13 of 1850, s. 11 allowed any number of distinct acts of embezzlement to be included in the same charges, provided they were all committed within a period of six months. Act 16 of 1852 allowed three acts of stealing to be charged in the same indictment if committed within six months.

It never was any objection that several charges were united in the same indictment, where they all arose out of the same transaction, as for instance where an indictment contained five counts, for setting fire to five houses belonging to different owners, but they were all in a row, and consumed by the same fire. (Arch. 60.)

In all these cases it will be observed that the charges are of really distinct crimes, capable of being the subject of separate convictions, and punishments. The only way of objecting is by an application to the Judge to quash the indictment, as being embarrassing to the prisoner, or to compel the prosecutor to elect upon which charge he will proceed. This application may, or may not, be granted by the Judge at his discretion, (Arch 60) and was never granted in the case of misdemeanours. (Per Lord Ellenborough, *C. J. Rex. v. Jones.* 2 Campb. 132.) But there is never any objection to charging the same offence in different ways, as for instance charging the same beating, as "voluntarily causing hurt" under s. 321, and "voluntarily causing grievous hurt" under s. 322.

The practice as laid down in the Criminal Procedure Code, Chapter XII is similar to that just stated. "The charge may contain one or more heads," (s. 168) which are admissible where the evidence shows several offences under the same section, (s. 171.) or under different sections of the Penal Code, (s. 170) or where it is doubtful under what class of offences the crime actually committed may come. (s. 172)

3. JOINDER OF DEFENDANTS.

It is never necessary to join several defendants in the same indictment as each is singly answerable for his own crime. There are some cases in which a crime cannot possibly be committed by one person singly, as for instance the offences of joining in an unlawful assembly, (s. 141) rioting, (s. 146) or taking part in an affray. (s. 159.) The indictment must therefore show that there were a sufficient number concerned in it to make the crime possible, but one may be indicted in the absence of the others. So also the guilt of a receiver of stolen property, or of an accessory to a crime involves the idea of a principal criminal, but such receivers or accessories may be indicted separately from the principal. (Act 16 of 1852, s. 15.)

Where several persons are joined in the same indictment, they may be indicted in the same Count, or in separate Counts. They can only be joined in the same Count when the offence is capable of being committed jointly, as for instance, a murder, house-breaking, or assault. But this cannot be done where the offences are in their very nature the separate offence of each, as in the case of perjury. Here the false evidence, is complete in itself, and cannot be shared in by any other person. An indictment charging two persons with perjury in the same count would, in the Supreme Court, be bad on demurrer or in arrest of judgment, after conviction, (Arch. 58 *Rex. v Phillips* 2 Stra. 921) though in the Mofussil the error would be amended.

Any number of persons may be joined in the same indictment provided they are charged in separate Counts with separate offences, for each count is considered as a separate indictment.

"But it seems that to warrant such a joinder in the same indictment, the offences must be of the same nature, and such as will admit of the same place and judgment." (Stark. Pl. 41.)

Where such is the case it is obviously more convenient to join all the prisoners than to have the same evidence gone over again in each case. Where the facts of each case are wholly unconnected with each other, the proper course is to apply to the Court to quash the indictment. (*Rex. v. Kingston*, 8 East. 46.) In a recent case, where two prisoners were charged, each in a different count, the first with committing perjury, and the second with suborning him to commit the same perjury, Sir Adam Bittleston refused to quash the indictment, or to arrest judgment after conviction (*Reg. v. Gungannah*, 3rd Madras Sessions 1860.)

The Criminal Procedure Act contains nothing upon the subject of joinder of defendants, and I do not imagine that any objection to an indictment on account of misjoinder would be listened to, unless in a very flagrant case.

II. DEMURRER.

The word *demurrer* is derived from the Latin verb *demorari*, and implied that the party demurring would wait for the judgment of the Court whether the case made out against him was one which he was bound to answer. A demurrer admits the facts alleged in the previous pleading, but alleges that those facts do not constitute a case upon which judgment could be given against him. For instance supposing an indictment for grievous hurt to disclose the fact that the injury had been inflicted by the defendant while resisting an attempt to rob him, the defendant might demur, admitting the facts, but alleging that under s. 703 he was justified in the violence used.

Demurrers are not very common in criminal law, because where they are necessary they are useless, and where they are unnecessary they are very dangerous. By Act 16 of 1852 s. 22 it is provided that

“Every objection to any indictment for any formal defect apparent on the face thereof shall be taken, by demurrer or motion to quash such indictment, before the jury shall be sworn, and not afterwards; and every Court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, and thereupon the trial shall proceed as if no such defect had appeared.”

On the other hand a demurrer is a very dangerous mode of taking a legal objection, since if overruled, it is in general conclusive upon the case. Formerly it was supposed that in cases of felony a prisoner might demur in law, and then try the issue in fact if his demurrer was decided against him. But this doctrine was finally overthrown in the case of *Reg. v. Faderman*, (1 Den. C. C. 565,) where the Court held that judgment against a prisoner on general demurrer must be final, since a general demurrer admits all the material facts of the case, though in the case of a special demurrer, which is usually called a demurrer in abatement, it might be otherwise. In a former case, (*Reg. v. Birmingham Railway*, 3 Q. B. 223) the Court granted leave to plead after a demurrer. But there the indictment was against a cor-

poration, and was on the special ground that a corporation was not indictable.

I may observe that nothing can well be more unjust than the rule which shuts out a defendant from proving his innocence, merely because he has chosen first to challenge the soundness of his adversary's law. By the system now in force in England in civil cases, a party may demur and plead at the same time, and the New York Criminal Procedure Code allows a defendant, whose demurrer is over-ruled, to plead over at once. Practically a prisoner will always be entitled to urge in his defence on the plea of not guilty, any matter which would have been ground of general demurrer. The latter course however will often save the delay of a long trial, and it is a pity it should be rendered so perilous.

The Criminal Procedure Code contains no provision for trying a question of law apart from the facts, and only speaks of one plea, viz, not guilty. (Chap. XIX.)

III. PLEAS.

1. Pleas to the jurisdiction seldom arise under English law, since the same objection may be taken under the general issue, or by demurrer, arrest of judgment, or writ of error. (Arch. 111.) But according to Mofussil practice, a party who denies the jurisdiction of the Court to try him must allege the reason of his exception specially, and loses the advantage of it if he submits to take his trial.

Judgment against the prisoner on a plea to the jurisdiction is not conclusive, but merely compels him to answer to the charge. (Stark. Pl. 292.)

The Supreme Courts have by their respective charters criminal jurisdiction over all crimes committed within their local limits. They have also exclusive jurisdiction over all crimes committed by European British subjects within their respective Governments, or dependant thereon, or within the Dominions of allied Native Princes. (See Ante p. 3.) They have also an Admiralty jurisdiction. (See Ante p. 4.)

The jurisdiction of the Mofussil Courts, with the single exception of the Admiralty jurisdiction which they have recently acquired, (See Ante p. 4) depends upon the offence having been committed within their local limits. (Criminal Procedure Code, s. 4.) For this purpose however the offence is considered as having been committed, either where the act was done, or where the consequence ensued. (ibid. s. 5.) Therefore if a wound was given in one Zillah, of which the sufferer died in another Zillah, the offender might be tried in either.

Abettors may be tried either in the district in which they abetted the offence, or in that where it was committed. (ibid. s. 6.)

Receivers may be tried in any district in which they have had possession of the property, or in which the principal criminal might be tried. (ibid. ss. 9 & 10.)

Offences committed on the boundaries of two districts, or begun in one and completed in another, may be tried in either. (ibid. s. 7.)

Offences committed on a journey or voyage in respect of any property in or upon any vessel, conveyance, or beast of burden, may be tried in any district through which such vessel, &c. passed in the course of the voyage or journey. (ibid. s. 8.)

Escape from lawful custody may be tried in the district from which the escape took place, or in which the offender is apprehended. (ibid. s. 11.) Similarly convicts who return from transportation before their sentence has expired may be tried either in the district where they are apprehended, or in that where they were originally tried (s. 12.)

Europeans, not being British subjects, and Americans can only be tried by a covenanted servant or a British subject. (ibid. s. 23.)

2. The plea of Not guilty throws upon the prosecution the burthen of proving everything that is necessary to make out the crime charged. Where a *prima facie* case has been made out, the person may either produce evidence to disprove it, or to justify it. For instance a man charged with an assault, may either show that he never committed the offence, or that he used the violence imputed to him in the exercise of his duty. Under this plea all objections may be taken which show that the acts proved do not constitute the legal definition of a crime.

Where a prisoner refuses to plead, a plea of Not Guilty is entered for him, and the trial proceeds in all respects as if he had pleaded.

3. *Previous Acquittal.* It is a well established rule of law, that a man shall not be twice vexed for one and the same cause. This does not mean that he may not be twice tried for the same offence, but that he may not be put twice in peril. As Abbott C. J. said, (Rex. v. Tayler. 3 B. & C. 507.)

“A plea of previous acquittal must show, that the defendant was lawfully acquitted, viz., that he was acquitted upon an indictment sufficient to induce punishment if he had been convicted, and charging the same offence.”

The acquittal must be upon a trial which might have terminated in a conviction. Therefore if a bill is preferred to the Grand Jury who throw it out, this cannot be pleaded afterwards as an acquittal, (2 Hale, 246) and so it would be if a case were investigated by a Magistrate with a view to a committal and he refused to commit. But if the case were one with which he was authorised to deal finally, and he took it up for the purpose of disposal, and not of committal, and dismissed the charge, this would be a bar in future.

So the indictment must be one upon which a conviction could have ensued, and therefore if the indictment were bad in law, an acquittal upon it would be no bar to a second indictment, because no conviction could have been maintained upon the first. (Arch. 120.) And so it would be where the defendant had judgment in his favor on demur-

rer, upon an indictment which charged no offence. Rolfe, B. said in such a case,

‘ The ground of the judgment on the demurrer being in favor of the prisoner was that the former indictment did not charge any felony. The prisoner was only discharged of the premises in that indictment specified, and that is no discharge from this indictment which does charge a felony.’ (Reg. v. Richmond, 1 C. and K. 241.)

Lastly, the acquittal must be upon substantially the same charge. This is tested by considering, whether the evidence necessary to prove the indictment could have procured a legal conviction upon the first (Arch. 118.) Therefore an acquittal on an indictment for murder will bar a subsequent indictment for culpable homicide not amounting to murder, since it would have been competent to acquit of the grave offence, and to convict of the minor. (Arch. 119.) So a person acquitted of a burglary or robbery cannot afterwards be indicted for an attempt to commit burglary or an assault with intent to rob. Nor can a person acquitted of a breach of trust be tried upon the same fact alleged to be a larceny. For in all these cases, if the facts set up in the second indictment had been proved in the first, a conviction would have resulted. Act 16 of 1852, ss. 9, 11, 13, Ante p. 290.)

But an acquittal on a charge of breaking and entering a house, having made preparation for causing hurt to any person, would be no bar to an indictment for breaking and entering the same house with intent to steal. For the same evidence which would ensure conviction on the second indictment must result in an acquittal upon the first, as the offences are distinct. (ss. 457, 458. Sec. 2, Leach 716.)

The proof of the issue lies upon the defendant. A certificate under the hand of the Clerk of the Crown or the Officer having the custody of the records of the Court in which the acquittal took place is sufficient proof of the fact of the acquittal. (Act 15 of 1852. s. 9.) Oral evidence is admissible to show that the two indictments related to the same charge, as for instance that the house said to be broken, the property alleged to have been stolen, &c., were the same in each case.

Where the plea is found against the defendant, the rule of English law was, that if the charge was one of treason or felony he should be allowed to plead over, but if the indictment was for a misdemeanor, judgment was passed at once for the Crown. (Rex. v. Taylor. 3 B. & C. 512.) This distinction arose in days when every felony was a capital crime, and seems quite absurd in the present age when one class of offences is punished as heavily as the other. As the difference between felonies and misdemeanors is now abolished, the Courts will probably take a common sense view of the matter, and allow the defendant to plead to the merits in every case. In the Mofussil this is undoubtedly the course which would be pursued.

4. The same remarks which I have just made upon the plea of previous acquittal apply to the plea of previous conviction. Instances are not likely often to arise.

FORMS OF INDICTMENT.

The following forms are drawn upon the model of those contained in the Criminal Procedure Code, and are intended for the use of the Mofussil Courts. In order to adopt them to Supreme Court practice, the commencement and conclusion will have to be altered. Indictments in the Supreme Court are always first found by the Grand Jury, and commence

“The Jurors for our Lady the Queen upon their oaths present that, &c.”

Where the offence is a statutable one, as every offence will now be, they end with the words,

“Contrary to the form of the Statute in such cases made and provided.”

The omission of these words is however immaterial since Act 16 of 1852. s. 21. (See Ante p. 289, Arch. 114.)

I have in many cases made the indictment more specific in its statement of the offence than the corresponding form given in the Code. I cannot imagine that the legislature intended that the indictment should convey no information whatever either to judge, jury, or prisoner, as would certainly be the case if it merely stated that on a certain day A cheated.

I have also referred to those enactments which govern indictments in the Supreme Court, partly to facilitate reference by Supreme Court practitioners, and partly as furnishing a guide to practitioners in the Mofussil, in cases not otherwise provided for.

To prevent repetition I may here notice certain sections of the Criminal Law Amendment Act (16 of 1852) which are continually brought into play.

V. In any indictment for forging, uttering, stealing, embezzling, destroying or concealing, or for obtaining by false pretences, any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same, or the value thereof.

Forms of indictment in cases of forgery and uttering, stealing, and embezzling, or obtaining by false pretences.

VI. In any indictment for engraving, or making the whole or any part of any instrument, matter or thing whatsoever, or for using or having the unlawful possession of any plate or other material upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made, or for having the unlawful possession of any paper upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been made or printed, it shall be sufficient to describe such instrument, matter, or thing by any name or designa-

In engraving plates, &c.

tion by which the same may be usually known, without setting out any copy or fac-simile of the whole or any part of such instrument, matter, or thing.

VII. In all other cases, wherever it shall be necessary to make any averment in any indictment as to any instru-

In other cases. ment, whether the same consists wholly or in part of writing, print, or figures, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile of the whole or any part thereof.

VIII. From and after the coming of this Act into operation, it shall be sufficient in any indictment for forging, uttering, offering, disposing of, or putting off any instrument whatsoever, or for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person; and on the trial of any of the offences in this section

Intent to defraud particular persons need not be alleged or proved in cases of forgery, uttering, or false pretences. mentioned, it shall not be necessary to prove an intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with an intent to defraud.

XVIII. In every indictment in which it shall be necessary to make any averment as to any money or any note of any bank, it shall be sufficient to describe such money or bank-note simply as money, without specifying any particular coin or bank-note; and such allegation, so far as regards the description of the property, shall be sustained by proof of any amount of coin or of any bank-note, although the particular species of coin of which such amount was composed, or the particular nature of the bank-note, shall not be proved, and in cases of embezzlement and obtaining money or bank-notes by false pretences, by proof that the offender embezzled or obtained any piece of coin or any bank-note, or any portion of the value thereof, although such piece of coin or bank-note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to any other person, and such part shall have been returned accordingly.

Indictment for Abetting an Offence, where the Principal is also indicted.

That he the said A B on or about the day of at
committed murder by causing the death of and that he
has thereby committed an offence punishable under s. 302 of the
Penal Code and within the cognisance of the (style of Court.)

That he the said C D on or about the day of at
abetted the commission of the said murder by the said A B, and that

he has thereby committed an offence punishable under ss. 109 and 302 of the Penal Code and within, &c.

Indictment for Abetting as a Separate Offence.

That one C D (or certain persons unknown) on the _____ day of _____ committed theft by stealing Rs. 50 the property of one _____ and that he the said A B abetted the said C D (or the said persons) in the commission of the said theft, and that he has thereby committed an offence punishable under ss. 109 and 379 of the Penal Code and within, &c.

Indictment for Abetting one Offence where a different Offence is committed.

That he on or about the _____ day of _____ did instigate and abet one A B to break by night into the house of one C D having made preparations for causing hurt to a person, and that the said A B did in pursuance of such abetment break into the house of the said C D, and killed one E F then being in the said house, and that he the said (abettor) has thereby committed an offence punishable under ss. 111 and 302 of the Penal Code and within, &c.

Indictment for Abetting an Offence which is not committed.

That he on or about the _____ day of _____ did instigate and abet one C D then being a Village Moonsiff in _____ to take a gratification other than his legal remuneration as a reward for showing favor to him the said (abettor) in O. S. 1 of 1861 then pending before him the said C D, and that he has thereby committed an offence punishable under ss. 115 and 161 of the Penal Code and within, &c.

Indictment against a Public Servant for Concealing a Design to Commit an Offence which it was his duty to prevent.

That on or about the _____ day of _____ A B and certain other persons unknown committed dacoity in the village of _____ and that he the said (defendant) being a police peon and, as such, a public servant whose duty it was to prevent the said crime, being well aware of the design to commit the said offence, did voluntarily conceal the same, and did illegally omit to inform his superior officer of such design, and that he has thereby committed an offence punishable under ss. 119 and 391 of the Penal Code and within, &c.

Note.—The indictment ought to state such facts as will show not only that the defendant was a public servant, but also that he was a public servant whose duty it was *as such*, not merely as an ordinary citizen, he prevent the offence.

Indictment for Waging War.

That he on or about the _____ day of _____ at _____ waged war against the Queen, and that he has thereby committed an offence punishable under s. 121 of the Penal Code and within, &c.

Note.—It is not necessary to set out the particular acts of the defendant. (Arch. 598.)

Indictment for Attempting to overawe a Councillor by Violence.

That he on or about the day of at with the intention of inducing the Honorable A B a member of the Council of the Governor General of India to refrain from exercising his lawful power as such member, assaulted such member, and that he has thereby committed an offence punishable under s. 124 of the Penal Code and within, &c.

Indictment for Attempting to Seduce a Soldier from his Allegiance.

That he on or about the day of attempted to seduce from his allegiance to the Queen one then being a private soldier in the Regiment of Her Majesty's Madras Army and that he has thereby committed an offence punishable under s. 131 of the Penal Code and within, &c.

Indictment for Joining an Unlawful Assembly Armed with a Deadly Weapon.

That he on or about the day of at with other persons to the number of five or more did unlawfully assemble together he the said being then and there armed with a deadly weapon that is to say a gun, and that he has thereby committed an offence punishable under s. 144 of the Penal Code and within, &c.

Indictment for Rioting.

That he on or about the day of at with other persons to the number of five or more unlawfully assembled together at and there committed the offence of rioting and that he has thereby committed an offence punishable under s. 147 of the Penal Code and within, &c.

Indictment for an Affray.

That on or about the day of they the said A B and C D did commit an affray in the public street at and that they have thereby committed an offence punishable under s. 160 of the Penal Code and within, &c.

Indictment against a Public Servant for Accepting a Gratification.

That he being a Public Servant, that is to say, an Inspecting Engineer in the Department of Public Works accepted for himself from one A B a gratification, other than legal remuneration, as a motive for his the said (*defendant's*) procuring a certain contract for the said A B, such being an official act, and that he has thereby committed an offence punishable under s. 161 of the Penal Code and within, &c.

Indictment for Non-attendance in Obedience to a Lawful Summons.

That on or about the day of one A B then being Zillah Judge of * and being as such Zillah Judge legally

competent to issue a summons, did by his summons call upon the said (*defendant*) to appear and give his evidence at the Court House of _____ on _____ and such summons was duly served upon the said (*defendant*) yet he intentionally omitted to attend at the said Court House and that he has thereby committed an offence punishable under s. 174 of the Penal Code and within, &c.

Indictment for Disobedience to an Order Promulgated by a Public Servant.

That on the _____ day of _____ A B then being Magistrate of _____ made and promulgated an order directing the Left Hand Caste to refrain from conducting a procession through the street in the Village of _____, such being an order which he was lawfully empowered to promulgate, and the said (*defendants*) well knowing the said order disobeyed the directions of the said A B, and conducted the procession through the said street, whereby a riot was caused in the said Village, and that they have thereby committed an offence punishable under s. 188 of the Penal Code and within, &c.

Note.—The indictment ought to show that the public servant was one authorised to promulgate an order, and that the order was one which he was competent to make.

FALSE EVIDENCE. *Indictment for Giving False Evidence in a Suit before a District Moonsiff.*

That he on the 1st day of May 1861 being summoned as a witness in O. S. 1 of 1861 being a judicial proceeding then pending before the District Moonsiff of _____ and being bound by solemn affirmation to state the truth, did knowingly and falsely state that he had seen one Ramasawmy sign a certain document marked A, whereas he had not seen the said Ramasawmy sign the said document, and that he has thereby committed an offence punishable under s. 193 of the Penal Code and within, &c.

Indictment for False Statement in an Income Tax Return.

That he on the _____ day of _____ being bound by law to make a declaration as to the amount of his profits for the year 1860, which declaration the Special Commissioner of Income Tax was authorized to receive as evidence of the amount of such profits, made a return to Robert Ellis, then being Special Commissioner of Income Tax for the Town of Madras, and did in such return knowingly and falsely state that his profits for the year 1860 had been only Rupees 1,000, whereas his profits for the said year had been Rupees 10,000, and that he has thereby committed an offence punishable under s. 199 of the Penal Code and within, &c.

Note.—The practice in the Supreme Court is to set out the substance and as nearly as possible the words of the statement upon which perjury is assigned. This practice ought I think to be observed in the Mofussil, otherwise it would be impossible to anticipate the parti-

cular part of his statement which the defendant would have to maintain, or to bring witnesses to prove its truth. The statement proved must also be substantially the same as that set out, unless the record is amended to meet the variance. (Arch. 632.) It must also be expressly alleged that the statement was knowingly and falsely made; (Arch. 677) but this allegation will be borne out by proof that the defendant had no reason to believe his assertion to be true, though he did not in point of fact know it to be false. (Arch. 680.)

By Act 16 of 1852, s. 19, it is provided that in any indictment for perjury it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what Court or before whom the oath &c. was taken, without setting forth any part of any proceeding in law or in equity, and without setting forth the commission or authority of the court or person before whom such offence was committed.

Indictment for using Evidence known to be False.

That one Ramasawmy fabricated false evidence by making a false entry in an account book, purporting to be an entry of a payment of Rs. 1,000 made by the defendant to one Verasawmy, and that he, the defendant, in O. S. 1. of 1861, being a judicial proceeding before the Civil Judge of _____, corruptly used the said entry as genuine evidence knowing it to be fabricated, and that he has thereby committed an offence punishable under s. 196 and 193 of chapter XI of the Penal Code, and within, &c.

Indictment for Fraudulent transfer of Property.

That one A B was a creditor of the said (*defendant*) and had sued him in the Moonsiff's Court of _____ in O. S. 1 of 1861, and had obtained judgment against him for the sum of Rs. 1,000, and the said (*defendant*) intending to prevent a certain piece of land situated in the village of _____ from being taken in execution of the said decree, fraudulently transferred the same to one A B, and that he has thereby committed an offence punishable under s. 206 of the Penal Code, and within, &c.

Indictment for a False Claim.

That he on or about the _____ day of _____ commenced a suit in the District Moonsiff's Court of _____ against one A B, and in the said suit falsely claimed to be the owner of certain jewels then in the possession of the said A B, with intent to injure the said A B, whereas he well knew that he was not the owner of the jewels so claimed, and that he has thereby committed an offence punishable under s. 209 of the Penal Code and within, &c.

Indictment for a False Charge of an Offence.

That he on or about the _____ day of _____ with intent to cause injury to one A B appeared before the Magistrate of _____ and there falsely charged the said A B with having stolen Rs. 50, he

the said (*defendant*) at the time well knowing that A B had not stolen the said money, and that there was no just or lawful ground for such charge, and that he has thereby committed an offence punishable under s. 211 of the Penal Code and within, &c.

Indictment for Harboursing an Offender.

That on or about the day of the crime of dacoity was committed in the village of and that he the said (*defendant*) harboured one A B, whom he at the time he harboured him knew (*or had reason to believe*) to be one of the offenders, and that he has thereby committed an offence punishable under s. 212 of the Penal Code and within, &c.

Indictment for Counterfeiting Coin.

That he on or about the day of counterfeited a piece of the Queen's Coin known as a Company's Rupee, and that he has thereby committed an offence punishable under s. 232 of the Penal Code and within, &c.

Indictment for Passing off and Possessing Counterfeit Coin.

First; That he on or about the day of having a Counterfeit Coin, which was a Counterfeit of a piece of the Queen's Coin known as a Company's Rupee, and which, at the time when he became possessed of it, he knew to be a Counterfeit of the Queen's Coin, fraudulently delivered the same to one A B, and that he has thereby committed an offence punishable under s. 240 of the Penal Code and within, &c.

Secondly; That he on or about the day of delivered to one A B as genuine a Counterfeit Coin, that is to say a Counterfeit Rupee, knowing the same to be Counterfeit, and that he has thereby committed an offence punishable under s. 241 of the Penal Code and within, &c.

Thirdly; That he on or about the day of was fraudulently in possession of Counterfeit Coin, that is to say three Counterfeit anna pieces, he, at the time when he became possessed thereof, having well known that they were Counterfeit, and that he has thereby committed an offence punishable under s. 242 of the Penal Code and within, &c.

Indictment for Murder and Culpable Homicide.

First; That he on or about the day of at committed murder by causing the death of and that he has thereby committed an offence punishable under s. 302 of the Penal Code and within, &c.

Secondly; That he on or about the day of at committed culpable homicide not amounting to murder by caus-

ing the death of _____ and that he has thereby committed an offence punishable under s. 304 of the Penal Code and within, &c.

Note.—According to English law separate Counts stating the same offence as murder and culpable homicide are not necessary. Upon an indictment for murder the jury are at liberty to find guilty of the lesser offence only.

By Act 16 of 1852 s. 4 it is unnecessary to set forth the manner or means by which the death was caused, and it is sufficient to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased, and it is sufficient in an indictment for manslaughter (culpable homicide) to charge that the defendant did feloniously kill and slay the deceased. The word “feloniously” will now be unnecessary.

Indictment for Causing Miscarriage.

That he on or about the _____ day of _____ voluntarily and without the consent of A B, then being a woman with child, caused the said A B to miscarry, such miscarriage not being caused in good faith for the purpose of saving the life of the said woman, and that he has thereby committed an offence punishable under s. 313 of the Penal Code and within, &c.

Indictment for Causing Grievous hurt by Dangerous Weapon.

That he on or about the _____ day of _____ voluntarily caused grievous hurt to one A B by means of an instrument for shooting, that is to say a pistol, the said hurt not being caused on grave and sudden provocation, and that he has thereby committed an offence punishable under s. 326 of the Penal Code and within, &c.

Indictment for Wrongful Confinement for the Purpose of Compelling Restoration of Property.

That he on or about the _____ day of _____ wrongfully confined one A B, for the purpose of constraining the said A B to cause the restoration of certain jewels before then stolen from him the said (*defendant*) and that he has thereby committed an offence punishable under s. 348 of the Penal Code and within, &c.

Indictment for an Assault.

That he on or about the _____ day of _____ assaulted one A B, the said assault not being committed on grave and sudden provocation given by A B, and that he has thereby committed an offence punishable under s. 352 of the Penal Code and within, &c.

Indictment for Kidnapping from Lawful Guardianship.

That he on or about the _____ day of _____ kidnapped one A B, being a female under the age of 16, from the lawful guardianship of her father C D, and that he has thereby committed an offence punishable under s. 361 of the Penal Code and within, &c.

Indictment for Rape.

That he on or about the day of committed rape upon the person of one A B, and that he has thereby committed an offence punishable under s. 376 of the Penal Code and within, &c.

Indictment for Theft by a Servant.

That he on or about the day of being the servant of one A B, did commit theft by taking six spoons then in the possession of his said master, and that he has thereby committed an offence punishable under s. 381 of the Penal Code and within, &c.

Note.—As to the description of the property stolen, see Ante p. 297.

If the facts proved under this indictment amount to embezzlement, there may still be a conviction; see Ante p. 290.

Where property alleged to have been stolen at one time, appears to have been taken at different times, the prosecutor shall not be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than six months elapsed between the first and last; in either of which cases, the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as have taken place within six months from first to last. (Act. 16 of 1852, s. 17.)

Indictment for Extortion by Putting in Fear of Death.

That he on or about the day of did extort a promissory note for Rupees 100 from A B having, in order to the committing of such extortion, put the said A B in fear of death, and that he has thereby committed an offence punishable under s. 386 of the Penal Code and within, &c.

Indictment for Highway Robbery by Night.

That he on or about the day of on the highway leading from A to B, and between sunset and sunrise, robbed one C D of a watch and seals, and that he has thereby committed an offence punishable under s. 392 of the Penal Code and within, &c.

Indictment for Dacoity with Murder.

That on or about the day of he with others to the number of five or more committed dacoity at the village of and that in committing such dacoity one of the said persons murdered one A B, and that he the said (*defendant*) has thereby committed an offence punishable under s. 396 of the Penal Code and within, &c.

Indictment for Criminal Misappropriation.

That he on or about the day of dishonestly misappropriated certain jewels, knowing that such property was in the

possession of one Ramasawmy, now deceased, at the time of his death, and that the same has not since been in the possession of any person legally entitled to such possession, and that he has thereby committed an offence punishable under s. 404, Chap. XVII of the Penal Code and within, &c.

Indictment for Criminal Breach of Trust.

That he being the Clerk of Messrs. A & Co., and being in such capacity entrusted with a promissory note the property of the said Messrs. A & Co., committed criminal breach of trust by dishonestly converting the said note to his own use, and that he has thereby committed an offence punishable under s. 408 of the Penal Code and within, &c.

Note.—As to the description of the property embezzled, see Ante p. 297.

If the alleged embezzlement should turn out to be a theft, the defendant may still be convicted under this indictment. See Ante p. 290.

The Criminal Procedure Code seems to consider that a mere statement that A committed criminal breach of trust is sufficient in an indictment. Even if such an indictment should be held legally sufficient, it is obvious that justice demands a more specific statement from the prosecutor.

Indictment for Receiving Stolen Property.

That he on or about the day of dishonestly received a gold bracelet, then being stolen property, knowing the same to be stolen property, and that he has thereby committed an offence punishable under s. 411 of the Penal Code and within, &c.

Indictment for Cheating.

That he on or about the day of cheated one Veerasawmy, by falsely pretending that a certain ornament was made of gold, and thereby deceived the said Veerasawmy, and fraudulently induced him to pay the sum of Rupees 100 as the price of the said ornament, whereas the said ornament was not of gold, in consequence of which the said Veerasawmy suffered damage in his property; and that he has thereby committed an offence punishable under s. 429 of the Penal Code and within, &c.

Note.—Under English law an indictment for cheating was bad unless it set out the false pretences, and it was not sufficient merely to allege that the money was obtained from the defendant by false pretences. (Arch. 388.) Probably in Mofussil practice such particularity would not be held necessary, but it seems to me most advisable that the indictment should be as specific as possible for the protection of the prisoners. A mere allegation in the words of the Code, that A cheated B would be too vague to give any information of value to the prisoner or the judge.

According to the practice of the Supreme Court it is also necessary to negative the pretences by special averment, (Arch. 392) but out of those limits such precision would probably not be required.

As to the mode of describing the property obtained by cheating, See Ante p. 297.

Indictment for Mischief to Cattle.

That he on or about the day of committed mischief by maiming a horse the property of A B, and that he has thereby committed an offence punishable under s. 427 of the Penal Code and within, &c.

Indictment for Lurking House-Trespass by Night.

That he on or about the day of at committed lurking-house trespass by night in the house of and that he has thereby committed an offence punishable under s. 444 of the Penal Code and within, &c.

Indictment for Breaking open a Closed Receptacle entrusted to him.

That he being entrusted with a closed receptacle, that is to say a box, containing jewels, did, on or about the day of dishonestly break open the same, not having authority so to do, and that he has thereby committed an offence punishable under s. 462 of the Penal Code and within, &c.

Indictment for Forging a Bill of Exchange and Fraudulently using the same.

First ; That he on or about the day of forged a certain Bill of Exchange, purporting to be a valuable security, with intent to defraud, and that he has thereby committed an offence punishable under s. 467, of the Penal Code and within, &c.

Secondly ; That he on or about the day of fraudulently used the said forged Bill of Exchange as genuine, knowing it to be forged, and that he has thereby committed an offence punishable under ss. 471 and 467 of the Penal Code and within, &c.

Note.—By Act 16 of 1852 s. 5, in any indictment for forging or uttering any instrument, it is sufficient to describe it by any name by which it is generally known, or by its purport, without setting forth any copy or otherwise describing it, or its value.

Where the forgery consists in altering a true instrument, the offence may still be described as a forgery of the whole. (Ante p. 255. Arch. 465)

It is not necessary to mention the person upon whom the forgery has been passed off, or attempted to be so. (Arch. 466)

It is sufficient to allege the intention to defraud generally, without

stating any particular person who would be defrauded by the forgery.
(Act 16 of 1852. s. 8.)

Indictment for Defamation.

That he on or about the day of defamed A B by writing and publishing concerning him the following words (*here insert the defamatory matter*) and that he has thereby committed an offence punishable under s. 500 of the Penal Code and within, &c.

Indictment for Criminal Intimidation.

That he on or about the day of criminally intimidated A B by threatening to cause grievous hurt to one B C, and that he has thereby committed an offence punishable under s. 506 of the Penal Code and within, &c.

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JUST PUBLISHED.

MADRAS IN THE OLDEN TIME: being a history of the Presidency from the first foundation of Fort St. George to the Governorship of Thomas Pitt, Grandfather of the Earl of Chatham, 1639—1702 compiled from Official Records, by J. TALBOYS WHEELER, Esq., miniature quarto, with Fac similies of the autograph of the early Governors of Madras.....Rs. 5 0

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It affords us much pleasure to observe that two very interesting and valuable publications are on the eve of being given to the world by Mr. HIGGINBOTHAM. We allude to Mr. TALBOYS WHEELER's volume entitled "Madras in the Olden Time," and his "Hand-Book to the Madras Records, preserved in the Government Office." The former of these works is a re-print of that admirable series of papers which have for some time past enriched the columns of the *Indian Statesman*. Those papers are so widely known and highly appreciated, that we need say nothing more about them in the meantime. We have immediately to deal with Mr. WHEELER's Summary (i. e. Hand-Book) of the Records of the Presidency, which lies beside us. Mr. WHEELER has had a rich mine opened to him, and has made the best of his opportunity. He was appointed last year to search through the Government Records, and to give an opinion as to the value of them, nor could the task have been placed in better hands. His report on them has been pronounced perfectly satisfactory by the Madras Government. —*Athenæum*, March 24, 1861.

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Madras has reason to be grateful for the labours of Mr. WHEELER, and we hope ere long to see a continuation of his researches into times of still increasing interest and importance. —*Madras Observer*, March 14th, 1861.

"Madras in the Olden Time," a compilation from the records of Government by Mr. J. T. WHEELER, has just been published in convenient form by Mr. HIGGINBOTHAM. The student of Indian history will find much to interest him in the old Records for the first time disintegrated and arranged chronologically by Mr. WHEELER, for the *Indian Statesman*, and now placed before the public in a compact volume by Mr. HIGGINBOTHAM. The compiler appears to have laboured with great zeal and industry, wading through hundreds of volumes of consultations," and we think it must be admitted by all who perused the several chapters as they appeared in the *Statesman* that the permission accorded by the Government to Mr. WHEELER has been used very judiciously. So far as we are able to judge, we should say that no event of any importance in the history of the infant Presidency has been omitted, whilst the extracts referring to the quarrels of the Governors with one another, with their servants and subjects and with the native chiefs from the Naik of Poonamallee to the great Mogul himself, convey the most vivid description of the position, manners and character of the first settlers, and of the people by whom they were surrounded. As to Mr. WHEELER the least we can say of him is that whilst he has furnished the public with some very interesting and amusing reading, he has added a valuable contribution to Indian History. —*Examiner*, March 2d, 1861.

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than from the worthless material by which they are encrusted, and work them into a continuous and readable narrative."—*Madras Crescent*, March 23d, 1861.

The *Herkaru* writing of Mr. WHEELER's work says:—

"We have to acknowledge the receipt of "Madras in the Olden Time," from 1639 to 1702 a seemingly very interesting work, by J. T. WHEELER, Esq. Every page of it into which we have had time to look contains matter of much interest to any settler in the East."

In conclusion, we may notice the fact that two works have issued from one of the local presses of great interest to all who are connected with Madras, and of considerable importance to the student of Indian History. They are both written by Mr. J. TALBOYS WHEELER, the Editor of the *Indian Statesman*, and are deservedly spoken of in the highest terms in two reviews which we quote elsewhere. One is "Madras in the Olden Time" being a history of this Presidency from its first foundation to the Governorship of Mr. Thomas Pitt, Grandfather of the Earl of Chatham, that is, from 1639 to 1702. This period has been almost ignored by Mill, and where alluded to by him is in many instances inaccurately treated. As the present work is compiled from the Government Records, which were placed at Mr. WHEELER'S disposal by the Madras Government, all the facts connected with the early history of the Presidency have been for the first time brought to light in a handy and well printed volume. The other work is a Hand-book to the old Records of Madras which has been prepared for Government. It deals with the same subject of Madras in the Olden Time, but is of course more official in style: it is nevertheless highly interesting."—*Overland Athenaeum*, March 29th, 1861.

We have now beside us the publication referred to, in the form of a "Hand-book to the Madras Records," a pamphlet in boards extending to the length of 91 pages, (with Chronological annals extending over 40 pages,) and full of most interesting matter connected with the past history of our Presidency, which we heartily commend to the notice of our readers, as a valuable addition to their libraries. They will learn from it much that even the most studious among them, and those best acquainted with extant books relative to India, never knew before, because he has wisely been permitted to open to them sources of information hitherto concealed, and the nature and value of which was unknown to the possessors of the treasure so long kept under lock and key, in the archives of Fort Saint George. Regarding the excellence of the Report, and the amount of labour bestowed on the preparation of it, we need add nothing to what we have said already, but we must particularly mention an addition to the Report, as now printed, of thirty-one pages, which are perhaps more valuable for the purposes of reference, although less directly instructive and amusing, than the Report itself, as they contain "Chronological Annals of the British Government at Madras, from the earliest period to the present day; 1631 to 1861." In those "Annals" Mr. WHEELER has brought his work down to the 5th of March 1861, his record concluding with a notice of the late lamented Bishop of Madras. He has furnished a minute and correct chronological series of past events, not to be found elsewhere, which every one who wishes to learn the past history of Madras will do well to consult.—*Athenaeum*, April 13th, 1861.

"**MADRAS IN THE OLDEN TIME**; being a history of the Presidency from the first foundation to the Governorship of Thomas Pitt, Grandfather of the Earl of Chatham—1639—1702;" such is the title of a work compiled from official records, by J. TALBOYS WHEELER, Professor of Moral Philosophy and Logic, Madras Presidency College. The work first appeared as a series of papers in one of the ablest of our Indian journals, the *Indian Statesman*. Many of our readers will remember that a similar work, entitled "The English in Western India," by the late lamented Phillip Anderson, a Chaplain of this Establishment, appeared as a series of papers in our own columns. The two works are the best we have on the Olden time in India. They are replete with information, amusement, and interest.

We could give our readers, if our space permitted, many more amusing pictures from the work before us. We shall, however, conclude by supplying them with a *tablan vivant* of Fort St. George at the end of the seventeenth century. They will hear the gun fired at early morning,—and they will see the gradual stir of the inhabitants,—the measured tramp of the European soldier,—the little stately peon with his sword and buckler,—the rush of noisy and naked coolies,—the appearance of apprentices, writers, factors, and merchants in half-Hindoo costume,—the assembly for morning prayers in the little chapel, good master Patrick Warner officiating in his gowu and bands, and indignant at the smallness of his congregation,—the opening of the Factory and jabbering crowd of Native traders,—the grand displays of European goods for sale, and packing up of Native Merchandise for export home,—the little school-room and long array of little boys and girls,—the orderly dinner shortly after noon, where all are assembled at the general table from the apprentices to the Honorable Governor himself,—the return to the labors of the desk and ware-house, until the joyous hour of closing has arrived, and the jaded Europeans recruit their exhausted spirits with the pleasures of punch, tobacco, and other pursuits which we need not and cannot name. If it is Sunday, all would be changed; for in old times English Sundays were rigidly observed as little festivals. Then Europeans, civilians as well as soldiers dropped their half native attire, and were apparelled in the European fashion of the time. Then for a brief hour or two the Chaplain would be a greater man than the Governor. Then he would denounce vice and popery to his heart's content, and expound the Scriptures by the light of a theological learning which was almost general in those days when the Church was a living reality, but which is fast passing away now. Then the Church could boast of literary giants, such as Walton, Lightfoot, Stillingeet, Beveridge; and thousand time-honored names. She has few men to

