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Entered

Just Published,

BY THE SAME AUTHOR,

THE INDIAN

LIMITATION ACT. 1877.

THIRD EDITION.

1895.

PRICE, RS. 9.

INDIAN
CRIMINAL LAW

CONTAINING

THE INDIAN PENAL CODE, AS AMENDED UP TO DATE, AND OTHER INDIAN ACT RELATING TO OFFENCES, AND ALSO ACTS OF PARLIAMENT AND ORDERS IN COUNCIL RELATING TO OFFENCES TRIABLE IN INDIA:

AND

INCLUDING THE INDIAN MERCHANDISE MARKS ACT, 1889, AS AMENDED BY ACT IX OF 1891,

WITH

FORMS OF CHARGES, AND NOTES ON EVIDENCE ILLUSTRATED BY ENGLISH AND INDIAN CASES;

AND

AN APPENDIX

OF ACTS AND ORDERS RELATING TO CRIMINAL MATTERS,

BY

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SEVENTH EDITION.

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BOMBAY: EDUCATION SOCIETY'S PRESS, BYCULLA;
CALCUTTA: THACKER, SPINK & CO.

1897.

PREFACE TO THE SEVENTH EDITION.

The last edition of this work having been sold out, the Editors revised the text by inserting the cases which have been decided during the last three years and by making such alterations and additions as have been suggested to them by various criminal trials which have occurred since the Author last had the text under review. A new English Merchant Shipping Act came into force at the beginning of last year, and that has been duly noticed in the text. The only other important matter to be noticed is the introduction into the Penal Code of the provisions of the English law as to the falsification of accounts by clerks and others filling a similar position, a very useful provision, but which would not have been so necessary as was supposed in some quarters if the distinction between criminal breach of trust and embezzlement had been clearly seen.

The index has been revised and amplified, and cross references have been, as far as was possible, discontinued. When it has been found necessary to retain them the page of the text on which the treatment of the subject to which the reference relates begins has in almost every case been inserted before the cross reference, so that any one using the book can, if he please, turn straight to the subject without using the cross reference. The table of cases has

been revised or rather reconstructed by Mr. Laldas Damodherdas, High Court Librarian at Bombay, to whom the best thanks of the Editors are due, as they are also to Mr. Wamanrao Trimbak Kharkar, for much assistance in correcting and revising the proofs.

The Editors desire to thank those readers who have been kind enough to take the trouble to point out errors which they have discovered and to call their attention to doubtful points of law which they considered needed discussion.

M. H. STARLING.
E. B. RAIKES.

HIGH COURT, BOMBAY,
December 1896.

ADDENDA.

Page 48, line 29, *after* "7 Mad. H. C. R. app. XXII," *insert* "A Magistrate ordering, under Section 113 of the Indian Railways Act, 1890, payment of excess charge and fare, can award imprisonment in default of payment under this section, *Emp.* v. *Vaidyalingan*, B. R., 27th August 1896."

„ 55 „ 5, *after* "offences," *insert* "*Emp.* v. *Bala Kom Nayapa*, B. R., 9th April 1896."

„ 83 „ 25, *after* "Cox, C. C. 275," *insert* "see *Emp.* v. *Kadar Nasyer* 23 Cal. 604."

„ 109 „ 34, *after* "8 All. 293," *insert* "and see *Emp.* v. *Dalip*, I. L. R. 18 All. 246."

„ 130 „ 15, *after* "ravish her," *insert* "But mere presence at the commission of an offence is not abetment of it if the person present has no authority to interfere, *Emp.* v. *Sidlingappa*, B. R., 5th March 1896."

216 „ 22, *after* "22 Cal. 286," *insert* "and see *Abdul Gafur* v. *Emp.*, I. L. R. 23 Cal. 896."

„ 217 „ 6, *after* "2 Bom. H. C. R. 128," *insert* "and see *Emp.* v. *Purshotam Tanamali*, B. R., 26th March 1896."

„ 222, *at bottom* of page, *insert* "The section refers to orders made for public purposes and does not apply to an order made in a possessory suit between party and party, *Emp.* v. *Ulwapgavda*, B. R., 18th June 1896."

„ 223, line 21 *after* "3 Beng. L. R., app. 149," *insert* "*Emp.* v. *Ulwapgavda*, B. R., 18th June 1896."

„ 237 „ 7, *after* "Cox, Cr. Cal. 121," *insert* "So too a man may be convicted of giving a false evidence at a trial which has proved abortive owing to the incompetency of one of the jurors, *Q. E.* v. *Virasami* I. L. R. 19 Mad. 375."

„ 293 „ 26, *after* "24 W. R. Cr. 45." *insert* "*Q. E.* v. *Calian* I. L. R. 19 Mad. 310."

„ 359 „ 3, *after* "I. L. R. 3 Mad. 178," *insert* "In a recent case in Allahabad it has been held that persons who entered upon a burial place and ploughed up the graves were liable to be convicted under this section notwithstanding that the entry on the land was by the consent of the owner thereof, *Emp.* v. *Subhan* I. L. R. 18 All. 395."

„ 374 „ 16. *after* "*ubi supra*," *insert* "So the Madras High Court have held that a woman causing her husband's death by gripping and squeezing his testicles was guilty of culpable homicide not amounting to murder, *Emp.* v. *Kaliyasi*, I. L. R. 19 Mad. 364."

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EXPLANATION OF ABBREVIATIONS.

A. & E. .....Adolphus and Ellis' Reports.
Add .....Addam's Ecclesiastical Reports.
B. & Ad. .....Barnewall and Adolphus' Reports.
B. & Ald. .....Barnewall and Alderson's Reports.
B. & C. .....Barnewall and Cresswell's Reports.
B. & S. .....Best and Smith's Queen's Bench Reports.
B. Moo.....J. B. Moore's Reports, C. P.
B. R. .....Unreported Rulings of the Bombay High Court.
Bar. K. B.....Barnadiston's Reports, K. B.
Beav. .....Beavan's Reports.
Bell, C. C. .....Bell's Crown Cases.
Bos. & P. .....Bosanquet and Pullen's Reports.
Burr. .....Burrow's Reports, K. B.
C. & K. .....Carrington and Kirwan's Nisi Prius Reports.
C. & Mar. or Car. & M....Carrington and Marshman's Nisi Prius Reports.
C. & P. .....Carrington and Payne's Nisi Prius Reports.
C. B. .....Common Bench Reports.
C. B. N. S. ...Common Bench Reports, New Series.
Camp .....Campbell's Reports.
Car. Sup. .....Carrington's Supplement of Treatises on Criminal Law.
Co. .....Lord Coke's Reports.
Cox C. C. or C. C. C.....Cox's Criminal Cases.
C. P. D.... .....Common Pleas Division Reports.
Cro. Car. .. ...Croke's Reports, temp. Charles I.
Curt. .....Curteis' Ecclesiastical Reports.
Deane. .....Deane's Ecclesiastical Reports.
Dears. C. C....Dearsley's Crown Cases.
Dears. & B. .. Dearsley and Bell's Crown Cases.

De G. M. & G.....De Gex Macnaghten and Gordon's Reports.
Den. C. C.....Denison's Crown Cases.
Doug.....Douglas' Reports, K.B.
Dow. P. C.....Dowling's Practice Cases.
East P. C.....East's Pleas of the Crown.
El. & Bl. .....Ellis and Blackburn's Reports.
Esp. .....Espinasse's Reports.
Ex. D. .....Exchequer Division Reports.
F. & F. ..... Foster and Finlason's Nisi Prius Reports.
Fost. or..... } Foster's Crown Law.
Fost. Cr. L.. }
Hagg. ..... Haggard's Ecclesiastical Reports
Hagg. Cons. ..Haggard's Consistory Reports.
H. & C.....Hurlstone and Coltman's Reports.
Hawk ..... Hawkins' Pleas of the Crown.
Jur. .....Jurist.
" N. S. ... " New Series.
Kel.....Kelynge's Reports, K.B.
L. & C. .....Leigh and Cave's Reports.
L. T. .....Law Times Reports
L. T. N. S.....Law Times Reports, New Series.
Ld. Raym.....Lord Raymond's Reports.
Lea. .....Leach's Crown Cases Reserved.
Lev. .....Levinz's Reports.
Lewin C. C. ...Lewin's Crown Cases on the Northern Circuit.
L. J. N. S. C. P. } Law Journal Reports, New Series, Common Pleas.
Ex..... Do. do. Exchequer.
M. C.... .. Do. do. Magistrates' Cases.
P. & M.... Do. do. Probate and Matrimonial.
Q. B..... Do. do. Queen's Bench.
Lofft.....Lofft's Reports, K. B.
L. R. C. C. ...Law Reports, Crown Cases.
C. P. ... Do. do. Common Pleas.
L. R. Ex..... Law Reports, Exchequer.
P. C. ... Do. do. Privy Council.
Q. B. ... Do. do. Queen's Bench.
M. Dig. .....Morley's Digest.
M. & R. .....Moody and Robinson's Reports.
Macq. H. L. Ca. } Macqueen's House of Lords Cases.
Mod .....Modern Reports.
Moo & M .....Moody and Malkin's Nisi Prius Reports.
Mood C C ...Moody's Crown Cases.
Moore I. A ..Moore's Indian Appeals.
M & Sel. .. ..Maule and Selwyn's Reports.
M & W .. ..Meeson and Welsby's Reports.
N R .... New Reports
Q B .....Queen's Bench Reports.
Q B D ... . Queen's Bench Division Reports
R C C Cr . Revenue Civil and Criminal Reporter (Calcutta) Criminal Rulings
R J & P .. Revenue, Judicial and Police Journal (Calcutta)
R & R ... ..Russell and Ryan's Nisi Prius Reports.
Robert ... .Robertson's Ecclesiastical Reports.
Rol Rep ... Rolle's Reports, King's Bench
Russ .. ..Russell on Crimes.
Ry & Moo N. P. C Ryan and Moody's Nisi Prius Reports
Salk ... . Salkeld's Reports.
Sim .... Simon's Reports.
Smale & G .. Smale and Giffard's Reports
Str ....Strange's Reports in the Queen's Bench.
T. R.....Term Reports.
T. Raym .. .. ..Thos Raymond's Reports.
W. Bl. .....Sir Wm Blackstone's Reports.
Wood. C. C... ..Wood's Crown Cases.
W. R. ....English Weekly Reporter.
W. R. Cr.....Calcutta Weekly Reporter, Criminal Rulings.

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INDIAN CRIMINAL LAW.

PENAL CODE.

ACT XLV. OF 1860.

CHAPTER I.

EXTENT OF OPERATION OF PENAL CODE.

Sect. 1. *Title and Extent of Operation of Penal Code.*—**This Act shall be called the Indian Penal Code, and shall take effect throughout the whole of the territories which are or may become vested in Her Majesty by the Statute 21 & 22 Vict. c. 106, entitled, "An Act for the better government of India."**

Notes.

By 21 & 22 Vict. c. 106, s. 1, the territories to which this Act applies are defined to be all territories then in the possession or under the government of the East India Company and all territories which may become vested in Her Majesty by virtue of any rights vested in or which might, but for the passing of that Act, have been exercised by the said Company in relation to any territories.

Sect. 2. *Infringement of Provisions of Code*—**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.**

Notes.

The locality of the said territories extends to three miles from their shore; and up to the year 1878 an offence committed within three miles of such shore would have brought the offender under

the provisions of the Indian Penal Code; *Reg.* v. *Irvine*, 1st *March, Sess.* 1867; *Reg.* v. *Elmstone*, 7 *Bom. H C. Rep. C. C.* 104; *Reg.* v. *Kastya Rama*, 8 *Bom. H. C. Rep. C. C.* 67; see also, *Rolet* v. *The Queen*, *L. R.*, 1 *P. C.* 198. This jurisdiction under the Code over such part of the sea did not oust the Admiralty jurisdiction; *Reg.* v. *Elmstone*, *ubi supra*; *Reg.* v. *Pauline*, 9 *Jur.* 286; *S. C.* 3 *Notes of cases*, 616. The limit of three miles appears to have been fixed as being the limit of the range of a cannon shot fired to sea from low-water mark, the rule being, *potestatem terra finiri ubi finitur armorum vis* (Bynkershoek, *De Dominio maris*, cap. 2).

In 1876, one Keyn, who was a foreigner in command of a foreign ship, whilst passing within three miles of the shore of England, on a voyage to a foreign part, ran into a British ship and sank her, thereby causing a passenger to be drowned, under such circumstances as would amount to manslaughter by English law; and it was held that the English Courts had no jurisdiction to try him; *Reg.* v. *Keyn*, 2 *Ex. D.* 63; see, also, *Harris* v. *Franconia*, 2 *C. P. D.* 173. Consequently from 1876 to 1878, the law was that the three miles' limit only applied to cases where an offence was committed within those limits by a British subject. Two years later, this ruling of the Court for Crown cases reserved was set aside by the *Territorial Waters Jurisdiction Act*, 1878, 41 and 42 Vict. c. 73, which came into force on the 16th August 1878, Sect. 2 of which provides that, "*an offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea, within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried and punished accordingly*;" but no person, who is not a subject of Her Majesty, can be tried and punished under this Act, except with the consent, in the United Kingdom, of one of the Secretaries of State, and out of the United Kingdom, of the Governor of the place where the proceedings are to be instituted, Sect. 3; although the preliminary enquiry can be held without such consent, Sect. 4; and the word "offence"

in this Act means an act, neglect or default of such a description as would, if committed within the body of a county in England, be punishable, on indictment, according to the law of England for the time being in force, Sect. 7. Section 7 also defines the expression "open sea within the territorial waters of Her Majesty's dominions" as being "*any part of the open sea within one marine league of the coast measured from low-water mark.*"

A very important question therefore arises whether an offence committed on the open sea within three miles from low-water mark is now an offence committed within the Admiralty jurisdiction and therefore to be dealt with in the manner proper to such offences, or whether it can be dealt with *directly* under the Penal Code. Any act, etc., punishable under the Penal Code, which would not, if committed in England, amount to an *indictable* offence, would not be affected by this Act, but the offences under the Penal Code, which are most likely to be committed within these limits, *viz.*, murder, culpable homicide not amounting to murder, theft, criminal breach of trust, hurt and riot, are indictable offences in England, and would therefore have to be dealt with as Admiralty offences; all those offences which are not indictable in England would have to be dealt with under the Penal Code, as laid down in *Reg.* v. *Kastya Rama*, 8 *Bom. H. C. Rep. C. C.* 67; but there would be no jurisdiction to try an accused, who was not a British subject, *under the provisions of this Act*, for such an offence committed on board a foreign ship; *Reg.* v. *Keyn*, 2 *Ex. D.* 63. The mode of dealing with Admiralty offences will be discussed under the heading of Admiralty Jurisdiction.

The whole of the acts which are necessary to constitute the alleged offence must have happened in British India; *Emp.* v. *Moorga Chetty*, *I. L. R.* 5 *Bom.* 338 overruling *Reg.* v. *Lakhya Govind*, *I. L. R.* 1 *Bom.* 50, and disapproving of *Emp.* v. *Sunker Gope*, *I. L. R.* 6 *Cal.* 307; *Reg.* v. *Carr*, 10 *Q. B. D.* 76; and *Bapu Daldi* v. *The Queen*, *I. L. R.* 5 *Mad.* 23; unless the Legislature makes provision to the contrary, as is done by Sects. 3 and 4 of the Penal Code; by the statutes which regulate the punish-

ment of offences committed at sea; by Act VIII. of 1882, Sect. 9, in respect of property stolen outside the jurisdiction of the Indian Courts, and received or retained within their jurisdiction; by the *Crim. P. C.* 1882, *Sect.* 188, in respect of offences committed by European British subjects in the dominions of a Prince or State in India in alliance with Her Majesty, or by Native Indian subjects of Her Majesty at any place outside British India. The offence, also, should be begun and completed within the local limits of the Court by which it is to be enquired into and tried; *Crim. P. C. Sect.* 177; except in the cases provided for in Chap. XV. of that Code, of which Sect. 177 forms a part, where the offence is partly committed within the jurisdiction and partly without.

Section 3. *Offences committed beyond the Limits of the said Territories.*—**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.**

Section 4. *Offences committed by a Servant of the Queen within a Foreign Allied State.*—**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 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.**

Notes.

Act I. of 1849, repealed by Act XI. of 1872, gave jurisdiction to the Indian Courts over all subjects of the British Government and all persons, in civil and military service of the same Government, while actually in such service, and for six

months afterwards, and *all persons who may have dwelt for six months* within the British Indian territories in respect of all offences committed by them within the territory of *any foreign Prince or State*, provided they were found within British Indian territory after the commission of such offence. Consequently, a foreigner who had dwelt for six months in British India and subsequently committed a murder at Pekin might have been tried in British India, if subsequently to the murder he had been found there. Such is not, however, the case now. The only persons now triable in British India under *any law passed by the Governor-General in Council* for offences committed outside British India, are those mentioned in Sects. 3 and 4 of the Penal Code; and under the provisions of the *Criminal Procedure Code*, Sect. 188, European British subjects in respect of offences committed in the territories of any Prince or State *in India* in alliance with the Queen; and Native Indian subjects of the Queen in respect of offences committed *anywhere* beyond the limits of British India. Under this section a Native Indian subject of Her Majesty who commits an offence in Cyprus, can be tried for it in British India; *Emp.* v. *Sarmukh Singh*, *I. L. R.* 2 *All.* 218, a case which was decided under the Foreign Jurisdiction Act of 1872, Sects. 8 and 9, the latter of which is identical in terms with Sect. 188 of the Criminal Procedure Code. Consequently a Native Indian subject might commit adultery in England, where it is no offence, and yet be charged by the injured husband and punished for that offence in Bombay, if found there, because he is liable for the offence *as if he had committed it in the place* in British India *where he is found*. A person in the service of the Queen, who is not a British subject, is liable to the provisions of the Penal Code, by virtue of Sect. 4, but that does not give a Court in British India, where such person is found, authority to try him under Sect. 188, Cr. P. C., for an offence committed in a Native State; *Emp.* v. *Natwarai*, *I. L. R.* 16 *Bom.* 178.

British subjects on a voyage from Bhavnagar to Bombay committed criminal breach of trust in respect of goods entrusted to them by selling them *en route* at Damaun, a Portuguese settlement, and having then absconded, they were subsequently found

in British Territory; and it was held that they could be tried there for the offence they had committed; *Emp.* v. *Daya Bhima*, *I. L. R.* 13 *Bom.* 147, following *Emp.* v. *Maganlal*, *I. L. R.* 6 *Bom.* 622. The proviso to Sect. 189, Cr. P. C., has no application to a place where there is no Political Agent; *Emp.* v. *Daya Bhima*, *ubi supra*.

The orders of the Governor-General in Council, declaring over what foreign Indian territories the various High Courts have respectively jurisdiction in respect of offences committed by European British subjects, will be found in Agnew and Henderson's Code of Criminal Procedure in the Notes to Sect. 458.

The Fugitive Offenders' Act, 1881, 44 & 45 Vict. c. 69, which will be found at length in the Appendix, further enlarges the applicability of the Penal Code, by making it applicable to certain cases arising under that Act. Sect. 23 provides, "*Where any part of this Act provides for the place of trial of a person accused of any offence, that offence shall, for all purposes of, and incidental to the trial and punishment of such person, and of, and incidental to, any proceedings, preliminary, incidental to, or consequential thereon, and of, and incidental to, the jurisdiction of any Court . . . with reference to such offence, and to any person accused of such offence, be deemed to have been committed in any place in which the accused can be tried for it, and such person may be punished in accordance with the Courts (Colonial) Jurisdiction Act, 1874*," for which, see *post*, p. 15.

Sect. 22 provides that, "*a person accused of the offence (under whatever name it is known) of swearing or making any false deposition, or of giving or fabricating any false evidence, for the purposes of this Act, may be tried either in the part of Her Majesty's dominions in which such deposition or evidence is used, or in the part in which it was sworn, made, given, or fabricated, as the justice of the case may require.*"

The latter part of Sect. 28 further provides that, "*a person guilty of the offence of escaping or of attempting to escape, or of aiding or attempting to aid a prisoner to escape, by breach of prison or otherwise,* from custody under any warrant issued or endorsed in pursuance of this Act, *may be tried in any of the following parts of Her*

Majesty's dominions, namely, the part to which and the part from which the prisoner is being removed, and the part in which the prisoner escapes, and the part in which he is found.

Sect. 34, also, makes provision for the case of persons convicted in any part of Her Majesty's dominions and being found at large in any other part before the expiry of their sentence, but does not provide in so many words for their trial and punishment at the place where they may be found.

Merchandize Marks.—Act IX. of 1891, Sect. 4, provides that any person abetting in British India the commission of any act outside British India, which, if committed in British India, would be an offence under the Merchandize Marks Act, or under any sections of Chap. XVIII. of the Indian Penal Code which relate to trade, property, or other marks, may be tried and punished in any place in British India in which the abettor may be found, in the same manner as if he had committed in that place the act which he abetted.

Sect. 5. *Certain Acts not to be repealed.*—**Nothing in this Act is intended to repeal, vary, suspend, or affect any of the provisions of the Statute 3 & 4 Will. 4 c. 85, or of any Act of Parliament passed after that statute in anywise 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.**

OFFENCES ON THE HIGH SEAS.

The question whether the Indian Legislature has power to legislate with reference to offences committed on the high seas was considered at great length in the case of *Reg.* v. *Elmstone*, 7 *Bom. H. C. Rep. C. C.* 89, by *Westropp*, C. J., at p. 100.

The legislative authority of the Governor in Council was created by Act 3 & 4 Will. 4 c. 85; Sect. 43, which is to the following effect:—*The said Governor in Council shall have power to make laws and regulations for repealing, amending, or altering*

any laws or regulations whatever now in force or hereafter to be in force, in the said territories, of any parts thereof, and to make laws and regulations for all persons, whether British or Native, foreigners or others and for all courts of justice, whether established by His Majesty's charters or otherwise and the jurisdiction thereof, and for all places and things whatsoever within and throughout the whole and every part of the said territories, and for all servants of the said Company within the dominions of Princes and States in alliance with the said Company; save and except that the said Governor-General in Council shall not have the power of making any laws or regulations which shall, in any way, repeal, vary, suspend or affect any of the provisions of this Act or any of the provisions of the Acts for punishing mutiny and desertion of officers and soldiers, whether in the service of His Majesty or the said Company, or any provisions of any Act hereafter to be passed in anywise affecting the said Company or the said territories or the inhabitants thereof, or any laws or regulations which shall, in any way affect any prerogative of the Crown or the authority of Parliament, or the constitution or rights of the said Company or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any persons to the Crown of the United Kingdom or the sovereignty or dominion of the said Crown over any part of the said territories." By Act 24 & 25 Vict. c. 67 (The Indian Councils' Act), s. 22, the Governor-General in Council as by the statute constituted, was enabled to make laws and regulations for "*all persons, whether British or Native, foreigners or others and for all courts of justice whatever and for all places and things whatever within the said territories* (of India), *and for all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty.*" With the proviso, however, that this Indian Legislature should not have the power of legislating so as to repeal or in any way affect certain imperial statutes therein named, "*or any provisions of any Act passed in this present session of Parliament* (1861) *or hereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof, or which may affect the authority of Parliament.*" The special

power in the above Acts to legislate for all servants of the Government within the dominions of Princes and States in alliance with the Company or Her Majesty was extended by Act 28 & 29 Vict. c. 17, to "*all British subjects of Her Majesty within the dominions of Princes or States in India in alliance with Her Majesty, whether in the service of the Government of India or otherwise.*" By Act 32 & 33 Vict. c. 98 the Governor-General in Council was empowered to make laws and regulations for all Native Indian subjects of Her Majesty, her heirs and successors, without and beyond as well as within the Indian territories under the dominion of Her Majesty; and by Sect. 2 of the same Act it was provided that "*no law heretofore passed by the Governor-General of India or by the Governors of Madras and Bombay respectively, in Council, shall be deemed to be invalid solely by reason of its having reference to Native subjects of Her Majesty not within the Indian territories under the dominion of Her Majesty.*" This last Act was passed on account of a doubt raised by the law officers of the Crown whether Act I. of 1849 was valid, the Act giving jurisdiction over *all* British subjects in foreign States, and the law officers of the Crown being of opinion, in 1866, that in the case of offences committed in foreign States by Native Indian subjects of the Crown, the Governor-General in Council had not the power to make laws for their apprehension and punishment in British India, his power being restricted by Statutes 24 & 25 Vict. c. 67, s. 22, and 28 and 29 Vict. c. 17; *Forsyth's Collection of Cases and opinions on Constitutional Law*, p. 24.

In *Reg.* v. *Alu Paru*, *Perry's O. Ca.* 551, Sir *Erskine Perry*, referring to Sect. 43 of 3 and 4 Will. 4 c. 85, and to the words in it "within and throughout the whole and every part of the said territories," said:—"It is contended that these latter words apply to the persons who are to be legislated for, as well as to the places and things with which they are immediately connected. But the express distinction, which is made in the Act, between persons and things, lies deeply seated, I apprehend, in the principles of legislation, and corresponds with the distinction well known to jurists between personal and real statutes." And in this case Sir *Erskine Perry* expressed it as his opinion that 3 & 4 Will. 4

c. 85 had conferred power on the Indian Legislature to legislate for the high seas. With the reasons assigned in support of this opinion, the court, in the case of *Reg.* v. *Elmstone* (cited before), expressed itself dissatisfied. In this case Sir *Michael Westropp*, in delivering judgment, said (p. 107) :—'The power given both in that Statute (24 & 25 Vict. c. 67, s. 22) and in the earlier Statute (3 & 4 Will. 4 c. 85 s. 43) to legislate, not only for all persons, British and Native, but, also, for foreigners, perhaps furnishes an argument in favour of the construction which applies the words 'within and throughout the whole and every part of the said territories' in the one statute, and 'within the said territories' in the other as well to 'persons' as to 'places and things,' as it is scarcely to be supposed that a general power to legislate for foreigners beyond those territories was intended; and if the word, 'foreigners' be limited to persons within the territories, so must the words 'all persons, British or Native.' It may be said that the intention was to give power to legislate for foreigners beyond the territories so far as international law would permit, *e. g.*, for foreigners on board British registered or Anglo-Indian registered ships. It is, however, difficult to understand why the Imperial Legislature should delegate to the Indian Legislature, or to any other provincial legislature, the power to legislate *generally*, either for British subjects or foreigners in British registered ships on the high seas. Were it to do so, British subjects and foreigners in British ships might be subjected to conflicting laws in respect of their conduct on the high seas. Yet, if the construction of the Statute 3 & 4 Will. 4 c. 85, s. 43, which Sir *E. Perry* put forward in *Reg.* v. *Alu Paru*, be correct, it would seem to involve such a power. It is not improbable that had the Imperial Legislature intended to confer any power upon the Indian Legislature to legislate for the high seas beyond the maritime territory of British India, that power would have been limited to Natives of India or persons domiciled in India, and perhaps to British subjects and foreigners in ships belonging to or registered in India. No such distinction is taken in the statutes. Nothing whatever is said as to the high seas, but words are introduced which, consistently with good grammar and

the probable intention of Parliament, may be applied so as to limit the general power of legislation to the territory constituting British India . . . . The power to legislate for all servants of the Company in one statute, and for all servants of the Government of India in the other statute, respectively, within the dominions of Princes and States in alliance with the Company or Her Majesty, is special and exceptional, and furnishes a very strong reason for supposing that the previous general power of legislation conferred by the same statutes is limited to the territories of British India." And *West*, J., in *Reg.* v. *Kastya Rama*, 8 *Bom. H. C. R. C. C.* 73, said:—"It seems impossible to maintain that a general power of legislation for the high seas, where a subordinate Government can neither enforce obedience nor afford protection, is implied in the delegation to it of authority to make laws for the territory placed under it."

Thus it would appear, for the reason set forth above, that the Indian Legislature has had no power conferred on it to legislate for offences committed on the high seas, even by British subjects, and the only authority which can apply the provisions of the Penal Code to such offences is the British Parliament. The Government of India have attempted to legislate for offences committed on high seas in Act XXXI. of 1838, but as this Act has been, so far as it affects offences on the high seas, repealed by Act VIII. of 1868, no question arises now on its interpretation. This was the only Act by which the Government of India had attempted to legislate for offences committed on the high seas until the passing of the Criminal Procedure Code, Sect. 188, which by using the expression "any place out of British India" contains words wide enough to include the high seas, and it has, in the case of *Emp.* v. *Sarmukh Singh*, *I. L. R.* 2 *All.* 218, been held that those words cover an offence committed in Cyprus, but whether the Indian legislature had power to include the high seas in those words, or did as a matter of fact intend so to include them, remains to be determined in some future case.

ADMIRALTY JURISDICTION OF THE HIGH COURTS.

The present High Courts of Calcutta, Madras, and Bombay have the same Admiralty jurisdiction as that of the late Supreme Courts

(see Charters, 1862, 1865, ss. 32, 33). The jurisdiction of the late Supreme Court was that of the High Court of Admiralty in England as it stood on the 8th Dec. 1823, the date of the Letters Patent creating the Supreme Courts. The jurisdiction of the Supreme Court in Vice-Admiralty was created by commission from the High Court of Admiralty in England in 1843. The Jurisdiction thus given in Vice-Admiralty was the Jurisdiction possessed by the English High Court of Admiralty before the passing of Statute 3 & 4 Vict. c. 65, which enlarged the Admiralty jurisdiction of the English High Court of Admiralty. See *Bardot* v. *The Augusta*, 10 *Bom. H. C. R.* 116; *in re The Asia* 5 *Bom. H. C. R.* 68, 69 where it was held that the Statutes 3 & 4 Vict. c. 65, and 24 Vict. c. 10, do not extend to India.

The offences which come within the Admiralty jurisdiction were defined by the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, s. 267, but now by the Merchant Shipping Act 1894, 57 & 58 Vict. c. 60, s. 687, in the following terms :—

"*All offences against property or person committed in or at any place, either ashore or afloat, out of Her Majesty's dominions, by any master, seaman, or apprentice, who, at the time when the offence is committed, is, or within three months previously has been, employed in any British ship, shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts, and in the same places, as if such offences had been committed within the jurisdiction of the Admiralty of England, and the costs and expenses of the prosecution of any such offence may be directed to be paid as in the case of costs and expenses of prosecutions for offences committed within the jurisdiction of the Admiralty of England.*"

Sect. 689 of the last mentioned same Act provides where such offences may be tried in the following terms :—

"(1) *Whenever any complaint is made to any British consular officer—*

(a) *that any offence against property or person has been committed at any place, either ashore or afloat, out of her Majesty's*

dominions by any master, seaman or apprentice, who at the time when the offence was committed or within three months before that time was employed in any British ship; or

(*b*) *that any offence on the high seas has been committed by any master, seaman or apprentice belonging to any British ship, that consular officer may inquire into the case upon oath, and may, if the case so requires, take any steps in his power for the purpose of placing the offender under necessary restraint, and of sending him as soon as practicable in safe custody to the United Kingdom, or to any British possession in which there is a court capable of taking cognisance of the offence, in any ship belonging to Her Majesty, or to any of her subjects, to be there proceeded against according to law:*

"(2) *The consular officer may order the master of any ship belonging to any subject of Her Majesty bound to the United Kingdom, or to such British possession as aforesaid, to receive and afford a passage and subsistence during the voyage to any such offender as aforesaid, and to the witnesses, so that such master be not required to receive more than one offender for every* 100 *tons of his ship's registered tonnage; or more than one witness for every* 50 *tons of that tonnage, and the consular officer shall indorse upon the agreement of the ship such particulars with respect to any offenders or witnesses sent in her as the Board of Trade require:*

"(3) *Any master of a ship to whose charge an offender has been so committed shall, on his ship's arrival in the United Kingdom, or in such British possession as aforesaid, give the offender in the custody of some police officer or constable, who shall take the offender before a justice of the peace, or other magistrate by law empowered to deal with the matter and the justice or magistrate shall deal with the matter, as in cases of offences committed upon the high seas.*"

By Sect. 18 of 52 & 53 Vict. c. 63. "British possessions" are defined as "*any part of Her Majesty's dominions, exclusive of the United Kingdom.*"

Sect. 686 of the 57 & 58 Vict. c. 60 further provides that:—"*If any person, being a British subject, is charged with having committed any offence on board any British ship on the high seas, or in any foreign port or harbour or on board any foreign ship to which he does not belong, or, not being a British subject, is charged with having committed any offence on board any British ship on the high seas, and that person is found within the jurisdiction of any court of justice in Her Majesty's dominions, which would have had cognisance of the offence if it had been committed on board a British ship within the limits of its ordinary jurisdiction, that court shall have jurisdiction to try the case, as if it had been so committed. Nothing in this section shall be construed to alter or interfere with the Admiralty Offences (Colonial) Act*, 1849.

Law and Procedure Applicable to Offences on the High Seas.

In the case of *Reg.* v. *Thompson* 1 *B. L. R. Cr* 1, decided in 1867 before the passing of the Act 30 & 31 Vict. c. 124, the prisoner was charged, under 7 Will. 4 & 1 Vict. c. 85, s. 2, with a criminal offence on board a British ship upon the high seas and within the Admiralty jurisdiction of the Calcutta High Court, and was found guilty by a jury of an offence under Statute 11 & 15 Vict. c. 19, s. 5. The Court held that the Procedure adopted was properly the Indian procedure, followed on this point in *Emp.* v. *Barton*, *I. L. R.* 16 *Cal.* 238; but that the charge and conviction were properly founded on the English statutes, and that the punishment must be according to English law. *Peacock*, C. J., in this case, referring to Statute 12 & 13 Vict. c. 96, said :—"I can well understand that Parliament would prefer to make such persons subject to the punishment imposed by English law, rather than that of the colony; they might not be certain, what that law was, or, if aware of it, might not wish to extend it." In the case of *Reg.* v. *Elmstone*, 7 *Bom H. C. Rep. C. C.* 89, it was held that the substantive law applicable to a British born subject tried in the High Court at Bombay for destroying a British ship on the high seas, at a distance of more than three miles from the shores of British India, was the English law, and not the Indian Penal Code,

and the procedure applicable, the ordinary criminal procedure of the High Court. In this case it was contended by counsel for the prisoner that the words "the Court shall have jurisdiction to hear *and determine* the case as if the offence had been committed within their local limits," in Act 30 & 31 Vict. c. 124, s. 11 (not in operation when *Reg.* v. *Thompson* was decided), had the effect, that the offence in question, committed on the high seas, must be tried and *punished* as if committed in India. But the Court—citing Sect. 267 of the Merchant Shipping Act, 17 & 18 Vict. c. 104; and Sect. 2 of the Statute 12 & 13 Vict. c. 96 as shewing conclusively that the law of punishment prescribed by those statutes is the law of England, and Sect. 1 of 30 & 31 Vict. c. 124 which provides that "this Act shall be construed with and as part of the Merchant Shipping Act"—held that the words cited by counsel could not have the effect contended for by them. In all criminal cases, then tried in India, whether in the Mofussil or High Courts, under their Admiralty jurisdiction, it would appear that the procedure applicable is the ordinary criminal procedure of the Court trying the case; but the substantive law applicable, at any rate, up to the passing of the statute about to be mentioned, was English law and not that of the Penal Code.

Subsequently to the decision in *Reg.* v. *Elmstone*, the Imperial Legislature passed the 37 & 38 Vict. c. 27, *Courts (Colonial) Jurisdiction Act*, 1874, which applies to India, by the third section of which it is enacted that, "*when, by virtue of any Act of Parliament, now* or hereafter to be *passed, a person is tried in a court of any colony*" (which term includes British India) "*for any crime or offence committed upon the high seas or elsewhere out of the territorial limits of such colony, and of the local jurisdiction of such court, or if committed within such local jurisdiction made punishable by that Act, such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such colony and of the local jurisdiction of such court*, and to no other, *anything in any Act to the contrary notwithstanding. Provided always that if the crime or offence is a crime or offence not punishable by the law of the*

colony in which the trial takes place, the persons shall, on conviction, be liable to such punishment (other than capital punishment) as shall seem to the court most nearly to correspond to the punishment to which such person would have been liable in case such crime or offence had been tried in England."

What then is the effect of this statute? At the time of the decision of the case of *Reg.* v. *Elmstone*, it was held that none of the English Acts permitted an accused to be punished under any but English law: consequently, the charges must be drawn under the English statutes and not under the Penal Code. The present statute specifically provides that the punishment for the "crimes and offences" therein described shall be the same as is allotted to the same "crimes and offences" within the jurisdiction of the court trying the case. What then is the meaning of the term "crimes and offences?" It cannot mean the technical names by which crimes are known in England, otherwise the statutes would be of scarcely any force at all, as it would then apply only to such colonies as described crimes by exactly the same terms as are used in England, but it must mean the acts, neglects and defaults which go to make up and constitute the crime or offence, and then the meaning of the Act would be that if a person is charged in a colony with having committed any act, default, or omission which would amount to a crime or offence under English law, then, on conviction, such person would be liable to be punished as if such act, neglect, or default had occurred within the local jurisdiction of the Colonial Court. Thus having, prior to this statute, had local procedure applicable, we, by this statute, have local punishment applied, and in India such punishment would be under the Penal Code; and since a law is a command to the breach of which a sanction or punishment is attached, it would appear that the law under which a person is to be punished must be the substantive law applicable to the case, because it is the law which points out the breach to which the punishment is attached; *see Reg.* v. *Thompson*, 1 *Ben. L. R. C. C.*, at p. 9. Consequently, on the general principles of jurisprudence the Penal Code would now be the substantive law in the case of offences committed on the high seas and tried in India. If we now

look at the reasons for the judgment in the case of *Reg.* v. *Elmstone* we shall see that they lead to the same conclusion. The statute 30 & 31 Vict. c. 124, s. 11, provided that all offences of the class we are discussing should be "tried and determined" as if they had been committed within the local jurisdiction. These words are the words used in the commission of Oyer and Terminer, and under them the Commissioners pass sentences, hence the court which decided *Reg.* v. *Elmstone*, at p. 122 of 7 *Bom. H. C. Rep. C. C.*, said:—"The direction to hear and *determine* the case, as if the crime had been committed within the limits of the ordinary jurisdiction of this court, seemed to point towards the law prevailing within those limits as the substantive law applicable to the case." But the 30 & 31 Vict. 124 forms part of the Merchant Shipping Act, 1854, and this later Act specially preserves in force the 12 & 13 Vict. c. 96 the second section of which requires the punishment in all such cases to be according to the English law; therefore, it was held by the court to limit to that extent the meaning of the word "determine," and that English law was consequently the substantive law; see the reasoning at pp. 125 to 129. Now, however, the Statute 37 & 38 Vict. c. 27 has caused 12 & 13 Vict. c. 96, s. 2 to be of no effect whatever, although it does not in so many words repeal it, and we have the word "determine" not only left to have its full force as in England, but the local courts are definitively empowered to punish in such a case as if the offence had been committed within the limits of the local jurisdiction. Thus it would appear that if the case of *Reg.* v. *Elmstone* had now to be considered, the court would hold that the local law was the substantive law and not the English law.

This restores the law to the state in which it was under 9 Geo. 4 c. 74 (an Act for improving the Administration of Criminal Justice in the East Indies), which by Sect. 25 enacts "*that all offences prosecuted in any of her Majesty's Courts of Admiralty shall upon every first and subsequent conviction, be subject to the same punishment, whether of death or otherwise as if such offences had been committed upon the land,*" *i. e.*, upon the land of British India, for the Act goes on to provide for the punishment of acts upon the land of India. This section is one of the few sections of that Act which

were left unrepealed by Act X. of 1875 and by the English repealing Acts of 1874, and although its operation was suspended by the Acts referred to in the case of *Reg.* v. *Elmstone*, it is now restored to full force by the 37 & 38 Vict. c. 27.

The Criminal Procedure Code, 1882, Sect. 221, provides that "*the law and section of the law against which the offence is said to have been committed shall be mentioned in the charge*," and Sched. 5 to that Act, Sect. 28, shows by the forms of charges therein given that this provision is to be carried out by alleging that the offence charged is "punishable under" a certain section of the Penal Code, consequently offences on the high seas when tried in India should now be charged as if they had been committed on land within the local jurisdiction; for it will be absurd still to charge them as punishable under an Imperial statute when the Act set out before says they are to be punished under the local Acts and not otherwise.

The acts, however, which are charged as an offence under the Penal Code, must be such as would, at the same time, constitute an offence punishable under English law; *Emp.* v. *Gunning*, *I. L. R.* 21 *Cal.* 782.

The arguments used in the foregoing pages, and the law laid down as to the form of charge proper for offences committed on the high seas, have been approved of, and adopted by the High Court at Bombay in *Emp.* v. *Shaik Abdul Rahiman*, *I. L. R.* 14 *Bom.* 227.

The Merchant Shipping Act, 1894, Sect. 686 it will be seen repeats the proviso at the end of Sect. 21 of 18 & 19 Vict. c. 91, that nothing in that section shall be construed so as to interfere with 12 & 13 Vict. c. 96, *i. e.* The Admiralty Offences (Colonial) Act, 1849, which requires punishments inflicted in colonies to be according to English law, but the present Merchant Shipping Act *does not repeal* the statute 37 & 38 Vict. c. 27 hereinbefore referred to, and as that refers to Acts of Parliament *thereafter* to be passed, the punishment to be inflicted is still that provided for by this last mentioned Act, as before the passing of the present Merchant Shipping Act.

If the act, neglect or default is not punishable by the local law, if committed within the local jurisdiction, then the case would come under the latter part of Sect. 3 of the 37 & 38 Vict. c. 27, and in this event it would still probably be proper and necessary to draw the charge under the English law most nearly applicable to the circumstances of the case.

As to the limits of Admiralty jurisdiction, especially as to the interval between high and low-water mark, see *Reg.* v. *Elmstone*, 7 *Bom. H. C. R.* 105; and *Reg.* v. *Pauline*, 9 *Jur.* 286, *S. C.* 3 *Notes of Cases*, 616; *Reg.* v. *Cunningham*, 28 *L. J. N. S. Mag. Ca.* 66; and 3 *Haggard Adm. Rep.* 275, 283, therein referred to. Whether the Admiralty has jurisdiction "in harbours below the bridges of great rivers near the sea, which are partly enclosed by the land, will be in most cases a question of fact rather than law, and determinable by local evidence. It is plain, however, that the Admiralty can have no jurisdiction in any rivers, or arms or creeks of the sea, within the bodies of counties, though within the flux and reflux of the tide"; 2 *East's Pleas of the Crown*, p. 803.

PIRACY.

Piracy, *jure gentium*, is justiciable everywhere. Piracy "is only a sea term for robbery—piracy being a robbery within the jurisdiction of the Admiralty . . . . If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself or any of the goods, with a felonious intention, in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy;" *Rex* v. *Dawson* 13 *State Trials*, 451. And the same, of course, holds whether the dispossession be by mariners or passengers; *Attorney-General of Hong-Kong* v. *Kwok-a-Sing*, *L. R.* 5 *P. C.* 179. In this last case it appeared that it is provided in the Hong-Kong Ordinance 2 of 1850, that where it may appear to a magistrate or court that there is a probable cause for believing that a Chinese, who has taken refuge at Hong-Kong, has committed "any crime or offence against the laws of China," he may be imprisoned with a view to his being surrendered to the Government of China. On this it was held that in certain circumstances piracy

would come within the Ordinance; as for example, if a Chinese went from the Chinese coast to plunder ships at sea, returning again to China with his plunder.

Where some of a large number of Chinese coolies, who were being taken from China to Peru in a French ship, killed the captain and several of the French crew, and then took the ship back to China, they were held to have been guilty of piracy *jure gentium*. But the piracy was held not to be an offence against the law of China within the meaning of the Ordinance. If they committed an act against the municipal law of any nation, it was against that of France; and if they were punishable by the law of China, it was only because they had committed an act of piracy, which *jure gentium*, is justiciable everywhere; *Attorney-General of Hong-Kong v. Kwok-a-Sing*, *L. R.* 5 *P. C.* 200.

Admiralty Jurisdiction in the Mofussil Courts.

We have referred as yet only to the Admiralty jurisdiction of the High Courts, and till the passing of the Statute 23 & 24 Vict. c. 88, the Mofussil Courts had no such jurisdiction. But by 23 & 24 Vict. c. 88, s. 1, the provisions of 12 & 13 Vict. c. 96 were extended to India. Sect. 1 of 12 & 13 Vict. c. 96 provides 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 or admirals have power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek, or place, shall be brought for trial to*" British India, "*then, and in every such case, all magistrates, justices of the peace, public prosecutors, juries, judges, courts, public officers, and other persons in India shall have and exercise the same jurisdiction and authorities for the inquiring of, trying, hearing, determining, and adjudging such offences, and they are hereby respectively authorised, empowered, and required to institute and carry on all such proceedings for the bringing of such person so charged, as aforesaid, to trial, and for and auxiliary to and consequent upon the trial of any such person for any such offence*

wherewith he may be charged as aforesaid, as by the law of" British India "*would and ought to have been had and exercised or instituted and carried on by them respectively, if such offence had been committed, and such person had been charged with having committed, the same upon any waters situate within the limits of*" British India, "*and within the limits of the local jurisdiction of the courts of criminal justice.*"

By Sect. 2:—"*Provided always that if any person shall be convicted before any such court of any such offence, such person so convicted shall be subject and liable to, and shall suffer all such and the same pains, penalties, and forfeitures as by any law or laws now in force persons convicted of the same respectively would be subject and liable to, in case such offence had been committed and were required of, tried, heard, determined, and adjudged in England, any law, statute, or usage to the contrary notwithstanding.*"

Sect. 3 provides that:—"*Where any person shall die in*" British India "*of any stroke, poisoning, or hurt, such person having been feloniously stricken, poisoned, or hurt upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, or at any place out of*" British India, "*every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before the fact to murder, or after the fact, to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in*" British India "*in the same manner in all respects as if such offence had been wholly committed in*" British India; "*and if any person in*" British India "*shall be charged with any such offence as aforesaid in respect of the death of any person who having been feloniously stricken, poisoned, or otherwise hurt, shall have died of such stroke, poisoning, or hurt upon the sea, or in any haven, river, creek, or place where the admirals or admiral have power, authority, or jurisdiction, such offence shall be held for the purpose of this Act to have been wholly committed upon the sea.*"

The Act 37 & 38 Vict. c. 27, s. 3, modifies Sect. 2 of 12 & 13 Vict. c. 96 above quoted, by making the offence punishable under the local law, if there were any such applicable to the offence of which the person might be convicted in place of under English law.

Claim to be tried by High Court.—By Sect. 2 of Act 23 & 24 Vict. c. 88, it is provided that:—"*Where any person within any place in India is charged with the commission of any offence, in respect of which jurisdiction is given by* Act 12 & 13 Vict. c. 96; *or where any person charged with the commission of any such offence is brought for trial under the said Act to any place in India; if at any time before his trial he makes it appear to the court exercising criminal jurisdiction, in the place where he is so charged or brought for trial, that in case the offence charged had been committed in such place, he could have been tried only in the Supreme Court of one of the three presidencies in India, and claim to be tried by such Supreme Court accordingly, the said court exercising criminal jurisdiction, as aforesaid, shall certify the fact and claim to the governor of such place or chief local authority thereof, and such governor or chief local authority thereupon shall order and cause the person charged to be sent in custody to such one of the presidencies, as such governor shall think fit, for trial before the Supreme Court of such presidency; and the said Supreme Court and all public officers and other persons in the presidency shall have the same jurisdiction and authority, and proceed in the same manner in relation to the person charged with such offence, as if the same had been committed, or originally charged to have been committed, within the limits of the ordinary jurisdiction of such Supreme Court.*"

CHARGE.

When a person, who would not but for special circumstances be liable to the jurisdiction of a particular court, is tried before that court, the charge ought to contain such a statement of facts as is sufficient to show the jurisdiction of the court. *Thus, if a person is liable to punishment under the Penal Code by virtue of Sect. 4, the charge should run as follows:—*

That you, on or about the day of , then being a servant of and in the service of Her Majesty the Queen-Empress, at within the dominions of , a Prince (or State) in alliance with Her Majesty the Queen-Empress, did, &c.

If the jurisdiction be given by one of the notifications of the Government of India issued in September 1874, *the charge should run as follows :—*

That you, on or about the day of , then being a European British subject and a Christian, and residing in (*here insert place of residence which must be one of the places named in such notifications*) did at aforesaid, &c.

If the offence be committed within the admiralty jurisdiction, the form of the charge should be as follows, or with such modifications as may be necessary to meet the circumstances of the particular case :—

That you, on or about the day of , then being a British subject on board the British ship , did, on the High Seas, and within the jurisdiction of the court, &c.

CHAPTER II.

GENERAL EXPLANATIONS.

Sect. 6. *Definitions to be subject to exceptions.*—**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.**

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."**

Sect. 7. *Expression always used in conformity with explanation.*—**Every expression which is explained in any part of this Code is used in every part of this Code in conformity with the explanation.**

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

Sect. 9. *Number.*—**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.**

Note.

The word "include" is enlarging, not restrictive, and does not mean that the words must apply exclusively to that which they are to include; *ex parte Ferguson*, L. R. 6 Q. B. at p. 291; *The Gauntlet*, L. R. 3 A. & E. at p. 388.

Sect. 10. *Man—Woman.*—**The word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age.**

Sect. 11. *Person.*—**The word "person" includes any company or association or body of persons, whether incorporated or not.**

Sect. 12. *Public.*—**The word "public" includes any class of the public, or any community.**

Sect. 13. *Queen.*—**The word "Queen" denotes the sovereign for the time being of the United Kingdom of Great Britain and Ireland.**

Sect. 14. *Servant of the Queen.*—**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 & 22 Vict. c. 106, entitled "An Act for the better Government of India," or by or under the authority of the Government of India or any Government.**

Sect. 15. *British India.*—**The words "British India" denote the territories which are or may become vested in Her Majesty by the said Statute 21 & 22 Vict. c. 106, entitled "An Act for the better Government of India."**

Sect. 16. *Government of India.*—**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.

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

The meaning of the word "Government" is extended by Sect. 263 A, so far as regards offences relating to postage

Sect. 18. *Presidency.*—The word "Presidency" denotes the territories subject to the Government of a presidency.

Sect. 19. *Judge.*—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.

(*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 punchayet 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 [illegible] to another court, is not a judge.

Sect. 20. *Court of Justice.*—**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.**

Illustration.

A punchayet acting under Regulation VII., 1896, of the Madras Code, having power to try and determine suits, is a court of justice.

Sect. 21. *Public Servant.*—**The words "public servant" denote a person falling under any of the descriptions hereinafter following, viz.:—**

First, **Every covenanted servant of the Queen.**

Second, **Every commissioned officer in the military 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 authorised by a court of justice to perform such duties.**

Fifth, **Every juryman, assessor, or member of a punchayet, 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.

Note.

A person appointed by the Government Solicitor with the approval of Government, and under an arrangement made by the Governor-General in Council, to act as prosecutor in the Calcutta Police Court, is a public servant; *Emp.* v *Butto Kristo*, *I. L. R.* 3 *Calc.* 497.

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.**

The word "officer" in this clause means a person employed to exercise to some extent a delegated function of Government. He must be either himself armed with some authority or representative character, or his duties must be immediately auxiliary to those of some one who is so armed. Hence an *Uzaphatdar*, *i. e.*, a lessee of a village who has undertaken to keep an account of its forest revenues and pay a certain proportion to the Government, keeping the remainder for himself, is not an officer, and therefore not a public servant under this clause, *Reg.* v. *Ramajirav Jibajirav*, 12 *Bom. H. C. Rep.* 1.

A peon of the Collector's Court who received no fixed pay from the Government, but was remunerated by fees whenever employed, to serve process, and who was placed on the register of supernumerary poons, was held a public servant; *Reg.* v. *Ramkrishna*

Das, 7 *B. L. R.* 446, *and sub nom. Reg.* v. *Ramkisto Doss*, 16 *W. R. Crim.* 27.

A servant of a bank carrying on the treasury business of the Government, and receiving a sum of money on account of Government, is a servant of the bank, and not a public servant; *In re Modun Mohun*, *I. L. R.* 4 *Calc.* 376; nor is a police officer under suspension, *Reg.* v. *Dinanath*, 8 *B. L. R. App.* 58.

A peon employed by the manager of an estate under the charge of the Court of Wards is not a public servant; *Reg.* v. *Arayi*, *I. L. R.* 7 *Mad.* 17.

A carter employed by Government is not a public servant; *Reg.* v. *Nachimuttu*, *ib.* 18.

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

Notes.

An engineer who receives and pays to others municipal moneys is a public servant within the meaning of this clause, although he may not have the power of sanctioning the expenditure of such moneys; *Reg.* v. *Nantaram Uttamram*, 6 *Bom. H. C. R. C. C.* 64. So is every registering officer appointed under Act VIII., of 1871, s. 82. A Municipal Corporation is not a public servant as distinct from its individual members; *Emp.* v. *The Municipal Corporation of Calcutta*. *I. L. R.* 3 *Calc.* 758; 2 *C. L. R.* 520.

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.

Note.

Any person, whether receiving pay or not, who chooses to take upon himself the responsibilities belonging to the position of a public servant, and performs those duties, and is recognized as filling the position of a public servant, must be regarded as one; *Emp.* v. *Parmeshar Dat, I. L. R.* 8 *All.* 201.

By Act IX of 1894, Sect. 23, prisoners appointed as officers of prisons are public servants.

Sect. 22. *Moveable property.*—**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.**

Note.

Earth when severed from the soil is moveable property; *Emp.* v. *Shivram, I. L. R.* 15 *Bom.* 702; disapproving of *Emp.* v. *Kotayya I. L. R.* 10 *Mad.* 225; and approving of *Reg.* v. *Tamma Ghantaya, I. L. R.* 4 *Mad.* 228, in which it was held that salt collected and removed from a swamp in which it had crystallized was moveable property.

Sect. 23. *Wrongful gain.*—*Wrongful loss.*—**"Wrongful gain" is gain by unlawful means of property to which the person gaining it is not legally entitled. "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.**

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 any property, as well as when such person is wrongfully deprived of property.

Fees payable to a College for attendance on lectures are property within this section; *Emp.* v. *Soshi, I. L. R.* 15 *All.* 210.

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

Notes.

The word "dishonest" is not used in the Penal Code in its widest popular sense. In order to make an action dishonest, there must be the intention of causing wrongful gain to one person or wrongful loss to another; and that loss must be of property. A person who attempts to obtain by means of a forged *sunnud* from a Settlement officer the recognition that he is entitled to the title of "*Loskur*" does not do it dishonestly, because there is no intention to cause wrongful gain or loss to any one; *Jan Mahomed* v. *Emp.*, *I. L. R.* 10 *Calc.* 584. A student who forges the certificate of a Head Master of a school in order to be allowed to sit at an examination, does not do so dishonestly within the meaning of this section; *Emp.* v. *Haradhan*, *I. L. R.* 19 *Calc.* 380; where the accused had forged a certificate from the Principal of a College which would enable him to attend lectures at another College on paying less than the full amount of fees, it was held that he had caused wrongful gain to himself and wrongful loss to the College; *Emp.* v. *Soshi*, *I. L. R.* 15 *All.* 210. See also cases cited under Theft and Forgery.

Sect. 25. *Fraudulently.*—**A person is said to do a thing "fraudulently" if he does that thing with intent to defraud, but not otherwise.**

Notes.

Looking at the definitions given by Webster of "fraud" and "defraud," to defraud is to deprive of right, to keep possession, or to withhold by deception deliberately practised with a view to gaining an unlawful advantage; but the decided cases give a rather wider interpretation to "fraud" and define it as an intention to deceive, whether from any expectation of advantage to the party himself, or from ill-will to the other, is immaterial; *Haycraft* v. *Creasy*, 2 *East*, *p.* 108, followed in *Emp.* v. *Vithal Narayen*, *I. L. R.* 13 *Bom.* 515 *n*; which was also followed in *Lolit Mohun* v.

Emp. I. L. R. 22 *Calc.* 313. Fraud is a term which should be reserved for something dishonest and morally wrong, and should not be used where "illegality" is really the appropriate expression; *ex parte Watson*, 21 *Q. B. D.*, *p.* 309. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false; *Derry* v. *Peek*, 14 *App. Ca.* 337.

There may be the intent without the power to defraud; *Reg.* v. *Nash*, 2 *Den. C. C.* 500.

Where a person in the course of an action, brought against him to gain possession of property, uses a forged document for the purpose of supporting his title, though there was no necessity for the use of it, such use is clearly fraudulent; *Emp.* v. *Dhumum Kazee*, *I. L. R.* 9 *Calc.* 53. It is fraudulent to fabricate a recommendation of fitness for a vacant post and a letter of appointment thereto; *Abdul Hamid* v. *Emp.*, *I. L. R.* 13 *Calc.* 349. The fabrication of receipts for the payment of rent, in lieu of genuine receipts, previously given, which had been lost, is not dishonest or fraudulent; *Emp.* v. *Shee Dayal*, *I. L. R.* 7 *All.* 459. See also *Emp.* v. *Syed Hussain*, *ib.* 403. The intention to produce a false belief in the mind of a settlement officer that a person is entitled to the title of "*Loskur*" is not an intention to defraud; *Jan Mahomed* v. *Emp.*, *I. L. R.* 10 *Calc.* 584. The intention of a person to screen himself, from the detection of a fraud which he has already committed is not a fraudulent intention; *Abdul Hamid* v. *Emp.*, *ubi supra*. The forgery of a Head Master's certificate in order to enable a person to be admitted to an examination is not fraudulent under this section; *Emp.* v. *Haradhan*, *I. L. R.* 19 *Calc.* 380. See also *Emp.* v. *Soshi* referred to under Sect. 25 and the cases cited and discussed under Forgery.

When fraud has to be proved as a constituent part of an offence, in order to show the fraudulent intent, acts other than those charged, but of a like nature with them, may be given in evidence; *Emp.* v. *Vajiram*, *I. L. R.* 16 *Bom.* 414, and the cases cited in the judgment of *Telang*, J.

Sect. 26. *Reason to believe.*—**A person is said to have "reason to believe" a thing if he has sufficient cause to believe that thing, but not otherwise.**

Note.

The question to be determined under this section is not whether a man *believes*, but whether he has *reason to believe*. The word "believe" is much stronger than the word "suspect," and involves the necessity of showing that the circumstances were such that a reasonable person must have felt convinced in his mind that certain other circumstances existed, *e. g.*, that the property with which he was dealing was stolen property; *Emp.* v. *Rango Timaji*, *I. L. R.* 6 *Bom.* 402.

In order to shew that an accused person had reason to believe that circumstances existed which would make his acts criminal, evidence may be given of other acts similar to those actually charged against him; *Emp.* v. *Vajiram*, *I. L. R.* 16 *Bom.* 414, and the cases cited in the judgment of *Telang* J.

Sect. 27. *Property in possession of wife, clerk or servant.*—**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.**

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.**

Sect. 28. *Counterfeit.*—**A person is said to "counterfeit" who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practised.**

Explanation 1.—**It is not essential to counterfeiting that the imitation should be exact.**

Explanation 2.—**Where a person causes one thing to resemble another thing, and the resemblance is such that a person might be deceived thereby, it shall be presumed until the contrary is proved, that the person so causing the one thing to resemble the other, intended by means of**

that resemblance to practise deception, or knew it to be likely that deception would be thereby practised.

Sect. 29. *Document.*—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.

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 cheque 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 word "pay to the holder," or words to that effect, had been written over the signature.

A writing which is not legal evidence of the matter expressed, may yet be a document within the meaning of this section if the parties framing it believed and intended it to be evidence of such matter; *Reg.* v. *Shifait Ali*, 2 *B. L. R. A. Cr. J.* 12, and 10 *W. R. Crim.* 61. In this case the document was a draft petition intended to be used as evidence of its contents. Thus, for an offence to be committed under Sect. 464, it is not necessary that the document as to which the forgery is alleged should, apart from such forgery, be legal evidence of the matter in such document contained.

Sect. 30. *Valuable security.*—**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.**

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."

Notes.

A valuable security is not only a document which *is*, but also one which *purports to be*, a document described in this section consequently an unstamped document which is not receivable in evidence in a civil court may be a valuable security; 7 *Mad. H. C. Rep. App.* 26; *Emp.* v. *Ramasami*, *I. L. R.* 12 *Mad.* 148.

A bill of exchange which wants the drawer's signature, but is otherwise complete, is, in the hands of the intended drawer, a security for payment of money; *Reg.* v. *Bowerman* [1891], 1 *Q. B.* 112.

A settlement of accounts in writing, although not signed by any person, is a "valuable security" within the meaning of this section; *Reg.* v. *Kapalavaya Sareya*, 2 *Mad. H. C. Rep.* 247.

A copy of a lease is not ; *Reg.* v. *Khusal Hiraman*, 4 *Bom. H. C. R. C. C.* 28 ; a deed of divorce is a valuable security within this section ; *Reg.* v. *Azimooddeen*, 11 *W. R. Crim.* 15. A *sunnud* granting a title is not a valuable security; *Jan Mahomed* v. *Emp. I. L. R.* 10 *Calc.* 584.

Sect. 31. *A will.*—**The words "a will" denote any testamentary document.**

Sect. 32. *Acts include omissions.*—**In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions.**

Sect. 33. *Acts Omissions.*—**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.**

Sect. 34. *Joint act.*—**When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.**

Sect. 35. *Joint intent.* **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.**

Sect. 36. *Effect caused partly by act and partly by omission.*—**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.**

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

Sect. 37. *Participation in series of acts.*—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.

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 according 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 jailers, and as such have 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 jailer, 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.

Sect. 38. *Division of criminal act.*—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.

Illustrations.

A attacks Z under circumstances of such 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.

Sect. 39. *Voluntarily.*—A person is said to cause an effect "voluntarily" when he causes it by means 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.

Sect. 40. *Offence.*—Except in the chapter and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV. and in the following sections, namely, Sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225,

327, 328, 329, 330, 331, 347, 348, 388, 389, and 445, the word "offence" denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

And in Sections 141, 176, 177, 201, 202, 212, 216, and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

Notes.

In the Penal Code as it was originally passed, the word "offence" denoted only a thing punishable under the Code. Act XXVII. of 1870 amended the section and brought it into the form in which it now appears, except that, in the second clause, certain sections have been added by Act VIII. of 1882 and Act X. of 1886. The section as it is now printed contains all the amendments. Anything committed out of British India which is by a Statute made punishable as if it had been committed in British India at the place at which the offender is found would be a thing punishable under this Code.

Nothing contained in the amending Act XXVII. of 1870 is to be taken to affect any of the provisions of any special or local law (*Sect.* 15, *Act* XXVII. *of* 1870).

No act or omission outside British India is an "offence" under this Code, unless this Code or some other enactment provides otherwise; *Emp.* v. *Gunpatrao, I. L. R.* 19 *Bomb.* 105; following *Reg.* v. *Elmstone*, 7 *Bomb. H. C. Rep. C. C.* p. 118; and *Emp.* v. *Moorgya Chetty, I. L. R.* 5 *Bomb.* p. 347. See also *In re Mukund Babu, I. L. R.* 19 *Bomb.* 72.

Sect. 41. *Special law.*—**A "special law" is a law applicable to a particular subject.**

Sect. 42. *Local Law.*—**A "local law" is a law applicable only to a particular part of British India.**

Sect. 43. *Illegal—Legally bound to do.*—**The word "illegal" is applicable to everything 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.

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

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

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

Sect. 47. *Animal.*—The word "animal" denotes any living creature other than a human being.

Sect. 48. *Vessel.*—The word "vessel" denotes anything made for the conveyance by water of human beings, or of property.

Sect. 49. *Year—Month.*—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.

Sect. 50. *Section.*—The word "section" denotes one of those portions of a chapter of this Code which are distinguished by prefixed numeral figures.

Sect. 51. *Oath.*—The word "oath" includes a solemn affirmation substituted by law for an oath, and any declaration required or authorised 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.

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

Notes.

In deciding whether an act is done with due care and attention, regard must be had to the position of the person doing the act

and what might not be due care and attention in an educated man in charge of a large office, might nevertheless be held to be such in one of his subordinates; *Bhawoo* v. *Mulji*, *I. L. R.* 12 *Bom.* 377.

A police officer, seeing a horse like one lost by his father tied up in a person's barn, seized it and arrested the person for theft without making any further enquiries; it was held that this was not done in good faith; *Shco Surur Sahai* v. *Mahomed Fazil*, 10 *W. R. Cr.* 20.

A man ignorant of surgery performing a dangerous operation, can scarcely be said to act in good faith; *Sukaroo* v. *Emp.*, *I. L. R.* 14 *Calc.* 566.

Sect. 58. *Offenders sentenced to Transportation how to be dealt with until Transportation.*—**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.**

Sect. 59. *Transportation instead of Imprisonment.*—**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.**

Notes.

This section did not appear in the original draft of the Penal Code. In the report made by the Indian Law Commissioners in 1837, at p. 2 of their notes, they say:—"It will be seen that, throughout the Code, wherever we have made any offence punishable by transportation, we have provided that the transportation shall be for life," and they then proceed to give their reasons for so providing. The Commissioners who made a second report on the 24th June 1847, wrote at p. 163:—"The second punishment, transportation may be substituted for death in all the capital cases. It is not allowed for any term short of life." Again, at p. 172, they report:—"With respect to transportation, from the absence of objection, it may be concluded that there is a general consent to the principle that the punishment shall be invariably for life." These remarks apply only to *principal* offences, the abetment of an offence, where not punishable by the same punishment as the principal offence, being punishable by imprisonment or fine only, as is the case in the Code itself, there being in the original bill no section dealing with attempts to commit offences. In the present Code, as passed, every *principal* offence punishable by

transportation was punishable by transportation for life and for no other term; *Reg.* v. *Meriam* 1 *B. L. R. A. Cr.* 5; 10 *W. R. Cr.* 10. Sects. 121A, and 124A, however, made part of the Penal Code by Act XXVII. of 1870, provide for the offences described therein transportation for life *or any shorter* term, and under Sect. 511, an attempt to commit an offence punishable by transportation for life may be punished by a term of transportation not exceeding ten years.

A sentence of transportation, for a *principal* offence, or for an offence punishable as a principal offence, for a term less than life, can only be passed under this section; consequently, when an offender is punishable either with transportation for life, or with imprisonment for a term which may extend to ten years, if a sentence of transportation for a term less than life is awarded, the term cannot exceed ten years; *Reg.* v. *Naiada*, *I. L. R.* 1 *All.* 43.

No sentence of transportation for less than seven years can be passed under this section on any charge; *Reg.* v. *Gour Chunder Roy*, 8 *W. R. Cr.* 2; but *this section* does not curtail the right of a court to pass a sentence of transportation for a shorter time under any other section which so provides.

The provisions of this section must be read in conjunction with those of the Criminal Procedure Code. Therefore, an ordinary magistrate, who can only sentence to two years' imprisonment, cannot sentence to transportation for seven years or more in lieu thereof, merely because the offence before him is *punishable* with imprisonment for seven years and upwards; but an officer empowered under Sect. 36 of the Criminal Procedure Code to imprison up to seven years, having passed this maximum sentence, may commute it for seven years' transportation; *Reg.* v. *Boodhoo*, 5 *R. C. C. Cr.* 20, 3 *Mad. Jur.* 151, and 9 *W. R. Cr.* 6.

To bring this section into operation, the punishment must be seven years imprisonment for one offence alone, and cannot be made up by adding two sentences together, and then commuting the amalgamated period to transportation; *Reg.* v. *Mootkee Kora*, 2 *W. R. Cr.* 1; *Reg.* v. *Shonaullah*, 5 *W. R. Cr.* 44; *Reg.* v. *Gour*

Chunder Roy, 8 *W. R. Cr.* 2; nor by adding a present sentence to an unexpired portion of another sentence; *Reg.* v. *Sakya valad Kavji*, 5 *Bom. H. C. R. C. C.* 36.

A was convicted of an attempt to commit rape, and was sentenced by the judge to seven years' imprisonment, which he commuted to transportation for the same period. Held that under Sects. 376 and 511 a sentence of *imprisonment* for the offence committed could not be more than five years, and such sentence could not be commuted to transportation for a longer period, although, if the sentence of transportation had been passed in the first instance, it might have been for ten years; *Reg.* v. *Meriam*, 1 *Ben. L. R. A. Cr.* 5 and 10 *W. R. Cr.* 10.

This section does not authorize the substitution of transportation for the imprisonment to which a court can sentence an offender, in default of payment of a fine; *Kunhussa* v. *Reg.*, *I. L. R.* 5 *Mad.* 28.

Sect. 60. *Sentence of Imprisonment wholly or partially rigorous or simple.*—**In every case in which an offender is punishable 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.**

Sect. 61. *Forfeiture of Property.*—**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.**

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.

Sect. 62. *Forfeiture of property of Offenders punishable with Death, Transportation, or Imprisonment.*—**Whenever any person is convicted of an offence punishable with death, the court may adjudge that all his property, movable and immovable, 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 movable and immovable estate during the period of his transportation or imprisonment shall be forfeited to Government, subject to such provision for his family and dependents as the Government may think fit to allow during such period.**

Notes.

Forfeiture of property is a punishment of which the infliction should be reserved for offences of the most atrocious kind, or for offences committed under the most aggravated circumstances, for, by such punishment, not only is the prisoner punished, but his family is impoverished; *Reg.* v. *Mahomed Akhir*, 12 *W. R. Cr.* 17. No forfeiture at all can take place on sentence less than transportation or seven years' imprisonment; *Reg.* v. *Kripomoyee Chassanee*, 8 *W. R. Cr.* 35.

Sect. 63. *Amount of Fine.*—**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.**

Notes.

The provisions of Sect. 63-70 apply to all fines imposed under the authority of any Act of the Legislative Council of India thereafter to be passed, unless it contains an express provision to the contrary; Act I of 1868, Sect. 5. By Ben. Act V of 1867

the same sections were applied to all fines imposed by any future Act of the Bengal Legislative Council.

The description of fine which it is the object of the section to prohibit is one which it would be impossible or very difficult for the accused person to pay, or wholly disproportioned to the character of the offence ; *In re Abdoor Rahman*, 7 *W. R. Cr.* 37.

Sect. 64. *Imprisonment in Default of Payment of Fine.*—**In every case of an offence punishable with imprisonment as well as fine, in which the offender is sentenced to a fine, whether with or without imprisonment, and in every case of an offence punishable with imprisonment or fine, or with fine only, in which the offender is sentenced to 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 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.**

Notes.

This section is now in the form in which it appears as amended by Acts VIII of 1882 and X of 1886. In it the word "offence" denotes anything punishable under the Penal Code or under any special or local law ; Sect 40. This was introduced by Act VIII of 1882, and does away with the Madras ruling that, where the accused was convicted under Section 48 of Act XXIV of 1859, and sentenced to pay a fine, or, in default, be imprisoned, the award of imprisonment in default of payment of fine was irregular, this action only applying to offences under the Code ; 7 *Mad. H. C. Reps. App.* 22.

Sect. 65. *Limit of term of imprisonment when the offence is punishable with Imprisonment as well as Fine.*—**The term for which the court directs the offender to be imprisoned in default of payment of a fine, shall not exceed one-fourth the term of imprisonment which is the maximum fixed**

for the offence, if the offence be punishable with imprisonment as well as fine.

Sect. 66. *Description of Imprisonment.*—**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.**

Sect. 67. *Term of Imprisonment when the Offence is punishable with Fine only.*—**If the offence be punishable with fine only, the imprisonment, which the court imposes in default of payment of the fine, shall be simple, and 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.**

Notes.

In the case of an offence punishable by fine and imprisonment, *or* fine only, and the magistrate fines only, but allots imprisonment in default of payment of fine, the term of imprisonment is governed by this section, not Sect. 65; *Reg.* v. *Chunder Pershad Singh*, 10 *W. R. Cr.* 30. In Sects. 65, 66, and 67, the word "offence" denotes anything punishable under the Penal Code, or under any special or local law; *Sect.* 40.

Sect. 68. *Imprisonment to terminate upon Payment of the Fine.*—**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.**

Notes.

The power of levying the fine is restricted to the court sentencing the offender, but the word "court" is not restricted to the particular person who held the office at the time the offender was sentenced. Therefore, the successor of a session judge may levy

a fine imposed by his predecessor, and the same rule applies to other officers by whom fines are imposed; *Chunder Coomar Mitter* v. *Modhoosoodun Dey*, 9 *W. R. Cr.* 50.

Sect. 69. *Payment of Proportional Part of Fine.*—**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 payment 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 later 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 later time while A continues in imprisonment, A will be immediately discharged.

Notes.

A prisoner was sentenced to imprisonment and fine, and in default of payment of fine to a further term of imprisonment. He paid a portion of the fine, but that fact not having been communicated to the jailer, underwent the full term of imprisonment. Held, that the court had no power to order the fine to be refunded; *Reg.* v. *Natha Mula*, 4 *Bom. H. C. R. C. C.* 87.

Sect. 70. *Fine may be levied within Six Years—Death of Offender.*—**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.**

Notes.

See Sects. 386 to 389 of the Criminal Procedure Code, 1882.

The law has provided for the distress and sale of movable property only, and there is no way in which immovable property may be made liable to pay the fine. Immovable property cannot, therefore, be proceeded against even after the death of the offender; *Reg.* v. *Lallu Karwar*, 5 *Bom. H. C. R. C. C.* 63. Imprisonment in default of payment of fine is not a satisfaction of the fine, but a punishment for contempt; *Reg.* v. *Moohoosoodhun*, 3 *W. R. Cr.* 61; and the fine may be recovered by distress within six years, even though the full term of imprisonment in default has been undergone. The bar of six years provided by the section may save the property of the accused, but not his personal arrest. The liability for any sentence of imprisonment, awarded in default of payment of fine, continues after the expiration of the six years; *Emp.* v. *Ganu Sakharam*, *B. R. 8th October* 1884.

Quære, whether, after the death of an offender, his immovable property is not liable in respect of a fine imposed upon him; 4 *W. R., C. L.*, 6; *Emp.* v. *Sita Nath*, *I. L. R.* 20 *Calc.* 478; but if so no distress can issue against such property; *ib.*

Sect. 71 *Limit of Punishment of Offence made up of several parts.*—**Where anything 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 of his offences, unless it be so expressly provided.**

Where anything is an offence falling within two or more separate definitions of any law in force for the time being, by which offences are defined or punished, or where several acts of which one or more could by itself or themselves constitute an offence, constitute when combined a different offence, the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences.

Illustrations.

(*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 up the whole beating. 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 Y.**

Notes.

In this section the word "offence" denotes anything punishable under the Penal Code, or under any special or local law; *Sect.* 40.

The first clause of this section evidently refers to the case mentioned in Ill. (*a*), and to others of a similar nature, *e.g.*, a thief who goes into a building and steals a number of articles from different parts of it. The first part of the second clause provides for acts the whole of which taken together may be looked at as constituting an offence which may fall under two or more separate definitions of law, according to the view which may be taken of some portion of such acts; such cases are referred

to in cl. 2 of Sect. 235. Cr. P. C. The second part provides for acts, a portion of which alone would constitute one offence, and another portion alone another offence, but which when combined form a totally different offence. No provision is, however, made for a series of acts, one part of which constitutes one offence, and another part a separate offence, but which when combined do not constitute a third offence; *Emp.* v. *Sakharam*, *I. L. R.* 10 *Bom.* 493; see, also, *Reg.* v. *Abdool Azeez*, 7 *W. R. Cr.* 59; and *Emp.* v. *Pir Mahomed*, *I. L. R.* 10 *Bom.* 254. Illustration (*b*) does, however, shew what should be done in such cases. Consequently, this last class of cases is governed by Sect. 235, Cr. P. C., alone, and separate sentences may be passed for each offence; *Emp.* v. *Sakharam*, *ubi supra*. The result is, in many cases, to enable an aggregate amount of sentence to be passed larger than that which could have been passed for the more serious of the two offences, and in some cases, *e. g.*, that put in Ill. (*b*) such a course might be right; yet, although separate sentences are strictly legal in such cases, yet where two distinct offences are really part of one transaction, it is not desirable to pass separate sentences for each offence, but one for the more serious offence which includes the lesser one, *Emp.* v. *Zor Singh*, *I. L. R.* 10 *All.* 146.

Housebreaking by night with intent to commit theft, and theft in a dwelling-house committed after the housebreaking is accomplished are distinct offences, which when combined are not punishable under any single section of the Penal Code. Consequently, it is legal to pass a separate sentence for each offence; *Emp.* v. *Kashinath Mahadu*, *B. R.* 11*th January* 1886; *Emp.* v. *Sakharam*, *I. L. R.* 10 *Bom.* 493; followed in *Emp.* v. *Nirichan*, *I. L. R.* 12 *Mad.* 36. This case, coupled with Ill. (*b*) to Sect. 235, Cr. P. C., does away with the ruling in *Reg.* v. *Arjun*, 1 *Bom. H. C. Rep.* 87, and *Reg.* v. *Tukaya*, *I. L. R.* 1 *Bom.* 214. It must, however, be remarked that, in a case of housebreaking with intent to commit theft, the actual theft of any article is the most cogent evidence of the intent, which might not otherwise be able to be proved; and as that offence is punishable with fourteen years' imprisonment, there is an ample range of punish-

ment within which to award what is commensurate with the particular offence. It has long ago been ruled that there is no necessity, in a case of housebreaking with intent to commit theft combined with actual theft, to divide the charge into two counts (see the notes to Sect. 457), and Sect. 235, Cr. P. C., does not say that the accused *shall* be, but that he *may* be, charged with the two offences.

There is one class of cases which has given rise to much discussion, *viz.*, cases of riot combined with hurt, and these cases may be divided into two portions; the first, that in which an accused is guilty of riot and has also by his own hands inflicted hurt; and the second, in which the accused is only guilty of causing hurt by the operation of Sect. 149, I. P. C. In the former division the courts are unanimous in holding that separate sentences may be passed for each of the two offences without regard to the limit of the combined sentences; *Emp.* v. *Ram Sarup*, *I. L. R.* 7 *All.* 757 (*F. B.*); *Mohur Mir* v. *Emp.*, *I. L. R.* 16 *Cal.* 725; *Ferasat* v. *Emp.*, *I. L. R.* 19 *Cal.* 105; *Emp.* v. *Bana Punja*, *I. L. R.* 17 *Bomb.* 260 (*F. B.*) Where the accused is guilty of causing hurt or grievous hurt only by virtue of Sect. 149, there is a divergence of opinion. In Allahabad it has been ruled that Sect. 71 does not apply, and that, consequently, a separate sentence can be passed for riot and for hurt although the combined sentences exceed the extreme sentence for either; *per Brodhurst*, J., in *Emp.* v. *Ram Sarup*, *I. L. R.* 7 *All.* p. 758; *Emp.* v. *Bisheshar*, *I. L. R.* 9 *All.* 645. The High Court at Bombay also agrees in this view of the law: *Emp.* v. *Bana Punja*, *I. L. R.* 17 *Bomb.* 260, (*F. B.*) The same view was formerly taken in Calcutta in *Loke Nath* v. *Emp.*, *I. L. R.* 11 *Cal.* 349 and *Tottenham*, J., is of the same opinion still; *Nilmoney* v. *Emp.*, *I. L. R.* 16 *Cal.* p. 447; but the majority of the Full Bench, which decided that case, held that separate sentences were illegal.

Making a false charge, and subsequently giving false evidence in support of that charge are not parts of the same offence but distinct offence; *Reg.* v. *Abdool Azees*, 7 *W. R. Cr.* 59; *Emp.* v. *Pir Mahomed*, *I. L. R.* 10 *Bom.* 254.

A prisoner charged under different sections with substantially the same offence, where the acts which are the basis of his conviction on one charge are the same as the acts which are the basis of his conviction on another charge, cannot be sentenced as for separate offences; *Reg.* v. *Zora Karubeg*, 4 *Bom. H. C. R. C. C.* 12; *Reg.* v. *Dina Sheikh*, 3 *B. L. R. A. Cr. J.* 15, *note*; and *Reg.* v. *Kali Sankar Sandyal*, *ib.* 14; *Reg* v. *Chunder Kant*, 12 *W. R. Cr.* 2. The authority of the last three of these cases is somewhat weakened by the fact that Sect. 235, Cr. P. C., Ill. (*a*) makes a rescue from custody and *grievous hurt* inflicted during the rescue two separate offences; but still the principle laid down would seem to be a reasonable one, and one which should be used in interpreting this section and Sects. 35 and 235, Cr. P. C., though, of course, there must always be a certain amount of difficulty in applying the principle to particular cases.

Where prisoners were convicted of three separate offences, but the magistrate had passed a single sentence of four years' rigorous imprisonment, it was held that the proper course would have been to give a separate sentence in each case, as in the event of appeal and reversal of the conviction in one or two of the cases, it would not have been practicable to determine to what portion of the aggregate imprisonment the prisoners remained liable; 4 *Mad. H. C. R. App.* 27.

Sect. 72. *Punishment of a Person found guilty of one of several Offences.*—**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.**

Note.

See Sect. 236 of the Criminal Procedure Code, 1882.

Sect. 73. *Solitary Confinement.*—**Whenever any person is convicted of an offence for which under the Code the court has power to sentence him to rigorous imprison-**

ment, 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:—

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 shall not exceed one year.

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

Sect. 74. *Limit of Solitary Confinement.*—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.

Note.

Solitary confinement must not be imposed for the whole term of a person's imprisonment, even though not exceeding fourteen days; *In re Nyan Suk Mether*, 3 *B. L. R. A. Cr. J.* 49.

Sect. 75. *Punishment after previous Conviction in certain Cases.*—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 and upwards, shall be guilty of any offence punishable under either of those chapters with imprisonment of either description for a term of three years and upwards, shall be subject for every such subsequent offence to transportation for life, or to imprisonment of

either description for a term which may extend to ten years.

Notes.

The previous conviction must have been for an offence punishable with imprisonment for *not less than three years*, and the subsequent offence must also be punishable with imprisonment *for not less than three years*. If both these requirements are not fulfilled, this section cannot be acted on.

Then, *under this section*, there are two alternatives as to the amount of punishment by incarceration:—transportation for life and for no shorter term, or imprisonment of either description for a term which may extend to ten years. It is further to be remarked that a fine in lieu of or in addition to a sentence of imprisonment is no longer lawful for a second offence of which the accused has been convicted under this section as it now stands.

If the term of imprisonment which is passed under this section amounts to seven years, then under Sect. 59 the term of imprisonment may be changed into a like term of transportation. Where the second offence is punishable with no longer a term of imprisonment than three years, there was, under this section as it formerly stood, no intermediate punishment between imprisonment for six years and transportation for life; *Reg.* v. *Gopala Santu*, *B. R.* 21 *November* 1876; *Emp.* v. *Mahadu*, *I. L. R.* 6 *Bom.* 690; and if the Judge who passed the sentence thought the prisoner ought to be sentenced to transportation, but not for life, the only course for him to pursue was to pass a sentence of transportation for life, and then forward, through the proper channel, to the Government a recommendation that the sentence which he had passed should be reduced to that term which he considered adequate under the circumstances.

The section as it now stands, altered by Act X. of 1886, does away with this difficulty and also with another which sometimes occurred, *viz.*, whether an offender on a second conviction could be punished with imprisonment for any term not exceeding double the term for the original offence, or whether he must, in all cases, receive the double amount of the original term, provided

it did not exceed ten years. The general interpretation was in favour of the former alternative. Now, however, on a second conviction the offender can receive *any* amount of imprisonment up to ten years, and the amount of transportation can be also proportioned under Sect. 59, except that the court cannot pass any sentence of transportation between ten years and life, but, if it thinks that an intermediate term is desirable, must adopt the procedure before mentioned. A fresh difficulty has, however, arisen in cases, where the original offence is punishable with imprisonment for fourteen years, for if an offender who is convicted of an offence which is punishable for that term of imprisonment is charged with a previous conviction, he is then liable only to a smaller term of imprisonment, *viz.*, ten years for the second offence, with, of course, the alternative of transportation for life. Possibly the Legislature thought that the punishment for such an offender on a second conviction ought to be transportation for life. The object of this section is, however, to provide for an additional and not for a less severe punishment on a second conviction, and recourse should not be had to it if the punishment provided for the offence is itself sufficient; *Sheo Saran* v. *Emp.*, *I. L. R.* 9 *Cal.* 877.

If a man, who has been convicted of an offence punishable under either of these two chapters with imprisonment for a term of three years and upwards, is subsequently convicted of an attempt to commit any such offence, he is not liable to the enhanced punishment provided by this section; *Emp.* v. *Nana Rahim*, *I. L. R.* 5 *Bom.* 140; *Emp.* v. *Ram Dayal*, *I. L. R.* 3 *All.* 773; *Emp.* v. *Sricharan Bauri*, *I. L. R.* 14 *Cal.* 357; *Emp.* v. *Ajudhia*, *I. L. R.* 17 *All.* 120; *Emp.* v. *Bharosa*, *ib.* 123.

This section does not create a separate offence, but only imposes a liability to enhanced punishment. So, where a magistrate sentenced a prisoner to six months' rigorous imprisonment under Sec. 457 of the Penal Code, and, finding the prisoner was liable to enhanced punishment under Sect. 75 of the Penal Code, sentenced the prisoner to six months' further imprisoment under Sect. 314 of the Criminal Procedure Code, the latter sentence was set aside by the High Court; 5 *Mad. H. C. R. Cr. Rulings, App.* 3.

This section does not authorize a Magistrate to pass sentence in excess of his power under Sect. 32, Cr. P. C.; *Emp.* v. *Gulab Hamir, B. R. 8th February*, 1894.

The previous offence must have been committed since the Penal Code came into operation; *Reg.* v. *Hurpaul*, 4 *W. R. Cr.* 9; *Reg.* v. *Moluck*, 3 *W. R. Cr.* 17; *Reg.* v. *Kushya bin Yesu*, 4 *Bom. H. C. Rep. Cr. C.* 11; *Budhun* v. *Emp.*, 10 *C. L. R.* 392. The subsequent offence must also be one committed after release from prison upon the previous conviction; 1 *R. C. C. Cr. R.* 60; *Reg.* v. *Sakya Kavji*, 5 *Bom. H. C. Rep. Cr. C.* 36; *Emp.* v. *Megha, I. L. R.* 1 *All.* 637. Consequently, the date of the previous conviction should be entered in the charge; 1 *R. J. and P.* 562; and *Cr. P. C., Sect.* 221. Or, if there should be any doubt as to whether the offence was really a prior one, then the date of the commission of the offence also should be inserted.

Previously convicted means convicted by a jury, or such other authority as has power to convict, and it is not necessary that judgment should have followed on conviction; *Reg.* v. Blaby, [1894] 2 Q. B. 170.

In the Central Provinces, it has been held that a conviction in a place where the Indian Penal Code is in force only under an executive notification of the Governor-General in Council, as in the Berars, cannot be taken into account under this section in a place where the Code is in force by direct Legislative authority; *Emp* v. *Ialsing*, 7 *Cent. Proc. L. R.* 24; decided on the 7th September 1893.

The previous conviction of the prisoner should be entered in the charge against him as a separate head; *Emp.* v. *Dorasami, I. L. R.* 9 *Mad.* 284; but should not be brought forward by the prosecution until after the prisoner has been convicted of or pleaded guilty to the subsequent offence; Sect. 310, Cr. P. C.

Charge.

"That he, the said A B, before the committing of the said offence, was convicted, to wit, on the day of in Calendar No. of on the file of , of an offence punishable under Chapter XVII (*or* XII) of the

Indian Penal Code with imprisonment for a term of three years, to wit, with the offence of , which conviction is still in full force and effect; and that he, the said A B, is thereby liable to enhanced punishment under Sect. 75 of the Indian Penal Code, and within," &c.

Evidence.

Sect. 511, *Cr. P. C.*, provides that in any inquiry, trial or proceeding under that Code, a previous conviction may be proved, in addition to any other mode provided by any law for the time being in force—

(*a*) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction was had to be a copy of the sentence or order; or

(*b*) either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered;

together with evidence as to the identity of the accused person with the person so convicted.

Although when a prisoner is charged with having been previously convicted under this section, this charge cannot be taken any notice of until he has been convicted of the subsequent offence; yet it was held that a previous conviction could, at any time, be proved against an accused person by way of prejudicing him in the eyes of the jury; *Emp.* v. *Kartick Chunder*, *I. L. R.* 14 *Cal.* 721; but this decision has been set aside by Act III of 1891, Sect. 6, which amends Sect. 54 of the Evidence Act, and provides that, in criminal proceedings, the fact, that an accused person has a bad character, is irrelevant, unless evidence has been given to show that he has a good character.

CHAPTER IV.

GENERAL EXCEPTIONS.

Note.

Throughout this chapter the word "offence" denotes anything punishable under the Penal Code, or under any special or local law; *Sect.* 40.

Sect. 76. *Act done by a Person believing himself bound by Law.*—**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.**

Illustrations.

(*a*) **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.**

(*b*) **A, an officer of a court of justice, being ordered by that court to arrest Y, and, after the due inquiry, believing Z to be Y, arrests Z. A has committed no offence.**

Sect. 77. *Act of Judge when acting judicially.*—**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.**

Sect. 78. *Act done pursuant to the Judgment of a Court of Justice.*—**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.**

Sect. 79. *Act done by a Person justified, or by mistake of fact believing himself justified, by law.*—**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.

Illustrations.

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.

Notes.

The foregoing sections simply say that under the circumstances therein referred to certain acts shall not amount to offences—that is, shall not be punishable under the provisions of the Indian Penal Code—but leave untouched the liability in a civil suit of the persons who claim their protection. Thus, although illustration (*b*) to Sect. 76 exempts an officer of justice from liability to criminal punishment for the acts therein described, it still leaves him exposed to liability to a civil suit, the result of which must depend upon the peculiar circumstances of each case.

Sects. 76 and 79 declare in the first instance that nothing is an offence which is done by a person who is bound by law to do it, or is justified by law in doing it. This provision covers the case of a person who hangs a man in obedience to a sentence of death, although this is also covered by Sect. 78. It also covers the case put in Ill. (*a*), but then the superior officer's commands must be in accordance with law. The cases in which force may be used, and to what extent, to disperse an assembly of people are set out in Sects. 127 to 131, Cr. P. C., 1882; and by these sections the authority of magistrates and officers in the army or volunteers is minutely laid down. The provision of Sects. 76 and 79 will also cover the case of private individuals assisting a police officer under the provisions of Sect. 42, Cr. P. C.; and private individuals to

whom a warrant of arrest has been addressed and persons aiding them under the provisions of Sect. 43, Cr. P. C.; and a person preventing, by proper means, a trespass or a nuisance on his own property.

These sections also provide for acts done under a mistake, but the mistake must be one of fact and not of law; the person desiring to shelter himself under them must be under a mistaken impression as to the existence or non-existence of a state of facts which, if it did exist, would authorise him to apply a known law to that state: it will not be sufficient that under a well-understood state of facts a mistake has been made in applying the law. In Ill. (*a*), if the officer's order be in conformity with the commands of the law, it is because he is right in law—and the soldier is, of course, bound to obey him; but if the officer is wrong in his law, although the soldier is, by military law, bound to obey him, yet the latter is not protected, but equally with his officer has committed an offence. It has been held in England that if a ship's sentinel shoots a man because he persists in approaching the ship when he has been ordered not to do so, the act will be murder, unless it was necessary for the ship's safety; *Rex* v. *Thomas*, 1 *Russ. on Crimes*, 5th Edit., p 731, in which case it appeared that the prisoner was a sentinel on board the Achille while she was paying off, and had received orders from the preceding sentinel to keep off all boats, unless they had officers in uniform in them, or unless the officers on board allowed them to approach; and he received a musket, three blank cartridges, and three balls. Boats pressed upon the ship, and would not keep off although repeatedly warned to do so; whereupon the prisoner fired at the man in one which persisted in coming nearer and closer than the others, and killed him. The jury found that the sentinel had fired under the mistaken impression that it was his duty to do so: but the judges were nevertheless unanimously of opinion that the act amounted to murder; but that if the act had been necessary for the preservation of the ship—as if, for instance, the deceased had been endeavouring to stir up a mutiny—then it would have been justifiable. Soldiers are only armed citizens; and the orders of their officers do not justify any acts of violence, unless the orders themselves are

legal. In *Reg.* v. *Hutchinson*, 9 *Cox C. C.* 555, it was held that, where a gun, discharged in the ordinary and regular course of ball-pratice by an artilleryman in a garrison town, missed the mark, and killed a man who was lawfully passing near the spot in a boat, the place being a public one, and open to all Her Majesty's subjects, and the artilleryman who fired the gun was acting under the command of a superior officer, who was acting in obedience to the general orders of the defendant the major-general, that the major-general was not guilty of manslaughter, because he was doing an act which he was justified by law in doing, and did not do it negligently or in an improper manner.

The same principal applies to other officials. No official is excused in doing an illegal act, although ordered to do it by his superior; and the inferior is supposed to be cognisant of what is and what is not legal. Not even the orders of the Supreme Government of India, or of the Secretary of State for India, would excuse an illegal act, unless the whole transaction was a State act; or else total or partial immunity is given by some Act or Statute. Thus the 21 Geo. 3 c. 70, ss. 1 to 3 provide "that the Governor-General and Council of Bengal shall not be subject, jointly or severally, to the jurisdiction of the Supreme Court of Fort William in Bengal for or by reason of any act or order, or any other matter or thing whatsoever, counselled, ordered or done by them in their public capacity only, and acting as Governor-General in Council." And, "that if any person or persons shall be impleaded in any action or process civil or criminal, in the said Supreme Court, for any act or acts done by the order of the said Governor-General in Council in writing, he or they may plead the general issue, and give the said order in evidence; which said order, with proof that the act or acts done, has or have been done according to the purport of the same, shall amount to a sufficient justification of the said acts, and the defendant shall be fully justified, acquitted, and discharged from all and every suit, action, and process whatsoever, civil or criminal, in the said court. Provided always that, with respect to such order or orders of the said Governor-General in Council as do or shall extend to any British

subject or subjects, the said court shall have and retain as full and competent jurisdiction as if this act had never been passed." This, however, does not prevent the Governor-General and his Council being sued in England, see Sects. 4 to 6; and *Reg.* v. *Eyre*, *L. R.* 3 *Q. B.* 487. Similar exemptions are provided in respect of the Governor-General, and the Governors and Councils of Madras and Bombay by the 39 and 40 Geo. 3, c. 79, s. 3, and 4 Geo. 4, c. 71, s. 7; and the charters of the Supreme Courts prohibit those courts from trying any suit against the Governor-General or the Governors or any of their Council for anything done as Governor-General or Governor in Council; and from trying any indictment against the Governor-General, or Governors or any of the Council, except for treason or felony.

Under Reg. III of 1818 and Act III of 1858, the Governor-General in Council has the power of detaining persons in custody without any charge being made against them, under circumstances set forth in that regulation; consequently, those who act under an order of the Governor-General in Council made in the form provided by that regulation are protected against either criminal or civil proceedings; see *In re Ameer Khan*, 6 *B. L. R.* 392.

An act of State is an act which has been done by a sovereign power to an independent or semi-independent State, or to the subject of another State, or to one of its own subjects in a state of rebellion, and not an ordinary transaction between a State and its subjects; *Le Caux* v. *Eden*, 2 *Doug.* 594; *Lindo* v. *Rodney*, 2 *Doug.* 613; *The East India Company* v. *Syed Ally*, 7 *Moore's I. A.* 555: *Secretary State.* v. *Kamachee Boye*, 7 *Moore's I A.* 476; *Ex-Rajah of Coorg* v. *The East India Company*, 29 *Beav.* 300; *Raja Saligram* v. *Secretary of State*, 12 *B. L. R.* (*P. C.*) 167, 184; *Doss* v. *Secretary of State*, *L. R.* 19 *Eq.* 509; *Sirdar Bhagwan* v. *Secretary of State*, 2 *I. A.* 38; or else something which arises out of transactions between the sovereign and another independent power; as where the Emperor of China on making a treaty of peace with Her Majesty paid over a sum of money as an indemnity for losses sustained by British subjects, in which case the courts held that they had no right to interfere with the way in

voted for members of Parliament for the borough against the recommendation of the justice: *Rex* v. *Williams*, 3 *Burr.* 1317.

A rule for a criminal information will not be granted against justices who wrongly or improperly reject bail, unless it manifestly appears to the court, by satisfactory and conclusive evidence, that they were influenced by partial and corrupt motives; *Rex* v. *Badger*, 6 *Jur.* 994 (*Bail Court*). Where the pecuniary sufficiency and solvency of bail are undisputed, the rejection of such bail on the ground of a coincidence of political opinion with the person or persons for whose appearance the bail offer to become security is improper, even though such rejection by the justices is reconcilable with the absence of corrupt motives: *ib.*; and where justices do reject bail on the ground that parties entertain objectionable political opinions, and on other grounds which are concealed and not stated, the court will grant a rule *nisi* for a criminal information; *ib.*; and where, in answer to such a rule, the justices deposed that they were not actuated by any corrupt or malicious motive in pursuing the course they had adopted, although the court discharged the rule, the justices were required to pay all the costs; *S. C.* 4 *Q. B.* 468; 7 *Jur.* 216 and 12 *L. J. N. S. M. C.* 66.

The provisions of Sect. 77 only protect a "judge," *i.e.*, "every person who is officially designated as a judge," and "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"; *Sect.* 19, *I. P. C.*; but not "a magistrate exercising jurisdiction in respect of a charge on which he has power only to commit for trial to another court," though it is very probable that, in respect to the granting or refusing bail during the pendency of such a charge, or on commitment, he would be held to be a judge, seeing that this is a "legal proceeding" in which he is empowered to give a definitive judgment, on grounds and under powers unconnected with the facts on which, or the powers under which, the commitment is made. The judge must be acting judicially, that is, he must be acting in a matter

and place where he has jurisdiction, and must be actually exercising his judicial functions in the matter in hand; or else he must, exercising due care and attention, believe that he has jurisdiction to act in the matter, but if he had the knowledge, or means, of knowledge of which he ought to have availed himself, he cannot be held to have been acting in good faith; see *Calder* v. *Halket*, 2 *Moore's I. A.* 293; *Spooner* v. *Juddow*, 4 *Moore's I. A.* at p. 379; *Leete* v. *Hart*, *L. R.* 3 *C. P.* 322; *Griffith* v. *Taylor*, 2 *C. P. D.* 194; *Collector of Sea Customs* v. *Punniar*, *I. L. R.* 1 *Mad.* 89.

An officer of a court is ordinarily bound to obey every order of the court to which he is subject; and it must be a very flagrant overstepping of jurisdiction, and one which is apparent on the face of the authority under which he was acting, which would justify him in refusing obedience, for in all cases, in the first instance at any rate, the court itself has to decide the question of jurisdiction, and that judgment is binding until it is reversed by a superior court; and thus the law would always presume very strongly that the person doing the act in good faith believed that the court had jurisdiction.

Where *peons*, acting under civil process, arrested a witness on his way to court, who, as such, was privileged *eundo, morando et redeundo*, and persisted in the arrest after due notice, it was held that they were not protected under this section, as although the officer issuing the warrant had jurisdiction, yet special circumstances had arisen after the issue which took away the jurisdiction of the *peons* to execute the warrant; 5 *R. J. & P.* 43. So, in a case where a bailiff in executing process against the movable property of a judgment-debtor, broke open the gate; *Reg.* v. *McQueen*, 3 *R. C. C. Cr.* 8.

As under Sect. 77 the protection thereby given is restricted to a certain class of judicial officers, so under Sect. 78 protection is afforded only to officers acting under the authority of a "judgment or order" of 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"; *Sect.* 20 *I. P. C.*, and this last proviso is also introduced *totidem verbis* into the body of Sect. 77: and in respect of this the Privy Council say, in *Calder* v. *Halket*, 2 *Moore's I. A.* at p. 308: "It is not merely in respect of acts in court, acts *sedente curiâ*, that a judge has immunity, but in respect of all acts of a judicial nature; and an order of the Foujdaree 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 dispunishable by ordinary process of law."

Furthermore, all these sections require "good faith"; and "nothing is said to be done or believed in good faith which is done or believed without due care and attention"; *Sect.* 52, *I. P. C.*

In the case of *Sheo Surun* v. *Mahomed Fazil*, 10 *W. R. Cr.* 20, it was decided that a police officer had not acted in good faith, and the facts as stated were these: "He sees a horse tied without any attempt at concealment in Bookoo's premises, and, because the animal happens to resemble one which his father had lost a short time previously, he jumps at once to the conclusion that Bookoo has either stolen the horse himself, or has purchased it from the thief, and he compels Bookoo to account for the possession accordingly. He finds that Bookoo bought the animal from one Sheo Surun Sahai, so he sends for that individual, charges him with the theft, and compels him to give bail for his appearance whilst an investigation is pending. The sub-inspector never sent for the supposed owner of the horse, or took the trouble of getting any credible information as to whether it was his father's horse or not. Had he done so, he would have found that the horse had already been discovered in another place; but without waiting for such information, and without making any further inquiry, he at once held Sheo Surun to bail, as a person suspected of having come by the animal dishonestly"; and the court held that the sub-inspector had not only not acted with due care and attention, but had not exercised any care or attention at all. When a person, having received information which causes him to suspect another of a felony which has in fact been committed by some one, gives him

into custody without availing himself of a ready and obvious mode of ascertaining the truth as to whether or not the accused had, in fact, committed the felony, the absence of inquiry is an element in determining the question of the existence of reasonable and probable cause; *Perryman* v. *Lister*, *L. R.* 3 *Exch.* 167, and 37 *L. J. N. S. Exch.* 166; and also an important element in determining whether a person has acted with due care and attention.

Where a police constable, against whom no malice is proved, who is placed on duty for the express purpose of preventing stolen property being carried off, sees at an early hour of the morning a person carrying a bundle, and questions him about the bundle, and not being satisfied with the answers he receives, takes him into custody, he cannot be said to have acted otherwise than with due care and attention, even though his superior officer to whom the person arrested is taken does not take the same view of the answers as the constable did; *Bhawoo* v. *Mulji*, *I. L. R.* 12 *Bom.* 377.

Sect. 80. *Accident in the doing of a lawful act.*—**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.**

Illustration.

A is at 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.

Notes.

This section requires a determination of two sets of questions —one of law, and the other of fact. The court must decide what acts, manner, and means, are lawful; and the jury, or the court as a jury, must decide whether those charged against the accused agree or not with what is lawful; and also whether proper care and caution has been exercised. For although, if in the prosecution of a lawful act, a pure accident arises, no criminal or civil responsibility attaches to the actor; *Reg.* v. *Murray*, 5 *Cox C. C.* 509; yet it seems that it is otherwise where any blame is imputable, though the

person is innocent of any intention to injure, as, if he drives a spirited horse improperly, or uses imperfect harness, and the horse takes fright and kills another; *Wakeman* v. *Robinson*, 1 *Bing.* 213. If a person is driving a cart at an unusually rapid pace, and drives over another and kills him, he is guilty of manslaughter, though he called to the deceased to get out of the way, and he might have done so if he had not been in a state of intoxication; per *Garrow*, J., in *Rex*, v. *Walker*, 1 *C. and P.* 320. And if two carriages are driving close together, apparently racing, the question for the jury, as laid down by *Patteson*, J., in *Rex.* v. *Timmins*, 7 *C. and P.* 499, 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 upon 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."

These two points are constantly mixed the one with the other, and it is utterly impossible entirely to separate them, because circumstances are so constantly changing that it is impossible to lay down a rigid rule of law as to what constitutes negligence under all combinations of events. The care and caution which the law requires is not the utmost possible, but only a reasonable precaution which, in the ordinary course of things, would be sufficient, and that, of course, varies with every case, and what is negligent under one set of circumstances, is quite excusable and justifiable under another. Thus, the fact that the streets are unusually crowded from a public procession or any other cause, instead of excusing a driver when proceeding at his ordinary pace, and with ordinary care, requires him to be particularly cautious, and may tend to render him criminally responsible from any accident ensuing from driving at a rate and with those precautions which he might have ordinarily observed; *Reg.* v. *Murray*, 5 *Cox C. C.* 509.

The mere happening of an accident is not sufficient evidence of negligence to be left to the jury, but some affirmative evidence of

negligence on the part of the defendant must be given; *Hammack* v. *White*, *C.* 11 *C. B. N. S.* 588; 31 *L. J. N. S. C. P.* 129. But accidents may be of such a nature that negligence may be presumed from the mere fact of the accident, or the mere fact of such an accident happening may be *primâ facie* evidence of negligence, so as to throw on the defendant the duty of showing that there was no negligence; *Byrne* v. *Boadle*, 2 *H. and C.* 722; 33 *L. J. N. S. Exch.* 13; 10 *Jur. N. S.* 1107; *Scott* v. *London Dock Company*, 3 *H. and C.* 596. On the contrary, there are cases where the accident carries on its face the impress of the absence of negligence. Thus, 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, although the man was bound, in handling such a dangerous weapon, to take extra care, as illustrated in the preceding paragraph, yet seeing the fact was, that in his absence some one else had reloaded the gun without his knowledge, *Foster*, J., directed an aquittal, "being of opinion, upon the whole evidence, that he had reasonable ground for believing the gun was not loaded;" *Foster*, *Cr. L.* 265. So, too, in *Alison's Crim. L.* 144, there is a case cited in which the prisoner was charged with having fired a fowling-piece loaded with small shot, in a field within sight of a highroad, 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 that the death was accidental under these circumstances, and so the jury found. It has further been laid down by *Wills*, J., in *Reg.* v. *Birchall*, 4 *F. and F.* 1087, that a man is not criminally responsible for the death of another party caused by his negligence, where he would not have been civilly liable in an action in respect of the alleged negligence, at the suit of the party injured, if the injuries sustained had fallen short of causing his death.

There is one other very important class of cases—poisoning by the administration of medicines, and killing by surgical

operations, which, however, will be more properly treated under Sects. 87, 88, and 89.

Sect. 81. *Act likely to cause harm, but done without a criminal intent, and to prevent other harm.*—**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.**

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 the risk of running down a boat, C, with only two 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 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.

Notes.

This section is a legislative enactment of the principle laid down in *Mouse's case*, 12 *Coke*, 63; "for the Commonwealth a man shall suffer damage; as for saving a city or town a house shall be pulled down if the next be on fire, and the suburbs of a city in time of war shall be plucked down; and a thing for the commonwealth every man may do without being liable for an action." In the United States of America, it has also been held that if, in the case of a fire, the flames attain to such a height that they cannot be arrested by ordinary means, the inmates of a house which is not on fire may be summarily ejected, and the building be blown up with gunpowder, or destroyed by any other convenient means; *Hare's American Constitutional Law*, 907.

When a soldier who was on duty at a fire and was ordered to keep off all persons not in uniform from the vicinity, kicked the chief constable, who was not in uniform, and was unknown to the soldier, but was attempting to get within the space ordered to be kept clear; it was held that the act of the soldier came within this section; *Emp.* v. *Bostan*, *I. L. R.* 17 *Bomb.* 626.

No theory can be started by which it can be decided beforehand where the necessity of doing harm arises in which there shall be an absence of "criminal intention" or the presence of "good faith." Certainly it must arise from accident or from the crime of another, not from the negligence or crime of the person doing the harm, and the danger to be avoided must not, certainly in ordinary cases, the danger to one individual, but be a danger to the Commonwealth, interpreted in a liberal sense. In the opinion of the framers of the Penal Code, a theft to satisfy the direst hunger would not come within this section, for they say in their report: "Nothing is more usual than for thieves to urge distress and hunger as excuses for their thefts. It is certain,

indeed, that many thefts are committed from the pressure of distress so severe as to be more terrible than the punishment of theft, and than the disgrace which that punishment brings with it to the mass of mankind. It is equally certain that when the distress from which a man can relieve himself by theft is more terrible than the evil consequences of theft, those consequences will not deter him from committing theft. Yet it by no means follows that it is irrational to punish him for theft; for though the fear of punishment is not likely to keep any man from theft when he is actually starving, yet it is very likely to keep him from being in a starving state. It is of no effect to counteract the irresistible motive which immediately prompts to theft, but is of great effect to counteract the motives to that idleness and that profusion which end in bringing a man to that condition in which no law will keep him from committing theft."

To further elucidate this section, it may not be useless to transcribe a series of propositions and definition from that part of Mr. Stephen's *General View of the Criminal Law of England* which is devoted to "the definition of crime in general." "An action may be said to consist of occurrence to the mind, deliberation, resolution, intention, will, and execution by—or, if the expression be allowed, translation into—a set of bodily motions co-ordinated towards the object intended; . . . . but, in order that there may be any action at all, the will which causes and the intention which co-ordinates bodily action must always be present. The absence of both or either would prevent the action from taking place at all, or reduce it from an action to a mere occurrence, and in either case there would be no crime.

"In order to illustrate this, cases may be put to shew the effect of the absence of both or either.

Firstly, Will and intention may both be absent. A man in a convulsive fit strikes another and kills him. He has committed no crime, because he has done no act; he has been acted upon . . . .

"*Secondly*, Will may exist without intention. This case is best illustrated by the motions of an infant . . . . Probably,

somnambulism and other movements during sleep are of the same kind . . . .

"*Thirdly*, Intention may exist without will. This happens in the common case of a person who lays aside a plan he has formed . . . .

"The result of the whole is, that an action consists of voluntary bodily motions, *combined by the mind towards a common object*. Intention is in every case essential to crime, because it is essential to action; and every crime is an action, as appears from the use of active verbs in every indictment.

"Such are the mental conditions which belong to a crime as an action; but other mental conditions are attached to actions before they can be punished by the law. No action is criminal in itself unless the intent, the mental element of it, is a state of mind forbidden to the law. This state of mind varies according to the nature of the case. To utter a forged note is no crime, unless there be a knowledge that the note is forged, and also an intent to defraud. In order to bring a person within the statute which makes the infliction of certain bodily injuries felony, there must be specific intent to commit murder or to inflict grievous bodily harm; killing is no murder unless there be malice. The appropriation of the property of another is not theft unless it be felonious. In short, in order to be a crime, an action must not only be intentional in the general sense already explained, but it must be accompanied with a specific intention forbidden by the law in that particular case. "In some cases the specific intent is defined by the law which creates the offence—as, for example, in the case of wounding with intent to maim or disfigure; but it is more frequently denoted by the general term 'malice.' Malice may thus be said to be a necessary ingredient in one form or other of all crimes whatever. "The etymological meaning of the words malice and malicious is simply wickedness and wicked. . . . .

"It is easy to exaggerate the vagueness of these words. In reality, the difficulty lies, not in the use of the words themselves, but in the theories by which we try to explain them. The proposition that lying is wicked is understood by millions who are

ignorant of the very existence of all moral theories whatever. It means that, in point of fact, it is blamed and under certain circumstances punished. The reason why it is blamed and punished are collateral to the fact; and it is with the facts and not with the theories about them that the law is concerned.

"Whatever may be the want of precision of these words it has in practice been remedied by experience. The consequences of making malice in general terms a necessary element of crime is that certain acts—as, for example, the destruction of life or the appropriation of what belongs to another—are declared to be *primâ facie* wicked actions, though circumstances may exist by which their wickedness is either removed or diminished. In the course of time experience shews what these circumstances are, and thus a technically exact conception of both theft and murder is gradually attained, although the orginal definition of each contained a term which was indefinite when it was first used. Thus, in the case of murder, where one man kills another, the presumption is that he did so maliciously, and so committed murder; but this presumption may be rebutted by shewing that the act was done in self-defence, or under certain specified provocations, or by certain forms of negligence.

"If it be asked why, under these circumstances, the term malice should be retained, and why murder, for example, should not be defined to mean the killing of a man under any other circumstances than those specified, the answer is that the word is convenient, because it sums up in a significant way many distinct propositions, and also because it is possible, although improbable, that new cases may arise in which it would be necessary to use it in its natural sense. Suppose, for example, that in a wreck, fire, or other catastrophe, a bystander were to kill one person for the sake of saving another, the question whether or not this was murder would turn on the question whether it was or was not identical in principle with acts which the law has determined to be malicious or wicked. The general result of the use of the word malice, and of the doctrine that malice is an essential element of crime, is to throw upon persons who commit acts of a particular class the burden of proving that they were not done under the circumstances

contemplated by the Legislature, but at the same time to permit them to give evidence to that effect."

Where a person placed in his toddy pots juice of the milk bush, knowing that if taken by a human being it would cause injury, and with the intention of thereby detecting an unknown thief who was in the habit of stealing his toddy, and the toddy was drunk by some soldiers who purchased it from some unknown vendor and were injured by it, it was held that the accused was rightly convicted under Sect. 328, and that he could not defend himself under this section; *Reg.* v. *Dhania*, 5 *Bom. H. C. Rep. C. C.* 59.

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

Sect. 83. *Act of a child above seven and under twelve years of age.*—**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.**

Notes.

These two sections alter the English law, only by reducing the age of mature understanding from fourteen to twelve years. By that law "an infant shall be *primâ facie* deemed to be *doli incapax*, and 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 the case. The evidence of malice, however, which is to supply age, should be clear and strong beyond all doubt and contradiction"; 1 *Russ.*, 5th Edit. p. 109. An infant under the age of seven years cannot incur the guilt of felony; *Marsh* v. *Loader*, 14 *C. B. N. S.* 535; 11 *W. R.* (*E.*) 784.

If a child, more than seven and under fourteen (under the Penal Code, under twelve), is indicted for a felony, it will be left to the jury to say whether the offence was committed by him, and, if so, whether at the time of the commission of the offence the prisoner had a guilty knowledge that he or she was doing wrong; and the

presumption of law is that a child of that age has not such guilty knowledge, unless the contrary is proved; *per Littledale*, J., in *Rex* v. *Owen*, 4 *C. and P.* 236. And this maturity of understanding must be affirmatively proved by the prosecution; *Reg.* v. *Vamplew*, 3 *F. and F.* 520; and must, in most cases, be inferred from surrounding circumstances. A boy of ten years old was convicted before Chief Justice *Willes* of the murder of a girl of five years of age, but the Chief Justice respited the execution, lest the punishment of such a child by death should be deemed to savour of cruelty; but the judges held that the circumstances of the case showed so much cunning that the boy ought to suffer as an example to others; and the convict would have been hanged, but for the interposition of the Secretary of State; *R.* v. *York*, *Fost.* p. 72. In this case the judges to whom the case was referred said:—"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 of capital punishment, and ought to suffer; for it would be of a very dangerous consequence that children may commit such crimes with impunity." Where a child of nine years of age stole a necklace, valued at Rs. 2-8, and immediately afterwards sold it to the accused for five annas, and the child was discharged under this section, but the accused was convicted, it was held, that the act of the child, though under twelve years of age, shewed that he had attained sufficient maturity of judgment to judge of the nature and consequences of his conduct, and that there was, therefore, a theft, and that the accused was rightly convicted; *Reg.* v. *Begaraji Krishna*, *I. L. R.* 6 *Mad.* 373.

In England, a child who, at the time of the commission of the offence of rape, is under fourteen, cannot, in point of law, be guilty of an assault with intent to commit a rape; and if he is under that age, no evidence is admissible to shew that, in point of fact, he was physically able to commit that offence; *Rex* v. *Phillips*, 8 *C. and P.* 736; *Rex* v. *Groombridge*, 7 *C. and P.* 582. And in England it has been further held that a boy under fourteen years of age cannot be convicted of feloniously carnally knowing and abusing a girl under ten years of age, even though it was proved

that he was arrived at the full state of puberty; *Rex* v. *Jordan*, 9 *C. and P.* 118; *Rex* v. *Brimilow*, *ib.* 366. In the Penal Code there is no provision corresponding with the law as laid down in these two decisions, and also in 1 *Hale*, 631; and under the words of Sect. 83 a boy under the age of twelve might be convicted of rape, though, of course, the prosecution would have to shew conclusively that the accused had attained the full state of puberty. There is, however, a case cited in 1 *Morley's Dig.* 190, s. 636, where a boy, only ten years old, was convicted by the Futwa of rape on a girl only three years old, and the Court of N. A. viewed it as an attempt only, and punished it as a misdemeanour with one year's imprisonment. This decision, however, would be inconsistent under the law as laid down by the Penal Code; but for a more detailed discussion of this point, see the notes on Rape.

Sect. 84. *Act of a person of unsound mind.*—**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.**

Notes.

The English law as to what constitutes a sufficient defence of insanity was laid down in *Reg.* v. *M'Naughten*, 10 *Cl. and Fin.* p. 210. "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; 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 as 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 circumstances of each particular case may require."

The principles laid down in *M'Naughten's case* have been acted on in various other cases which it will be well to illustrate here. In *Rex* v. *Offord*, 5 *C. and P.* 168, Lord *Lyndhurst* held that to justify the acquittal of a prisoner indicted for murder, on the ground of insanity, the jury must be satisfied that he was incapable of judging between right and wrong: and that, at the time of committing the act, he did not consider it was an offence against the laws of God and nature. So, again, in *Rex* v. *Higginson*, 1 *C. and K.* 129, *Maule*, J., held that, to entitle a person to be acquitted on the ground of insanity, he must, at the time of committing the offence, have been so insane that he did not know right from wrong. In *Reg.* v. *Townley*, 3 *F. and F.* 839, *Martin*, B., said that the question for the jury was, "Did the prisoner do the act under a delusion, believing it to be other than it was? If he knew what he was doing, and that it was likely to cause death, and was contrary to the law of God and man, and that the law directed that persons who did such acts should be punished, he was guilty of murder." In *Reg.* v. *Oxford*, 9 *C. and P.* 525, three judges, Lord *Denman*, C. J., *Alderson*, B., and *Patteson*, J., held that, if

in answer to an indictment for treason, for attempting the life of the sovereign by shooting at Her Majesty, the defence is insanity, the question for the jury will be, whether the prisoner was labouring under that species of insanity which satisfies them that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was really unconscious at the time he was committing the act that it was a crime. In *Reg.* v. *Burton*, 3 *F. and F.* 772, *Wightman*, J., explained to the jury that the delusions which indicate a defect of sanity such as will relieve a person from criminal responsibility, are delusions of the senses, or such as relate to facts or objects—not mere wrong notions or impressions of a moral nature; and the aberration must be mental, not moral, to affect the intellect of the individual. It is not enough that they shew a diseased or depraved state of mind, or an aberration of the moral feelings, the sense of right and wrong being still not destroyed although it may be perverted; and the theory of moral insanity or insanity of the moral feelings, while the sense of right and wrong remains, is not to be reconciled with the legal doctrine on the subject. A mere uncontrollable impulse of the mind, co-existing with the full possession of the faculties, will not warrant an acquittal on the ground of insanity, if at the time the prisoner committed the act, he knew that what he was doing was wrong; *Bramwell*, B., in *Reg.* v. *Haynes*, 1 *F. and F.* 666, and *Parke*, B., in *Reg.* v. *Burton*, 3 *Cox C. C.* 275.

If a person labours under an insane delusion as to an existing state of facts, "we think he must be considered in the same state 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 killed him in revenge for such supposed injury, he would be liable to punishment"; *Reg.* v. *M'Naughten*, *ubi sup.* On a trial for murder, the defence of insanity by the evidence shewing a great amount of senseless extravagance and

absurd eccentricity of conduct, coupled with habits of excessive intemperance, causing fits of *delirium tremens*, the prisoner, however, not having been labouring under the effects of such a fit at the time of the act, and the circumstances shewing sense and deliberation, and a perfect understanding of the nature of the act, it was held, by *Erle*, C. J., that the evidence was not sufficient to support the defence, as it rather tended to shew wilful excesses and extreme folly, than mental incapacity; *Reg.* v. *Leigh*, 4 *F. and F.* 915. Where a person is in a state of mind in which she is liable to fits of madness, it is for the jury to consider whether the act done was done during such a fit, even although there is nothing before or after the act to indicate it, and though there is some evidence of design and malice; *Reg.* v. *Richards*, 1 *F. and F.* 87. A married woman having killed her husband immediately after an apparent recovery from a disease (the result of child-birth) which caused a great loss of blood, and exhausted the vessels of the brain, and thus weakened its power and tended to produce insane delusions of the senses which while suffering under such disease, she had complained of, and which by her own account had been renewed at the time of the act of homicide (although they were not such as would lead to it); it was held by *Erle*, C. J., that this was evidence from which a jury might properly find that she was not in such a state of mind at the time of the act as to know its nature or be accountable for it; *Reg.* v. *Law*, 2 *F. and F.* 836. So, too, where a married woman, fondly attached to her children, and apparently most happy in her family, had poisoned two of them with some evidence of deliberation and design; but it appeared that there was insanity in her family; and from her demeanour before and after the act, which, although not wholly irrational, was yet strangely erratic and excited—and from recent antecedents, and the presence of certain exciting causes of insanity, and her own account of her sensations—the medical men were of opinion that she was labouring under actual cerebral disease, and that she was in a paroxysm of insanity at the time of the act; this was left by *Wightman*, J., to the jury as evidence on which they might rightly find her not guilty on the ground of insanity; *Reg.* v.

Vyse, 3 *F. and F.* 247. Where a man, who is suffering from fever which causes him while suffering from its paroxysms to be bewildered and unconscious, commits murder, but not while delirious, and there is no evidence to shew that he was not conscious of the nature of his act, he cannot be acquitted under this section; *Emp.* v. *Laksman, I. L. R.* 10 *Bom.* 512. In order that a *ganja*-smoker, who has committed homicide, may take advantage of this section, it is necessary to shew that, by reason of his practice, he had contracted an habitual and fixed frenzy, a disease of the brain which caused unsoundness of mind as described in the section; *Emp.* v. *Sakharam I. L. R.* 14 *Bom.* 564. On an indictment for maliciously setting fire to a building, it is not necessary to prove actual ill-will in the prisoner towards the owner; and in order to justify a jury in acquitting a person on the ground of insanity they must believe that he did not know right from wrong; but if they find that the prisoner, when he did the act, was in such a state of mind that he was not conscious that the effect of it would be to injure any other person, this will amount to a general verdict of not guilty; *per Crompton*, J., in *Reg.* v. *Davies*, 1 *F. and F.* 69.

When the defence of insanity is set up, in order to warrant the jury in acquitting the prisoner, it must be proved affirmatively that he is insane; if that fact be left in doubt, and the commission of the crime charged in the indictment is proved, it is their duty to convict; *per Rolfe*, B., in *Reg.* v. *Stokes*, 3 *C. and K.* 185. So, too, in *Reg.* v. *Layton*, 4 *Cox C. C.* 149, the same learned judge ruled that, where a prisoner sets up insanity as a ground of defence, one cardinal rule is, that the burden of proving his innocence on that ground rests on the party accused. The question in such a case for the jury is, not whether the prisoner was of sound mind, but whether he has made out to their satisfaction that he was not of sound mind. The jury may come to a conclusion on this point from the conduct and acts of the accused shortly before and down to the commission of the alleged crime. Although insanity on one point, for instance, a delusion as to property, will not exempt a party from responsibility, the fact is not immaterial in considering his responsibility at another time and

on another subject. The want, too, of motive for the commission of the crime and its being committed under circumstances which render detection inevitable, are important points for the consideration of the jury when coupled with the evidence of insanity on any particular point.

A party having been indicted for a misdemeanor, in uttering seditious words, and upon his arraignment refusing to plead, and shewing symptoms of insanity, and an inquest being forthwith taken to try whether he was insane or not, it was held, first, that the jury might form their own judgment of the present state of the prisoner's mind from his demeanour while the inquest was being taken, and might thereupon find him to be insane, without any evidence being given as to his present state; and, secondly, that, upon his shewing strong symptoms of insanity in court during the taking of the inquest, it became unnecessary to ask him whether he would cross-examine the witnesses, or would offer any remarks on the evidence: *Reg.* v. *Goode*, 7 *A. and E.* 536.

A prisoner was indicted for shooting at his wife with intent to murder her, and was defended by counsel, who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane; and he was allowed by the judge to suggest questions to be put by his lordship to the witnesses for the prosecution, to negative the supposition that he was insane; and the judge also, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They, however, failed in shewing that the defence was an incorrect one, but, on the contrary, their evidence tended to establish it more clearly; and the prisoner was acquitted on the ground of insanity; *Reg.* v. *Pearce*, 9 *C. and P.* 667.

Where a jury is empannelled to try whether a prisoner is insane or not at the time when he is brought up to plead to an indictment, the counsel for the prosecution is to begin and call his witnesses to prove the sanity of the prisoner; *Reg.* v. *Davis*, 6 *Cox C. C.* 326, 3 *C. and K.* 328. But where a jury is empannelled at the instance of the counsel for the prisoner, the proof of his insanity is incumbent on his counsel; *Reg.* v. *Turton*, 6 *Cox C. C.* 385.

A class of cases may occasionally arise which will cause some difficulty, that is, where a prisoner is both deaf and dumb. Where a person is deaf only, or dumb only, there is generally some means of causing intelligent communications to pass from the court to him, and from him to the court; but such is not always the case with a person who is both deaf and dumb. Two cases have occurred of this kind in modern practice in England; *Reg.* v. *Dyson* 7 *C. and P.* 305, and *Reg.* v. *Pritchard*, *ib.* 303. In the latter case *Alderson*, B., laid down the law to the jury in the following terms: "There are three points to be inquired into: first, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings in the trial so as to make a proper defence, to know that he might challenge any one of you to whom he may object, and to comprehend the details of the evidence which, in a case of this nature, must constitute a minute investigation. Upon this issue if you think there is no certain mode of communicating the details of the trial to the prisoner, so that he can clearly understand them, and be able properly to make his defence to the charge, you ought to find that he is not of sane mind. It is not enough that he may have a general capacity of communicating on ordinary matters." In both the foregoing cases the jury found that the prisoner was not of sound mind, and the judge ordered the prisoner to be detained under 39 and 40 Geo. III. c. 94, s. 2. Treating such cases as cases of insanity, provision is made for them by the Criminal Procedure Code.

Sect. 85. *Act of a person incapable of judgment by reason of intoxication.*—**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.**

Sect. 86. *Offence requiring a particular intent committed by one who is intoxicated.*—**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 not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

Notes.

By the English law drunkenness is not any excuse for crime; *Pearson's Case*, 2 *Irwin, C. C.* 144. Still, by the practice of the courts in England, it is constantly held that a person who is intoxicated may be incapable of having any intention, and thus the nature of an offence may be considerably reduced, though intoxication does not render him entirely dispunishable for the act he may have committed while under the influence of liquor. Thus in a case of stabbing, where the prisoner used a deadly weapon, the fact that he was drunk does not at all alter the nature of the case; but if he had intemperately used an instrument not in its nature a deadly weapon, at a time when he was drunk, the fact of his being drunk might induce the jury to less strongly infer a malicious intent in him at the time; *per Alderson*, B., in *Rex* v. *Meakin*, 7 *C. and P.* 297. Again, *Parke*, B., says that if a man is drunk, this is no excuse for any crime he may commit; but where provocation by a blow has been given to a person who kills another with a weapon which he happens to have in his hand, the drunkenness of the prisoner may be considered on the question whether he was excited by passion or acted from malice; as, also, it may be on the question whether expressions used by the prisoner manifested a deliberate purpose, or were the idle expressions of a drunken man; *Rex* v. *Thomas*, 7 *C. and P.* 817. In a third case, *Crowder*, J., laid it down that though drunkenness is no excuse for crime, it may be taken into account by the jury when considering the motive or intent of a person acting under its influence; *Reg.* v. *Gamlen*, 1 *F. and F.* 90. Where, on a trial of an indictment for an attempt to commit suicide, it appeared that the prisoner was, at the time of the commission of the alleged offence, so drunk that she did not know

what she was doing, it was held that this negatived the intent to commit suicide; *Reg.* v. *Moore*, 3 *C. and K.* 319; 16 *Jur.* 750.

This being the English law, how far do those sections alter it? The 85th is really an enunciation of the general principle, that drunkenness is no excuse for crime; with the further enunciation, that if a person is forcibly, against his will, put in a position in which he has no control over his actions, he is not responsible for them. The 86th section then provides that a drunken man committing an offence shall be assumed to have the same knowledge and intention as he would have had if sober; it makes a man who gets intoxicated his own insurer against the possible results of his drunkenness. If the law infers a certain knowledge or intention in a man who does certain acts when he is sober, the same knowledge and intention will be attributed to a drunken man who does those acts. Thus a man who stabs another with a dagger, or shoots him with a pistol, is presumed in law to intend to kill him, whether the accused be drunk or sober; and under this section, although drunkenness does not excuse, it does not aggravate an offence; *Reg.* v. *Zulfukar Khan*, 8 *B. L. R. App.* 21, and 16 *W. R. Cr.* 36. In a case, however, of murder committed in a drunken squabble, voluntary drunkenness, though it does not palliate the offence, may be taken into account as throwing some light on the question of intention; *Reg.* v. *Ram Sahoy Bhar*, *W. R.* 1864 *Cr.* 24. And where an act may be innocent or may be guilty, as, for instance, the passing of a forged note, the law does not attribute any greater knowledge or intention to a drunken than to a sober man; and the prosecution must prove the intent by surrounding circumstances, as in ordinary cases, and the court or jury may take the fact of the accused having been drunk at the time he committed the act into account in forming a conclusion upon his innocence or guilt. The same remark would apply to acts, the heinousness of which would differ according to the intention with which they were done. So in a case similar to that of *Reg.* v. *Moore*, *supra*, it might be a question whether the act alleged was an attempt at suicide, or whether it was not even an act of the prisoner, but an accident or misadventure arising from her having been utterly incapable of taking care of herself.

Sect. 87. *Act not intended to cause Death, &c., done by consent.* —**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, 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 expressed 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.

Notes.

Grievous hurt is by Sect. 320 limited to the following kinds:—Emasculation; permanent privation of the sight of either eye, of the hearing of either ear; privation of any member or joint; destruction or permanent impairing of the powers of any member or joint; permanent disfiguration of the head or face; fracture or dislocation of a bone or tooth; 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: and by the joint operation of Sects. 321 and 322, a person is said voluntarily to cause grievous hurt who does any act with the intention of thereby causing grievous hurt to any person, or *with the knowledge that he is likely thereby to cause grievous hurt* to any person, and does thereby cause grievous hurt to any person. Therefore, it will appear that this section is practically in accord with the English law as respects games and pastimes. In both cases the probability of grievous hurt being caused seems to have been the practical limit.

A tilt or tournament, although the martial diversion of our ancestors was nevertheless an unlawful act; see *Reg.* v. *Coney*, 8 *Q. B. D.* 549; and so are prize-fighting and sword-playing, the succeeding amusements of their posterity from time to time; *Reg.* v. *Brown*, *Car. and M.* 314. And the unlawfulness extends to all persons assembled for the purpose of aiding and abetting those sports; *Reg.* v. *Parkins*, 4 *C. and P.* 537; *Reg.* v. *Hargrave*, 5 *C. and P.* 170; *Reg.* v. *Murphy*, 6 *C. and P.* 103. Therefore, if a knight in the former case, or a gladiator or boxer in the latter, be killed, such killing is manslaughter; 4 *Bl. Com.* 1st Edit, 183. It is scarcely possible to suppose that a prize-fight would be allowed by the provisions of this section, on the ground of want of probability that the fight would cause either death or grievous hurt; for does not experience teach the probability of permanent disfiguration of the head or face, of a fracture or dislocation of a bone or tooth, of severe bodily pain or inability to follow one's ordinary occupation for the space of twenty days? If so, then prize-fighting does not come within the exception allowed by this section, and is not justifiable, independently of any prohibition which might arise from other terms of Sect. 91, in consequence of a prize-fight involving a breach of the peace. Fencing with naked swords is forbidden, but with foils is allowable so long as the buttons are at the end of the foils; boxing with gloves is also allowable, and many other pastimes, of which in the ordinary course of affairs it is not likely that death or grievous hurt will be the result. Therefore, in England it is a good defence to prove that a battery was merely an amicable contest as, that one wrestled with another for a wager; *Com. Dig. Pleader*, 3 *M.* 18. So, also, that it happened by accident whilst the defendant was engaged in some sport or game, which was neither unlawful nor dangerous, is a good defence. In the case of *Reg.* v. *Coney*, 8 *Q. B. D.* 539, *Cave*, J., says:—"A blow struck in anger, or which is likely, or intended, to cause corporal hurt, is an assault, but a blow struck in sport, and not likely, nor intended, to cause bodily harm, is not an assault, and an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct a blow struck in a prize-fight

is clearly an assault, but playing with single sticks or wrestling do not involve an assault; nor does boxing with gloves in the ordinary way, and not with the ferocity and severe punishment to the boxers deposed to in *Reg.* v. *Orton*, 39 *L. T.* 293."

The consent given, it should be observed, must be of a person above eighteen years of age, and, therefore, by the terms of the section, there is no permission for any game in which there is any degree of danger between persons under that age. Therefore, two boys of sixteen fencing with foils or single sticks, or boxing with gloves, would not by it be protected. Further, the consent given being to take a certain kind of risk, the amount of risk must not be increased, nor the kind thereof changed; and this involves the necessity that both parties should strictly observe all the rules of the game or pastime in which they are engaged, though, of course, it is quite competent to either party in the course of the game to take upon himself a greater amount of risk than he agreed to at first. And to this effect it is ruled in *East's 'Pleas of the Crown,' vol.* i. *p.* 269: "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 cause such act to amount to manslaughter, but not murder, because the intent was not malicious." The other questions connected with consent will be discussed under Sect. 90.

Sect. 88. *Act not intended to cause death, done by consent in good faith for the benefit of a person.*—**Nothing which is not intended to cause 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 expressed 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.

Sect. 89. *Act done in good faith for the benefit of a Child, &c., by or by consent of Guardian.*—**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 expressed 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—**

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 the object was the cure of the child.

Notes.

Sect. 92 ought to follow these two sections in the Code, because it applies to the same acts as enumerated here, when those acts are done without the patient's consent, when the circumstances are such that it is impossible for him to signify his consent, or if he is incapable of giving consent and has no guardian or other person in lawful charge of him, from whom it is possible to obtain consent in time for the thing to be done with benefit. The remarks and illustrations to these two sections will, therefore, equally apply to Sect. 92, and will not be repeated there.

First, it will be necessary to import the explanation attached to Sect. 92, which is, that "mere pecuniary benefit is not benefit within the meaning of Sects. 88, 89, and 92"; the benefit to accrue must be some physical benefit, the alleviation of some disease or diseased or disorganised condition of some part or member of the body. Therefore, if a man desiring to enter a society of eunuchs induces another to castrate him, the operator is liable for the consequences of the emasculation; and it has been held in the case of *Reg.* v. *Baboolun Hijrah*, 5 *W. R. Crim.* 7, that where a man of full age (over eighteen years) voluntarily submits himself, for the cure of no diseased state, to emasculation, performed neither by a skilful hand nor in the least dangerous way, and dies from the injury, the persons concerned in the act are guilty of culpable homicide, although not only did they not know that emasculation was unlawful, but believed a man might cause himself to be emasculated if he pleased. Mr. Mayne relates "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 cas-

trated in order to make possibility of issue extinct!" It need hardly be said that his legal advisers did not sanction this extraordinary device. In some parts of India, however, where eunuchs yet abound, the practice of emasculation of children, and even of adults, still exists for the purpose of obtaining the benefit (?) of admission to the caste, and out of such a desire arose the case just before quoted. But this kind of cases ought to diminish now that the class of persons by whom they are committed has been placed under special supervision.

The cases to which these exceptions really apply are those which are met with in medical practice, where dangerous operations are performed in the hope of benefitting the patient, or where life is jeopardised for the sake of saving life, and where pain is caused in the hope of relieving pain. Others may arise, but they are of such unfrequent occurrence that it is scarcely possible to discuss them profitably at any length; and in fact, after applying the principles which have been laid down under the English law as to the liability of medical practitioners, nearly all that can be said is that you must make the best of a bad job, and act for the best under the particular circumstances of each case.

The all-important part of these sections is the provision that whatever is done should be done in "good faith," that is, with "due care and attention," and due care and attention cannot be exercised without competent knowledge and skill; therefore, the principles on which these sections will be interpreted may be learnt from a study of the decisions on the liability of medical practitioners for want of skill in the exercise of their profession. First, in civil actions, it has been ruled that every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not, if he is an attorney, undertake, at all events, to gain the cause; nor does a surgeon undertake that he will perform a cure; nor does the latter undertake to use the highest possible degree of skill, as there may be persons of higher education and greater advantages than himself; but he undertakes to bring a fair, reasonable, and competent degree of skill; and in an action against him by a patient, the

question for the jury is, whether the injury complained of must be referred to the want of a proper degree of skill and care in the defendant or not; *per Tindal*, C. J., in *Lamphier* v. *Phipos*, 8 *C. and P. p.* 479. So *Erle*, C. J., in *Rich* v. *Pierpont*, 3 *F. and F.* 35, has ruled that to render a medical man liable for negligence, or want of due care or skill, it is not enough that there has been a less degree of skill than some other medical man might have shown, or a less degree of care than even he himself might have bestowed—nor is it enough that he himself acknowledged some degree of want of care; there must have been a want of competent and ordinary care and skill, and to such a degree as to have led to a bad result. And in discussing the question of want of skill no distinction of any kind will be made between a duly qualified practitioner and one who practises without a legal qualification; see the cases of *Ruddock* v. *Lowe*, 4 *F. and F.* 519; and *Jones* v. *Fay*, 4 *F. and F.* 525. Secondly, in criminal charges it has been held that any person, whether a licensed medical practitioner or not, who deals with the life or health of any of Her Majesty's subjects, is bound to have competent skill, and is bound to treat his or her patients with care, attention, and assiduity; and if a patient dies for want of either, the person is guilty of manslaughter: *Rex* v. *Spiller*, 5 *C. and P.* 333; see also *Rex* v. *Simpson*, 1 *Lewin, C. C.* 172; and *Rex* v. *Ferguson*, 1 *Lewin, C. C.* 181; *Sukaroo* v. *Emp. I. L. R.* 14 *Calc.* 566. But if a person *bonâ fide* and honestly exercising his best skill to cure a patient, performs an operation which causes the patient's death, he is not guilty of manslaughter; and it makes no difference whether such person is a regular surgeon or not, or whether he has had a regular medical education or not; *Rex* v. *Van Butchell*, 3 *C. and P.* 629; see also the case of *Rex* v. *St. John Long*, 4 *C. and P.* 398, and *ib.* 423. If a medical man, though lawfully qualified as such, causes the death of a person by the grossly unskilful or the grossly incautious use of a dangerous instrument, he is guilty of manslaughter; *Reg.* v. *Spilling*, 2 *M. and Rob.* 107. So, too, where a person, grossly ignorant of medicine, administers a dangerous remedy to one labouring under a disease, proper medical assistance being at the time

procurable, and that dangerous remedy causes death, the person so administering it is guilty of manslaughter; *Rex* v. *Webb*, 1 *M. and Rob.* 405; and 2 *Lewin, C. C.* 196; and the same doctrine has been laid down by *Willes*, J., in the case of *Reg.* v. *Markuss*, 4 *F. and F.* 356, where it was held that if an unskilled practitioner ventures to prescribe dangerous medicines, of the use of which he is ignorant, that is culpable rashness, for which he will be held liable. In three cases the law has been laid down a little less strictly than in those just referred to, though the general principle acted on has been the same. In the case of *Reg.* v. *Crook*, 1 *F. and F.* 521, and in that of *Reg.* v. *Crick*, *ib.* 519, it was held that the administration by an ignorant person of a dangerous medicine, in the one case corrosive sublimate, and in the other lobelia, was evidence on which the jury were to decide whether the prisoner had acted so rashly and carelessly as to cause death. In the former case, the prisoner, a blacksmith, applied the corrosive sublimate to a cancer, and thereby caused the death of the patient, and the accused was convicted of manslaughter; in the latter, a herb-doctor administered lobelia to a child, and the child got better; but the mother, observing this, continued the medicine without consulting the herb-doctor again, and the child died; but the accused was acquitted. The third case is that of *Rex* v. *Williamson*, 3 *C. and P.* 635, where Lord *Ellenborough*, C. J., held that a person in the habit of acting as man-midwife, who tore away part of the prolapsed uterus of one of his patients, supposing it to be a part of the placenta, by reason of which the patient died, cannot be convicted of manslaughter, unless the jury consider from the facts in evidence that he is guilty of criminal misconduct arising either from the grossest ignorance or from the most criminal inattention. In all these last three cases it will be observed that the acts causing the death were left to the jury as a piece of evidence from which they could infer ignorance or inattention or misconduct, but not as in themselves constituting legal negligence.

Sect. 90. *Consent known to be given under Fear, &c.*—**A consent is not such a consent as is intended by any section**

of the 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 of a Child or Person of Unsound Mind.—**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.**

Notes.

Under the former half of this section, the question arises as to what kind of injury it is the fear of which renders nugatory a consent given. Clearly, it must be a fear of an injury other than that which it is supposed will be the result if a proposed course of treatment is adopted, an injury other than that which maybe the natural result of the state the patient is in. It must, in fact, be the consequence of a threat of injury to be *done*, external to and unconnected with the injury which may be *suffered*. So, too, although it is not so stated, it is surmised that there must be fear of injury to the person, and not to property; for the consent to be given is apparently part of a contract, and, under the English law, an agreement made under duress of goods, or threat of damage, legal or actual, to goods, is not void, *Skeate* v. *Beale*, 11 *A. and E.* 983; *Wakefield* v. *Newbon*, 6 *Q. B.* 276; *Kearns* v. *Durrell*, 6 *C. B.* 596, and 18 *L. J. N. S. C. P.* 28.

The interpretation of the words "misconception of fact" must be carefully undertaken; for it is evident from the sections which this controls that they cannot mean that the person consenting simply believes the facts to be different from what they really are, but that, by a *wilful misrepresentation*, he is made to believe the facts to be different from what the person representing them believes them to be, otherwise a medical man, honestly

representing facts according to his skill and belief, might find himself charged as a criminal by reason of a mistake of judgment; and the facts misrepresented must be in connection with the state of the patient and the action to be taken. Where a man consented to an operation which was dangerous, and the danger of which was unknown to him, but which he was led to believe would cure him, he cannot be said to have consented, so as to bring the case under Sect. 88; *Sukaroo* v. *Emp. I. L. R.* 14 *Calc.* 566. Further, the person about to act, in order to come within the terms of this section, must be aware at the time of acting that the consent was given under circumstances which nullify it.

For a case of consent given under the belief that snake charmers could heal those bitten by snakes, see *Reg.* v. *Punai Fattama*, 3 *Ben. L. R. A. Cr. J.* 25 and 12 *W. R. Cr.* 7.

The latter half of the section makes the Indian law different from the English. In England it is necessary in a case of rape there should be some evidence that the act was without the consent of the woman, *even where she is an idiot*; *Reg.* v. *Fletcher*, *L. R.* 1 *C. C.* 39, and the consent of a woman produced by mere animal instinct is sufficient to prevent a conviction for rape; *Reg.* v. *Fletcher*, *Bell*, *C. C.* 63.

Sect. 91. *Acts which are Offences independently of harm caused.*—**The exceptions in Sects. 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.**

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.

Sect. 92. *Act done in Good Faith for the benefit of a Person without Consent.*—Nothing is an offence by reason of any harm 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 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—

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 Sects. 88, 89, and 92.

Sect. 93. *Communication made in Good Faith.*—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.

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.

Sect. 94. *Act to which a Person is compelled by Threats.*—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 threats 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.**

Notes.

To obtain the benefit of this section, a prisoner must show that the act was done under fear of instant death; therefore, persons giving false evidence under the alleged influence of a threat not of death are not protected by this section; *Reg.* v. *Sonoo*, 10 W. R. Cr. 48; *Reg.* v. *Gonowri*, 22 W. R. Cr. at p. 5. See also *Emp.* v. *Maganlal I. L. R.* 14 *Bom.* p. 131. Nothing but fear of instant death is a defence for a policeman who tortures any one by order of his superior; *Emp.* v. *Latiff Khan*, B. R. 12 March, 1895.

The fact that one prisoner says he has committed a crime from fear of what his companions might do to him, there being no definite threat of instant death, is no excuse for the commission of a crime. See *Reg.* v. *Tyler*, 8 *C. & P.* p. 620; *McGrowther's* case, 18 *St. Trials*, 391.

Sect. 95. *Act causing Slight Harm.*—**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.**

Notes.

The taking of almost valueless pods from a tree standing upon Government waste ground comes within this section, and so does not amount to theft; *Reg.* v. *Kasya bin Ranji*, 5 *Bom. H. C. R. C. C.* 35.

In a case where the accused, annoyed at the rejection of a petition presented by him struck a District Superintendent of Police a blow across the chest with an umbrella, it was held that the pain caused was not of such a trivial character as to bring the case within this section; *In re Sheo Gholam Lalla*, 24 *W. R. Cr.* 67.

The tearing up by the accused of an account in his own handwriting and signed by him, showing advances made by the prosecutor to him, and payments made by him, and the balance due by him to the prosecutor, the accused having just made a payment to the prosecutor of a sum far short of the amount actually due, does not fall under this section; *Emp.* v. *Ramasami*, *I. L. R.* 12 *Mad.* 148.

OF THE RIGHT OF PRIVATE DEFENCE.

Sect. 96. *Nothing done in Private Defence is an Offence.*—**Nothing is an offence which is done in the exercise of the right of private defence.**

Sect. 97. *Right of Private Defence of the Body of Property.*—**Every person has a right, subject to the restrictions contained in Sect. 99, to defend—**

First, **His own body, and the body of any other person, against any offence affecting the human body;**

Secondly, **The property, whether movable or immovable, of himself or of any other person, against an 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.

Sect. 98. *Right of Private Defence against the Act of a Person of Unsound Mind, &c.*—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.

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 housebreaker, 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.

Sect. 99. *Acts against which there is no Right of Private Defence.—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.

Secondly, 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.

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

Fourthly, *Extent to which the Right may be exercised.*—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.

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 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.

Sect. 100. *When Right of Defence of Body extends to causing Death.*—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:—

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.

Sect. 101. *When such Right extends to causing any harm other than Death.*—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 restriction mentioned in Sect. 99, to the voluntary causing to the assailant of any harm other than death.

Sect. 102. *Commencement, &c., of the Right.*—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.

Sect. 103. *When the Right of Private Defence of Property extends to causing Death.*—The right of private defence of property extends, under the restrictions mentioned in Sect. 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:—

First, Robbery.

Secondly, Housebreaking 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.

Sect. 104. *When such Right extends to causing any harm other than Death.*—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 Sect. 99, to the voluntary causing to the wrong-doer of any harm other than death.

Sect. 105.—*Commencement, &c., of Right.—First*, The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

Secondly, 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.

Thirdly, 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.

Fourthly, 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.

Fifthly, **The right of private defence of property against housebreaking by night continues as long as the house-trespass which has been begun by such housebreaking continues.**

Sect. 106. *Right of private Defence when there is risk of harm to an innocent Person.*—**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.**

Illustrations.

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.

Notes.

The right of private defence commences when a reasonable apprehension of danger to the person or property actually commences; *Emp.* v. *Narsang*, *I. L. R.* 14 *Bom.* 441.

The right of private defence authorizes a man to defend his own body or the body of any other person against any offence affecting the human body, and his own or any one else's property against any act which falls under the definition of theft, robbery, mischief or criminal trespass, or which would constitute an attempt to commit any of these offences, even though, through some legal disability, or misconception of fact in the person against whom the right is exercised, that person may not by his act have committed any offence punishable under the Code; but there is no right of private defence *under the Penal Code* against any act which is not *in itself* an offence under the Code; *Ganouri* v. *Emp. I. L. R.* 16 *Cal.* p. 218. The right given by Sects. 96-98

and 100-106 is, however, controlled by Sect. 99; *Reg.* v. *Dhumunjai Poly*, 14 *W. R. Cr.* 68. There is no right of self-defence against any act *which does not cause the apprehension of death or grievous hurt*, if the act be done or attempted to be done *by, or under the direction of, a public servant*, acting in good faith under the colour of his office, although the act may not be strictly justified by law, if the person desiring to exercise the right knows that the person doing the act is, or is acting under the direction of, a public servant. In the latter case, however, the fact of the person having authority must be communicated, or, if in writing, shewn.

The first and second paragraphs of Sect. 99 does not apply to cases where the act done or the order given is entirely *ultra vires*; *Emp.* v. *Tulsiram*, *I. L. R.* 13 *Bom.* p. 171.

If a constable illegally arrests a person, that person may legally struggle to free himself and his property from arrest, but he is not justified in voluntarily causing hurt to the constable for that purpose; *Bhawoo* v. *Mulji*, *I. L. R.* 12 *Bom.* p. 377.

An officer, subordinate to an officer in charge of a police station, who was deputed by the latter to make an inquiry under Sect. 135 of the old Criminal Procedure Code, attempted, without a search-warrant, to enter a house in search of property alleged to have been stolen, and was obstructed and resisted. It was held that, even though the police officer was not strictly justified in searching the house without a warrant, the person obstructing and resisting could not set up the illegality of the officer's proceeding as a justification to his obstruction, as it was not shewn that that officer was acting otherwise than in good faith and without malice; and he was, therefore, within the exception contained in the first clause of Sect. 99; *Reg.* v. *Vyankatrav Shrinivas*, 7 *Bom. H. C. Rep. C. C.* 50. So, too, where an officer arrested a man under a warrant for his arrest which was only initialled by the officer issuing it; *Emp.* v. *Janki Prasad*, *I. L. R.* 8 *All.* 293. Where, under the Madras Rent Recovery Act, a landlord, with the assistance of the police, had actually seized cattle, the defendants were held not to be entitled to rescue

them on the plea that they were exercising their right of private defence of property; *Emp.* v. *Ramaya, I. L. R.* 13 *Mad.* 148. There is, also, no right of private defence in cases where there is time to have recourse to the public authorities for protection after a reasonable apprehension of danger has arisen, and the apprehension which justifies a recourse to the authorities ought generally to be based on some information of a definite kind as to the time and place of the danger actually threatened; *Emp.* v. *Narsang, I. L. R.* 14 *Bom.* 441; and where danger to property *suddenly* arises, the owner, on hearing of it, is entitled to go at once to the property to defend it without going to the authorities, unless, perhaps, it could be shewn that he had actually to pass a police station on the way; *ib.* Where the servants of an indigo factory in Bengal, who had a right to sow land, but had been interfered with by villagers, went out in force armed with deadly weapons in order to effect their purpose, and the villagers also went out armed to meet them; it was held that, in the affray which followed, neither party could plead the right of private defence of property, as there was a police station near at hand, and each party could have applied for the protection of the law; *Reg.* v. *Jeolall*, 7 *W. R. Cr.* 34.

Further, no greater harm must be inflicted in the exercise of the right of self-defence than is absolutely necessary for the defence of the person using it; *Reg.* v. *Dhunnjai Poly*, 14. *W. R. Cr.* 68.

Under Sect. 100 it has been decided that the right of private defence of the body and property is not exceeded by a person who, when attacked by another with a spear, strikes a blow with a *lattee*; and such right extends to the taking of life where grievous hurt is reasonably apprehended; *Reg.* v. *Moizudin*, 11 *W. R. Cr.* 41; *Reg.* v. *Ram Lall Sing*, 22 *W. R. Cr.* 51.

In a case under Sect. 102 the following facts appeared in evidence: The accused and the deceased, with a third person, met one day at a liquor-shop; and there drank together. They afterwards walked together, the third person being just behind the other two. Whilst so walking together, and altercation took place

in respect of the deceased having, as alleged by the prisoner, caused the death of the prisoner's four children by incantations. According to the prisoner's account the deceased admitted that he had done so, and added that he would also bring about the death of the prisoner; in short, that he would not allow him to leave the jungle alive, but would cause him to be taken and eaten by a tiger. Thereupon the prisoner stated that he killed the deceased with several blows of a heavy *lattee*. It was held, with reference to the provisions of Sects. 97, 99, and 102, that the accused had no reasonable apprehension of danger to himself from the threats of the deceased, whom he killed; and that, therefore, the right of private defence of the body did not arise, and the case was not taken out of the category of murder by reason of the second exception to Sect. 300; *Reg.* v. *Gobadur Bhooyan*, 13 *W. R. Cr.* 55.

Under Sects. 103 and 104, it has been ruled that a party in possession of land is legally entitled to defend his possession against another person seeking to eject him by force; *Reg.* v. *Tulsi Sing*, 2 *Ben. L. R. A. Cr. J.* 16, and 10 *W. R. Cr.* 64. The prisoners in another case, in resisting a sudden attack made upon them by certain persons for the purpose of cutting their crops, and when they had no time to complain to the police, inflicted a wound upon one of the other party with a bamboo, from effects of which the man afterwards died, and were convicted by the Sessions Judge under Sects. 148 and 304; but the High Court held that the force used and the injuries inflicted were not such as to exceed the right of private defence of property, and directed an acquittal; *Reg.* v. *Guru Churn Chung*, 6 *Ben. L. R. App.* 9, and 14 *W. R. Cr.* 69; see, also, *Reg.* v. *Mitto*, 3 *W. R. Cr.* 41; *Reg.* v. *Sachee*, 7 *ib.* 112; *Reg.* v. *Raj Kisto*, 12 *ib.* 43; *Reg.* v. *Ram Lall*, 22 *ib.* 51. Where the accused, whose property had frequently been stolen, went, armed with a *lattee*, to watch his property, and with the *lattee* struck a thief, who died from the effects of the blow, it was held, having regard to the nature of the injuries inflicted, and the subsequent conduct of the accused, that the case did not fall within the 4th clause of

Sect. 97, and that the prisoner was not guilty of culpable homicide not amounting to murder, being protected by Sects. 97 and 104, he not having exceeded the legal right of private defence of property; *Reg.* v. *Mokee*, 12 *W. R. Cr.* 15; see, also, *Reg.* v. *Goberdhun Pari*, 14 *W. R. Cr.* 74. But where A trespassed on the lands of B whose servants seized and confined A till the following morning, when B gave information to the police, it was held that the conduct of B and his servants in thus confining A could not be excused on the ground that they were exercising the right of private defence of property; *Shurufoodeen* v. *Kasinath*, 13 *W. R. Cr.* 65.

Where A trespassed into B's house, with the object of having intercourse with B's wife, and B and his friend C severely beat A, B was held justified under Sect. 104 and Sect. 96 in so acting, and C was also acquitted, as having aided in the commission of no offence; *Reg.* v. *Dhaumun Teli*, 20 *W. R. Cr.* 36.

Where the accused pursued a thief and killed him after the house-trespass ceased, it was held that the act did not fall under Exception 2 to Sect. 300, the right of private defence of property only continuing so long as the house-trespass continues; *Reg.* v. *Balakee Jolahee*, 10 *W. R. Cr.* 9; *Reg.* v. *Gour Chand*, 18 *W. R. Cr.* 29.

A head constable, making an enquiry into a case of house-breaking and theft, searched the tents of some gipsies for the stolen property, but did not find it. The gipsies then gave him a sum of money, which he deemed insufficient and demanded more, which the gipsies refused to give. Thereupon, he ordered one of the gipsies to be bound and taken away. While this was being done, the gipsies came up in a threatening manner, some of them being armed with sticks and stones, towards the place where the constable and gipsy were. Before any actual violence was done by the gipsies, and while they were still at a distance of five paces, the constable took up a gun and fired it, killing one of the gipsies. It was held that the constable had not a right of private defence against the gipsies, as their acts did not reasonably cause apprehension to him of death or grievous hurt, and, being caused

by his illegal conduct, would have ceased if he had released the gipsy he had ordered to be bound; and that he was guilty of culpable homicide amounting to murder; *Emp.* v. *Abdul Hakim*, *I. L. R.* 3 *All.* 253.

Under English law, homicide may be justified, if committed *se defendendo*, or as it is sometimes termed of necessity; so, also, an assault may be justified if committed in defence of person or property. The text books mention one species of homicide said to be *se defendendo*, where the party slain is equally innocent as he who occasions his death, that of two persons who, having been shipwrecked, get on to the same plank, but finding it not able to save both of them, one thrusts the other from it and he is drowned, and it was said that such homicide is excusable through unavoidable necessity, and upon the principle of self-defence. In the case of *Reg.* v. *Dudley*, 14 *Q. B. D.* 273, this doctrine, and the authorities by which it was supposed to be supported, were examined, and no decided case was found to support it. The one real authority of former time was Lord Bacon in his commentary on the maxim "*necessitas inducit privilegium quoad jura privata*," in which he puts the case of the two men on the plank, which he is said to have derived from the canonists. *Coleridge*, C. J., commenting on this, said at p. 286:—"If Lord Bacon meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour, it certainly is not law at the present day. Consequently, a man who, in order to escape death by starvation, kills another for the purpose of eating his flesh, is guilty of murder; although at the time of the act he is in such circumstances that he believes, and has reasonable ground for believing, that it affords the only chance of preserving his life, and that the person slain would be likely to die very shortly of inanition." The Penal Code excuses no such act as this, and the only case in which the Code would reduce the punishment is, perhaps, in the case of the person slain consenting to have his life taken for the benefit of the survivors.

CHAPTER V.

ABETMENT.

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

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

Secondly, Engages with one or more 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 an 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 authorised 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 instigating the apprehension of C.

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

Sect. 108. *Abettor.*—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.

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.

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 being 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 of 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 of 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.

ABETMENT GENERALLY.

Evidence.

By English law, where two or more persons are to be brought to justice for one and the same felony, they are considered in the light either—(1) of principals in the first degree; (2) of principals in the second degree; (3) of accessories before the fact; (4) of accessories after the fact. The general definition of a *principal in the first degree* is, one who is the actor or actual perpetrator of the fact; 1 *Hale*, 233, 615. *Principals in the second degree* are those who are present, aiding and abetting, at the commission of the fact, but the presence may be either actual or constructive. A person watching outside a house to prevent surprise, while his companions are in the house committing a felony, is as much present in law as if he were actually inside the house; but he must be sufficiently near to give assistance; *Reg.* v. *Stewart, R. and R.* 363. *Accessories before the fact* are those who, being absent at

the time of the felony committed, do yet procure, counsel, command or abet another to commit a felony; 1 *Hale*, 615; and it is essential that the party should not be present at the time the offence is committed. *Accessories after the fact* are those who, knowing a felony to have been committed, relieve, comfort or assist the felon, in order to hinder his apprehension, trial or punishment; 1 *Hale*, 618; *Dalt.* 530.

Under the Penal Code, there are practically the same classes of offences but the nomenclature is different. There are principals corresponding to principals in the first degree; abettors who are present at the commission of the offence, punishable under Sect. 114 as principals, corresponding to principals in the second degree; abettors who are not present at the commission of the offence; and those who harbour or conceal an offender, who are punishable under Sects. 212, 213 and 216.

Abetment under the Code may be by *instigating* a person to commit an offence; by *engaging in a conspiracy* to commit it; or by *intentionally aiding* him to commit it; but in the proof of abetment care must be taken to discriminate between acts which are innocent, although at first suspicious, and those which are criminal. It is absolutely necessary to shew that the alleged abettor is doing acts which necessarily lead up to, or aid in, the commission of the offence; *Reg.* v. *Nim Chand*, 20 *W. R. Cr.* at p. 44. In a case of abetment by instigation, every step must necessarily be criminal, because instigation presupposes that the instigator has made up his mind from the beginning that, if possible, the offence shall be committed. In abetment by conspiracy, the case is somewhat different, because the accused may have been in company of the other conspirators, may even have gone to the meeting at which the offence was resolved to be committed, but may have parted from the others before they had resolved to commit the offence. So, too, where the abetment is by *intentional aiding*, a man may have made a chisel for a burglar, or may have walked with him up to the door of the house into which he was going to break, but might have done either act innocently, although both acts might rightly be looked upon as being very suspicious. Acts which are *merely* suspicious are

not *proof* of abetment, but it must be shewn that the accused knew and intended that the offence should be committed, and that the act in which he engaged actually assisted in starting, or aided in, the commission of the offence.

Abetment by instigation.—It must be proved that the accused instigated the commission of the offence, but it is immaterial whether the instigation be personal, or through the intervention of a third person, *Fost.* 125; *R.* v. *Earl of Somerset*, 19 *St. Tr.* 804. It may also be direct, by hire, counsel, command or conspiracy; or indirect, by evincing an express liking, approbation or assent to another's design of committing an offence; 2 *Hawk, c.* 29, *s.* 16. But a tacit acquiescence, or words which amount to a bare permission, will not be sufficient to prove abetment by instigation; 1 *Hale*, 616. There must be an active proceeding on the part of the accused: he must procure, incite, or in some other way encourage the act done by the principal. Therefore, where the accused acted as a stakeholder on the occasion of a prize fight which ended in the death of one of the fighters, but was not present at the fight, and took no other part in any of the proceedings connected with it, than to hold the stakes and hand them over to the winner, it was held that he could not be convicted as an accessory before the fact to the manslaughter; *R.* v. *Taylor*, *L. R.* 2 *C. C.* 147.

The offence of abetment by instigation depends upon the intention of the person who abets, and not upon the act actually done by the person whom he abets; *Reg.* v. *Imandi Bhooyah*, 21 *W. R. Cr.* 8; and an accused may thus be convicted of abetting a much more serious offence than that of which the person abetted is convicted. And so is the law laid down in Sect. 110. It seems to me to be very doubtful, looking at Sects. 111 and 118, whether an abettor can abet a minor offence of the same character as that committed by the person abetted, as would seem to be the idea of the judges who decided the case of *Reg.* v. *Imandi Bhooyah*, seeing that an abettor is liable for any act or effect which would naturally occur in the course of carrying out the course of action which he had abetted. Thus, if A command B to beat C, and C dies of the beating, A is guilty of instigating

the murder; 1 *Hale*, 617. So, too, if A command B to burn the house of C, and in so doing the house of D is also burnt, A would be guilty of abetting the burning of D's house; *R.* v. *Saunders*, *Plowd.* 475*a*. So, also, if the offence commanded be committed by means different from those suggested, as for instance, if A commanded B to poison C, and B instead of poisoning C, shot him, A would nevertheless be guilty of instigating B to murder C; *Fost.* 369, 370.

In the case of *Reg.* v. *Pestonji Dinsha*, 10 *Bom. H. C. R.* 75, it was argued that the abetment of murder by sorcery or other impossible means is not an offence under the Penal Code. The question was left in doubt, the court finding it unnecessary to come to a decision on the point. Counsel for the Crown contended that abetment to murder by sorcery is an offence, because death may be caused indirectly by sorcery; and that, even if that be not so, intention to kill, followed by an overt act of instigation, constitutes an abetment of murder under Sect. 109 of the Indian Penal Code; and in such a case as that of A impressing B strongly with his desire for the death of C, and attempting to influence B to murder C by sorcery, and the murder thereon of C ensuing by the hand of B, through the agency of some possible means, it seems impossible, without a quibble, to hold that A is not guilty of having *instigated* the murder of C. C has been killed on account of A's inciting B to kill him; and B, in substituting possible means of death for the impossible means suggested by A, must have supposed, by inference, that though he thereby departed in some measure from the instructions given by A, still that so long as he followed out the main object, the murder of C, he was acting as the agent for carrying out C's expressed wish; see, too, Sect. 111. Upon an indictment on 43 Geo. III. c. 58, s. 2, *Lawrence*, J., said: "It is immaterial whether the shrub was savin or not, or whether it was capable of procuring abortion, or even whether the woman was actually with child. If the prisoner believed at the time that it would procure abortion, and administered it with that intent, the case is within the statute, and he is guilty of the offence laid to his charge;" *Rex* v. *Phillips*, 3 *Camp. Rep.* 73, 76.

And if one man instigates another to commit a particular offence, and that other, in pursuance of such instigation, not only commits that offence, but in the course of it commits another in furtherance of it, the former is criminally responsible as abettor in respect of such last mentioned offence, if it is one which, having regard to the immediate object of the instigation, he must, as a reasonable man, have known would, in the ordinary course of events, probably have to be committed in order to carry out the original scheme; *Emp.* v. *Mathura Das*, *I. L. R.* 6 *All.* 491. Where, of several persons constituting an unlawful assembly, some only were armed with sticks, and A, one of them, was not so armed, but picked up a stick and used it, B, the master of A, who had given a general order to beat, was held to be guilty of instigating the assault made by A; *Reg.* v. *Rassoo Koollah*, 12 *W. R. Cr.* 51.

But if the abettor order one offence, and the principal commit another, as, for instance, to burn a house, and instead of that he commits a theft, the accused will not be an abettor of the offence committed; 1 *Hale*, 617; *Sect.* 111, *Ill.* (*b*).

The instigation must be continuing; for, if the instigator of an offence repent, and before the offence is committed actually countermand it, and the principal notwithstanding commit it, the original instigator will not be liable as an abettor; 1 *Hale*, 618; *Reg.* v. *Amrita Govinda*, 10 *Bom. H. C. Rep.* 497.

Where a person instigates to the commission of an offence by means of a letter sent through the post, the offence of abetment is complete as soon as the contents of the letter become known to the addressee, and such offence is triable at the place where the letter was received; *Emp.* v. *Sheo Dial*, *I. L. R.* 16 *All.* 389.

Abetment by conspiracy.—In order to constitute a conspiracy there must be at least two persons, but it is not necessary that the names of any but the accused should be known, or even that their persons should be capable of identification. In England a person can be charged with conspiring with certain persons whose names are to the jurors unknown, but evidence must always be given to shew that there were other persons engaged with him in

the conspiracy. It is not necessary that the accused should concert the offence with the person who actually commits it. It is sufficient that he engages in a conspiracy, in pursuance of which the offence is committed; *Reg.* v. *Gobind Dobey*, 21 *W. R. Cr.* 35. It must also be shewn that the accused continued engaged in the conspiracy down to the time when the offence was committed; *Reg.* v. *Amrita Govind*, 10 *Bom. H. C. Reg.* 497; or, at any rate, until the very last stage when the final resolution was taken in the matter, and the act put in the course of actual execution. A woman believing herself to be with child, but not being with child, who conspires with others to administer drugs to herself, or to use instruments on herself, with intent to procure abortion, is liable to be convicted of conspiracy to procure abortion; *Reg.* v. *Whitchurch*, 24 *Q. B. D.* 420.

Abetment by intentionally aiding.—In this case the aid must be given in the doing of a thing which is an offence, but the assistance may be given directly at the time the act is done, or it may be by doing something either before or at the time of the commission of the offence which facilitates its commission. Consequently, the aider must not be actually or constructively present at the commission of the offence, as is the case with an aider and abettor under English law, because if present at the commission of the offence he is, by Sect. 114, to be deemed to have committed the offence. The facilitating of the commission of the offence may be either by commission or omission, but it must be shewn that the omission was intentional, and with the intent to aid the commission of the offence; *Noorul Hosseín* v. *Fabre-Tonnerre*, 24 *W. R. Cr.* 26; and the omission must involve a breach of a legal obligation; *Reg* v. *Khadim*, 4 *Ben. L. R. A. Cr.* 7. A head constable, knowing that certain persons are likely to be tortured, and keeping out of the way, is guilty of abetment; *Reg.* v. *Kali Churn Gangooly*, 21 *W. R. Cr.* 11.

The mere fact that the offence of extortion was committed in the presence of the village chowkidar without eliciting any disapproval on his part will not render him liable as an abettor; *In re Gopal Chunder*, *I. L. R.* 8 *Cal.* 728. To be present and aware that an offence is about to be committed, does not con-

stitute abetment, unless the person there present holds some position of rank and influence such that his presence is a direct encouragement of the offenders, or unless some specific duty of prevention rests upon him which he leaves unfulfilled in such a way as to afford ground for the inference that he has joined it a conspiracy for the perpetration of the offence; *Emp* v. *Lakshmi B. R. 19th August* 1886. Where a police officer, whose duty it is to shelter persons in custody and arrest persons committing assaults likely to cause grievous bodily injury, purposely keeps out of the way, knowing that persons are likely to be tortured to get confessions out of them, he is guilty of abetment; *Emp.* v. *Latiff Khan, B. R.* 12 March 1895.

A prisoner, who consented to form one of a party who subsequently committed a theft, withdrew from his agreement, bu. was nevertheless present at the time the theft was committed, does not conspire within cl. 2 of Sect. 107, but is guilty of intentionally aiding under cl. 3 : *Reg.* v. *Bhoodhun Mooshur*, 8 *W. R. Cr.* 78.

A gave a dao to B, who had declared his intention of coercing C against whom he was acting. B inflicted a grievous hurt on C with this dao. A was held guilty of abetment under Explanation 2 of Sect. 107 ; *Reg.* v. *Eshan Meah*, 12 *W. R. Cr.* 52.

A priest who knowingly celebrates a bigamous marriage commits the offence of abetment of bigamy ; *Emp.* v. *Umi, I. L. R* 6 *Bom.* 126; but the mere consent of persons to be present at such a marriage ; or their presence in consequence of such consent; or the grant of accommodation in a house for such a marriage, does not necessarily constitute abetment of such marriage ; *ib.* Any unmarried person who knowingly enters into a marriage which renders the other party guilty of bigamy is a principal in the second degree; *R.* v. *Brawn*, 1 *C. and K.* 114; and would be punishable under Sect. 114 as a principal.

A Mahomedan guardian of a married female infant who, while her husband is living, causes a marriage ceremony to be gone through in her name, but in her absence and without her consent,

with another man, does not commit an offence of abetting the commission of an offence under Sect. 494. No principal offence having been committed, there was no offence which could be abetted; *Emp.* v. *Abdool Curreem*, *I. L. R.* 4 *Cal.* 10.

The supplying of food to a person about to commit an offence is not an abetment of that offence, unless it was supplied in order to facilitate the commission of the offence, *e.g.*, to enable the offender to go on a journey to the scene of the offence, or to enable him to conceal himself while he sought for an opportunity; *In re Lingam Ramnanna*, *I. L. R.* 2 *Mad.* 137.

A debtor, having paid a sum of money to his creditor, who had not at hand a receipt stamp, accepted from him an unstamped receipt, promising to affix a stamp thereto; it was held that this did not constitute an abetment of the offence of giving an unstamped receipt; *Emp.* v. *Mithulal*, *I. L. R.* 8 *All.* 18; *Emp.* v. *Janki*, *I. L. R.* 7 *Bom.* 82.

By Sect. 40, as amended by Act XXVII of 1870, the word "offence" in Sects. 109, 110, 112, 114, 115, 116 and 117 denotes a thing punishable under the Penal Code, or under any special or local law, as defined by Sects. 41 and 42; consequently, the abetment of offences under special and local laws is punishable under these sections. Before the passing of 37 and 38 Vict. c. 27, there could be no abetment in India punishable, under Sect. 109, of an offence committed on the high seas; *Reg.* v. *Elmstone*, 7 *Bom. H. C. Rep. C. C.* 89; but as that statute makes such offences punishable as if committed within the local jurisdiction, they are now punishable under the Penal Code, and an abetment in India of such offence would also be punishable under the Code.

A foreign subject, resident in foreign territory, instigated in such territory the commission of murder, which murder was in consequence committed within British territory. It was held, that the instigation having taken place wholly in foreign territory, and not within any local jurisdiction created by the Code of Criminal Procedure, the instigator not belonging to any class made punishable by British Courts by a special law as contemplated by

Sect. 3 of the Penal Code, was not amenable to a British Court; *Reg.* v. *Pirtal*, 10 *Bom. H. C. Rep.* 356.

Mere subsequent knowledge of an offence does not amount to evidence of abetment of that offence; *Reg.* v. *Shumseruddeen*, 2 *W. R. Cr.* 40. There can be no abetment of an offence after it has once been committed, and, therefore, mere proof that an accused person has given evidence in support of a false charge is no evidence that he abetted the institution of it; *In re Jugut Mohini Dassee*, 10 *C. L. R.* 1; *Reg.* v. *Ram Panda*, 9 *B. L. R. App.* 16; *S. C. sub nom. Reg.* v. *Pann Panda*, 18 *W. R. Cr.* 28.

To constitute the offence of abetment it is not necessary that the offence abetted should be committed; *In re Dinonath Burooa*, 18 *W. R. Cr.* 32; but to make it punishable under Sect. 109, the offence abetted must have been committed; *Reg.* v. *Rajcoomar Banerji*, 1 *Ind. Jur. O. S.* 105.

The offence of abetment under the Penal Code is a substantive offence. The conviction of an abettor is, therefore, in no way dependent on the conviction of the principal; *Reg.* v. *Maruti Dada*, *I. L. R.* 1 *Bom.* 15.

On a charge of abetment of the abetment of an offence it is not necessary to prove that the principal offence was actually committed; *Emp.* v. *Troylukho Nath*, *I. L. R.* 4 *Cal.* 366.

Punishment of Abetment—Principal offence being committed.

Sect. 109. *Punishment of Abetment if the act abetted is committed.*—**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 this offence.**

Explanation.—**An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the 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 shewing A some favour in the exercise of B's official functions. B accepts the bribe. A has abetted the offence defined in Sect. 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.**

Offences under this chapter are triable by the court by which the offence abetted is triable. A warrant or summons should ordinarily issue in the first instance, according as a warrant or summons may issue for the offence abetted. For offences coming under Sects. 115, 118 *and* 119 (*if the offence concealed be punishable with death or transportation for life*), *defendants are not bailable; for other offences defendants are bailable or not as the offence abetted is bailable or not.*

Charge.

Where Principal is charged in same indictment.—That you, the said A B, did, on or about the day of , at , abet the commission of the said offence of by the said C D, which was committed in consequence of the said abetment, and that you have thereby committed an offence punishable under Sects. 109 and of the Indian Penal Code, and within, &c.

Where Principal is not charged in the same indictment.—That one A B (*or* some person unknown) did, on the day

of , at , commit , and that you, the said C D, at , abetted the said A B (*or* person unknown) in the commission of the said , which was committed in consequence of the said abetment, and that you have thereby committed an offence punishable under Sects. 109 and of the Indian Penal Code, and within, &c.

Evidence.

In order that an abettor may be punished under this section, it is necessary that it should be found distinctly, not only that the abetment was committed, but also that the principal offence was committed in consequence of such abetment; therefore, the charge must contain an allegation of the latter fact. In like manner, if the abetment is to be brought under any of the subsequent sections which provide for the punishment of certain kinds of abetment, proper charges must be framed in the terms of those sections, and the numbers of those sections and of the sections imposing a punishment for the principal offence must be mentioned in the charge; 1 *W. R. Cr. Letters*, 9; 2 *W. R. C. L.* 1, 8.

In this section the word "offence" denotes anything punishable under the Penal Code, or under any special or local law; Sect. 40, *ante* p. 38.

Liability of Abettors under various circumstances.

Sect. 110. *Punishment of Abetment if the person abetted does the act with a different intention from that of the Abettor.*—**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.**

Sect. 111. *Liability of Abettor when a different act is done.*—**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.

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

Sect. 112. *Cumulative Punishment for act abetted and for act done.*—**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.**

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 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.

Sect. 113. *Liability of Abettor for an effect different from that intended.* **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 to 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.**

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.

Note.

In Sections 110 and 112 the word "offence" denotes anything punishable under the Penal Code or under any special or local law; Section. 40, *ante*, p. 38.

Abettor present when offence committed.

Sect. 114. *Abettor present when offence is committed.*—**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.

Evidence.

This section simply provides for the punishment of what the English law calls principals in the second degree. A person present abetting an offence is to be *deemed* to have committed the offence, though he does not in fact do so any more than a principal in the second degree does. Hence "all who are present aiding and assisting a man to commit a rape are principal offenders in the second degree, whether they be men or women"; 1 *Russ. on Crimes*, 5 Edit. 859; and hence Lord Audley (3 *Howell's State Trials*, 401) was convicted as a principal of a rape on his own wife, because he aided another to ravish her.

There are several modes of abetment defined in the Penal Code. One is instigating another to commit an offence. If A instigates B to murder Z he commits abetment; if absent, he is punishable as an abettor, if the offence is committed, under Sect. 109; if present, he is by this section to be *deemed* to have committed the offence, and is punishable as a principal. Another mode of abetment is by intentionally aiding, by any act or illegal omission, the doing of an offence. A aids B to murder Z. If absent, he is punishable as an abettor, and may be liable under Sect. 109; if present, then he is to be *deemed* as much to have committed the offence as if he had struck the fatal blow. The meaning of this section is, that if the nature of the act done constitutes abetment, then, if present, the abettor is to be deemed to have committed the offence, though, in point of fact, another actually committed it; 4 *Mad. H. C. Rulings*, *8th March* 1869, 37. If an abettor of an offence is, on account of his presence at its commission, to be charged under Sect. 114 as a principal, his abetment must continue down to the time of the commission of the offence. If he distinctly withdraws at any moment before the final act is done, the offence cannot be held to have been committed under his continuing abetment; *Reg.* v. *Amrita Govinda*,

10 *Bom. H. C. R.* 497. Where the court finds that parties came with a number of armed men and forcibly carried off a crop without the consent of the owner, even if such parties took no part in the actual carrying off, they must be considered as principals; *Reg.* v. *Shib Chunder Mundle*, 8 *W. R. Cr.* 59.

In framing a charge against an abettor who is present at the commission of the principal offence, he should be charged with having committed that offence; *Reg.* v. *Chima*, 8 *Bom. H. C. Rep. C. C.* 164; and in support of the charge it must be proved that the accused did such acts as to make himself liable as abettor if absent; and that he was actually present when the offence was committed; *Reg.* v. *Niruni*, 7 *W. R. Cr.* 49.

The word "offence" in this section denotes any thing punishable under the Penal Code or under any special or local law; Sect. 40, *ante*, p. 38.

Punishment for abetment—Principal offence not having been committed.

Sect. 115. *Abetment of an Offence punishable with Death or Transportation for Life where offence is not committed.*—**Whoever abets the commission of an offence 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.

Sect. 116. *Abetment of an Offence punishable with Imprisonment where Offence is not committed. If the Abettor or the Person abetted be a Public Servant whose duty it is to prevent the Offence.* —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 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 shewing 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, 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.**

For Court of Trial, issue of Summons or Warrant, and bail, see ante, p. 126.

Charge.

That you, the said A B, did on or about the day of , at , abet the commission by one C D of an offence punishable by death, to wit, murder, which said offence was not committed in consequence of such abetment, and that you have thereby committed an offence punishable under Sect. 115 of the Indian Penal Code, and within, &c.

In the case of a charge under Sect. 116, both that section, and the section under which the principal offence is punishable must be mentioned.

In these two sections the word "offence" denotes anything punishable under the Penal Code, or under any special or local law; Sect. 40, *ante*, p. 38.

Abetment of an Offence by the Public, or by more than ten Persons.

Sect. 117. *Abetting the Commission of an Offence by the Public, or by more than ten Persons.*—**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.**

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.

For Court of Trial, issue of Summons or Warrant, and Bail, see ante, p. 126.

Charge.

That you, the said AB, did on or about the day of , at , abet the commission of an offence, to wit, the offence of rioting, by a number of persons exceeding ten, to wit, by affixing in the public streets of Bombay a placard instigating the Seedees to attack the Hindus while engaged in the Gunputti processions, and thereby committed an offence punishable under Sect. 117 of the Indian Penal Code, and within, &c.

Evidence.

This offence can be committed by one person, or by any number of persons. The first thing to be proved is the abetment of some offence as defined by Sect. 40, *ante*, p. 38. Then it must be proved, in the event of the abetment being by instigation or conspiracy, that it was intended that the offence should be committed by the public generally, or by more than ten persons; and in the event of the abetment being by aiding, that it was actually committed or attempted to be committed by the public generally, or by more than ten persons.

The word "offence" in this section denotes anything punishable under the Penal Code, or under any special or local law; Sect. 40, *ante*, p. 38.

Concealment of design to commit Offences.

Sect. 118. *Concealing a design to commit an Offence punishable with Death or Transportation for Life.*—**Whoever, intending to facilitate or knowing 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 of illegal omission, the existence of**

a design to commit such offence, or makes any representation which he knows to be false respecting such designs, 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 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.

Sect. 119. *A Public Servant concealing a design to commit an Offence.*—Whoever, being a public servant, intending 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 the offence. Here A has, by an illegal omission, concealed the existence of B's design, and is liable to punishment according to the provisions of this section.

Sect. 120. *Concealing a design to commit an Offence punishable with Imprisonment.*—**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.**

Evidence.

In cases under Sects. 118, 119 and 120 it must be alleged in the charge and proved—1stly, that there was an intended offence; 2ndly, that the intention to commit that offence was known to the accused, not merely suspected by him; 3rdly, that he *voluntarily* concealed the existence of such intention, and such concealment may be by an act on his part, or an *illegal* omission, or a false representation; 4thly, that the accused by his concealment of the design actually intended to facilitate the commission of the offence, or knew that he would be likely thereby to facilitate such commission. If it is desired that the higher punish-

ment provided by these sections should be inflicted, it must be alleged and proved that the offence, the commission of which was concealed, was actually committed; but it is not necessary to prove that the concealment *actually facilitated* the commission of the offence. These sections all contemplate the concealment of a design by persons other than the accused to commit the offence charged; *Reg.* v. *Rajcoomar*, 1 *Ind. Jur. O. S.* 105. The concealment of an offence after it has been committed is not of itself an abetment; 5 *R. J. and P.* 106; though, coupled with other facts, it may be an important link in the chain of evidence, bringing home the offence of abetment to an accused person; and in some cases it may bring the person concealing the offence under the provisions of Sects. 202 and 203.

CHAPTER VI.

OFFENCES AGAINST THE STATE.

WAGING WAR.

Sect. 121. *Waging War, &c.*—**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 in Ceylon, by sending arms to the insurgents. A is guilty of abetting the waging of war against the Queen.**

Sect. 121A. *Conspiracy to commit Offences punishable by Sect.* **121.—Whoever within or without British India conspires to commit any of the offences punishable by Sect. 121, or to deprive the Queen of the sovereignty of British India or of any part thereof, or conspires to overawe by means of criminal force or the show of criminal force, the Government of India or any Local Government, shall be punished with transportation for life or any shorter term, or with imprisonment of either description which may extend to ten years.**

Explanation.—**To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.**

Sect. 122. See p. 142.
Sect. 123. See p. 143.
Sect. 124. See p. 144.
Sect. 124A. See p. 146.

Sect. 125. *Waging War against any Asiatic Power in Alliance with the Queen.*—**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.**

Offences under Sects. 121, 121*A*, *and* 125, *are triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable. Sanction must be obtained for the prosecution under Sect.* 196 *of the Criminal Procedure Code,* 1882.

Charge.

That you, on or about the day of , at , waged war (*or* attempted to wage war, *or* abetted the waging of war) against the Queen (*or* against , an Asiatic power, in alliance with, *or* at peace with the Queen); and that you have thereby committed an offence punishable under Sect. 121 (125) of the Indian Penal Code, and within, &c.

Evidence.

In order to support this charge, it is necessary to prove that which in law amounts to a waging of war, or an attempt to wage war, directly or constructively, against the Queen or against any Asiatic power in alliance or at peace with the Queen; and to prove that the person charged was either present and actually engaged in it, or was aiding and abetting it. The waging of war intended by these sections is an offence of a narrower description than that called in England levying war. Levying war includes not only the actual disposition of an armed force, but also the collection and training of such force. Waging war evidently only refers to the actual carrying on of aggressive operations with or without actual fighting taking place. Waging war is nearly the same as what is called in English law direct levying of war.

The number of persons assembled is not material to constitute either a levying or a waging of war; three or four will constitute it as well as a thousand; 3 *Inst.* 9. It is not necessary that they should be armed with military weapons, or with colours flying; *Fost.* 208; nor is actual fighting necessary; *Fost.* 218; 1 *Hale*, 144; if substantial steps be taken towards that end, beyond the mere collection of a number of men or arms together, which is met by Sect. 122, *post*, p. 142. But there must be an insurrection, there must be force accompanying that insurrection, and it must be for an object of a general nature; *Reg.* v. *Frost*, 9 *C. and P.* 129; and not in furtherance of some private grievance.

War waged against a sovereign supposes an open rebellion against him for the purpose of deposing or imprisoning him, or of getting him into the power of the rebels, or of forcing him to put away his ministers, or of overturning his Government; 1 *Hale*, 152; *Fost.* 210; and see *R.* v. *The Earls of Essex and Southampton*, 1 *St. Tr.* 1334: and includes the holding or defending any of the sovereign's castles, forts, or ships against the sovereign or his forces, or delivering them up to rebels through treachery; *Fost.* 219; 1 *Hale*, 168, 169. In case of war waged against a sovereign, all persons assembling and marching with rebels are guilty, whether they are aware of the purpose of the assembly, or aid and assist in committing acts of violence or not; *R.* v. *The Earls of Essex and Southampton*; *Moore*, 621: unless compelled to join and continue with them *pro timore mortis*. But, under the Penal Code, this does not extend to the participating in crimes punishable with death. But if a person is not actively taking part in the main enterprise, but keeping himself in such a position as to be able to aid those who are, then such person is guilty of abetting the waging of war against the Queen or sovereign of the country where the war is actually waged. In order to maintain the charge either of waging war or of abetting the waging of war, proof must be given of a war actually waged, and not merely of a conspiracy to wage it; 1 *Hale*, 141-148; 1 *Hawk*, c. 27, *s.* 27. A conspiracy to wage war, however, is provided for by Sect. 121A, *ante*, p. 138.

The existence of a State as a separate power is a fact of which judicial notice will be taken by the courts of law, if such State has been recognised by the sovereign power under which the courts are constituted. But if, upon a civil war in any country, one part of a nation should separate from the other, and establish for itself an independent government, the newly-formed nation cannot be recognised by the courts of law until it has been recognised by the sovereign. Still the judges are bound, *ex officio*, to know whether or not the Government has recognised such nation as an independent State; *Taylor on Evidence*, 8th Edit., Vol. I., p. 3. If there should be any doubt on this point, the court should refer to its superior court, through which information will be obtained from that department of the Government within whose province the subject actually falls; *Michell* v. *Sultan of Johore*; (1894) 1 *Q. B.* 149.

The rule of English statute law in regard to treason and misprision of treason is, that no person shall be indicted, tried, or attainted thereof but upon the oaths and testimony of two lawful witnesses. The repealed Evidence Act II. of 1855 recognised the English law on this subject, Sect. 28 (which provided that the direct evidence of one witness, entitled to full credit, should be sufficient for proof of any fact in any court), making an exception in cases of treason. But this exception no longer holds; for now, under Sect. 134 of the present Evidence Act, I. of 1872, "No particular number of witnesses shall, in any case, be required for the proof of any fact." Under English statute law the two witnesses in cases of treason must testify, "either both to the same overt act, or one to one and the other to another overt act of the same treason, unless the accused shall openly, without violence, confess the same; and further, that if two or more distinct treasons, of divers heads or kinds, shall be alleged in one indictment, one witness produced to prove one of these treasons, and another another, shall not be deemed to be two witnesses to the same treason." This protective rule, which in England has remained in its present state since the days of King William III., and in Ireland was adopted in the year 1821, has been incorporated, with some slight variation, into the constitution of America,

of the same, intending by such concealment to facilitate (*or* knowing it to be likely that such concealment would facilitate) the waging of such war against the Queen, and that you have thereby committed an offence punishable under Sect. 123 of the Indian Penal Code, and within, &c.

Evidence.

Prove the existence of a design to wage war, that the defendant knew of such design, and that he concealed it either by one act, or by a series of acts, or by one illegal omission, or by a series of illegal omissions. The concealment will only be able to be proved inferentially, as, to prove it actually, it would be necessary to call every one to whom he ought to have made the design known, which would be in fact to call every official in the neighbourhood. The most usual case will be that of a conspiracy to wage war, in which case every one who takes an active part in the conspiracy will be guilty of an offence under this section. The intent with which the design was concealed must also be shewn directly or inferentially.

ASSAULTING GOVERNOR-GENERAL, &c.

Sect. 124. *Assaulting Governor-General, &c.*—**Whoever, with the intention of inducing or compelling the Governor-General in 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.**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant.

Defendants are not bailable. Not compoundable. Sanction required under Sect. 196, *Cr. P. C.*, 1882.

Charge.

That you, on or about the day of , at , with the intention of inducing (*or* compelling) the Right Hon. A B, the Governor-General of India (*or* the Governor of the Presidency, *or* the Lieutenant-Governor of , *or* the Hon. A B, a Member of the Council of the Governor-General of India, *or* of the Council of the Presidency) to exercise (*or* refrain from exercising) a lawful power as such , to wit: (*here insert description of power intended to be affected*) assaulted (*or* wrongfully restrained, *or* attempted wrongfully to restrain: *or* overawed by means of criminal force, *or* by the show of criminal force) such , and that you have thereby committed an offence punishable under Sect. 124 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the defendant committed the assault on, or wrongfully restrained or attempted wrongfully to restrain, or overawed by means or by show of criminal force, some one of the persons named in the section. It will not be necessary to prove the appointment of such person, nor that he acted as such, for the Evidence Act provides that no fact of which the court will take judicial notice need be proved, and among the things of which the court is bound to take judicial notice, are the accession to office and the names and titles of persons filling any public office in British India, if the fact of their appointment has been notified in the *Gazette of India* or the local Gazette: Sects. 56, 57; but the fact that the person against whom the offence was committed was the person known under the name or title by which he is described in the charge must be proved. As to what is wrongful restraint, see Sect. 339, *post*; and for the definition of criminal force, see Sects. 349 and 350, *post*. Prove, also, by the words or acts of the defendant, or by the circumstances connected with the commission of the offence, the object with which it was committed.

EXCITING DISAFFECTION.

Sect. 124A. *Exciting Disaffection.*—**Whoever by words, either spoken or intended to be read, or by signs, or by visible representation, or otherwise, excites or attempts to excite feelings of disaffection to the government established by law in British India, shall be punished with transportation for life, or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.**

Explanation.—**Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority is not disaffection. Therefore, the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause.**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable. Sanction required under Sect. 196, *Cr. P. C.*, 1882.

This section was inserted by Act XXVII. of 1870. Chaps. IV. and V. apply to offences under this section, but not Chap. XXIII.

Sect. 125. See p. 139.

Evidence.

If a person *uses* either spoken or written *words calculated* to create in the minds of persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when the occasion should arise, and *if he does so with the intention* of creating such a disposition in the minds of his hearers or readers, he will be guilty of the offence of attempting to excite disaffection within the meaning of this section; *Emp.* v. *Jogendra, I. L. R.* 19 *Cal.* 35.

COMMITTING DEPREDATION.

Sect. 126. *Committing Depredation on Territories of any friendly Power.*—**Whoever commits depredation, or makes preparations to commit depredation, on the territories of any power in alliance 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.**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable. Sanction required under Sect. 196, *Cr. P. C.*, 1882.

Charge.

That you, on or about the day of , at , committed (*or* made preparations to commit) depredation on the territories of , a power in alliance (*or* at peace) with the Queen, and that you have thereby committed an offence punishable under Sect. 126 of the Indian Penal Code, and within, &c.

Evidence.

The proof of this offence will be very similar to that of waging war against an Asiatic power in alliance or at peace with the Queen. In fact, it may be found that a person charged with that offence is really guilty of this, as an expedition which was apparently for the purpose of waging war may really be only for that of plunder. The power on whose territories the depredation is to be committed need not be an Asiatic power, as in the 125th section. There must be an entry of some kind, armed or otherwise, into the territories of a foreign friendly power during which depredation is committed, *or* there must be preparations made for purpose of such an expedition.

RECEIVING PROPERTY ACQUIRED BY DEPREDATION.

Sect. 127. *Receiving Property acquired by Depredation.*—**Whoever receives any property, knowing the same to**

have been taken in the commission of any of the offences mentioned in Sects. 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.

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable. No sanction required.

Charge.

That you, on or about the day of , at , received a ring and a brooch ("any property"), knowing the same to have been taken in the commission of depredation on the territories of , a power in alliance (*or* at peace) with the Queen (*or* in waging war against , an Asiatic power in alliance *or* at peace with the Queen); and that you have thereby committed an offence punishable under Sect. 127 of the Indian Penal Code, and within, &c.

Evidence.

Prove the waging of war, or the committing of depredation, the receipt of the property, and the knowledge of the defendant. As to what constitutes receipt and knowledge, see the Chapter on the Receipt of Stolen Property, *post*, the remarks in which will also apply to this section. There is no definition of the word "property" in the Code, but it would seem as if by property was meant movable property, because the terms "take" and "receive" are hardly applicable to immovable property.

SUFFERING STATE PRISONER TO ESCAPE.

Sect. 128. *Voluntarily allowing Prisoner of State, &c., to escape.* **—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.**

Sect. 129. *Negligently suffering Prisoner of State, &c., to escape.*—**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.**

Offences under Sect. 128 *are triable by the Court of Session; those under Sect.* 129 *either by the Court of Session, Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable under Sect.* 128, *but bailable under Sect.* 129. *Not compoundable. Sanction required under Sect.* 196, *Cr. P. C.*, 1882.

Charge.

That you, being a public servant, to wit: (*here describe the office of the accused*), and as such having the custody of , a State prisoner (*or* prisoner of war), on or about the day of , at , voluntarily allowed (*or* negligently suffered) such prisoner to escape from , the place in which such prisoner was confined; and that you have thereby committed an offence punishable under Sect. 128 (*or* 129) of the Indian Penal Code, and within, &c.

Evidence.

Prove that the accused acted as a public servant, and had the custody, in a place of confinement, of a State prisoner, or prisoner of war, and that such prisoner escaped. It must be proved also that such escape was through the voluntary act of the accused, or through his negligent default. It is not necessary to prove actual negligence, the law will imply it; see 1 *Hale*, 600; but if, in fact, the escape were not negligently suffered or voluntarily allowed, as if the prisoner by force rescued himself, or was rescued by others, and the defendant made fresh pursuit after him, but without effect; all this must be shewn upon the part of the defendant. Also, it is immaterial whether the prisoner were

guilty of such acts as would justify his detention as a State prisoner, provided the warrant or authority was such on the face of it as would justify the accused in detaining him.

See the explanation to the next section.

AIDING STATE PRISONER TO ESCAPE.

Sect. 130. *Aiding escape of and harbouring Prisoner.*—**Whoever knowingly aids or assists any State prisoner, or prisoner of war, in escaping from lawful custody, or offers 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 recapture 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.**

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.**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable. Sanction required under Sect. 196, *Cr. P. C.*, 1882.

Charge.

That you, on or about the day of , at , knowingly aided (*or* assisted, *or* rescued, *or* attempted to rescue) , a State prisoner (*or* prisoner of war) in escaping from lawful custody; *or* knowingly harboured (*or* concealed, *or* offered, *or* attempted to offer resistance to the recapture of) , a State prisoner (*or* prisoner of war) who had previously escaped from lawful custody; and that you have thereby committed an offence punishable under Sect. 130 of the Indian Penal Code, and within, &c.

Evidence.

Prove that A B was in custody as a State prisoner or prisoner of war, and that the accused aided and assisted such prisoner to

escape from lawful custody; or that the accused rescued him or attempted to rescue him from such custody. Or, that such prisoner having escaped from lawful custody, the accused, knowing the facts, harboured or concealed him, or offered, or attempted to offer, resistance to officers who were endeavouring to recapture him. The knowledge of the defendant may be proved either from the admission of the accused before a magistrate, or by evidence of circumstances from which the court or jury may fairly presume such a knowledge. For further remarks on this offence, in respect of its necessary ingredients, see the Chapter on Offences against Public Justice.

CHAPTER VII.

OFFENCES RELATING TO THE ARMY AND NAVY.

Sect. 131. *Abetting Mutiny, &c.*—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.

Explanation.—In this section the words "officer" and "soldier" include any person subject to the articles of war for the better government of Her Majesty's army, or to the articles of war contained in Act No. V. of 1869.

Sect. 132. *Abetting Mutiny, if mutiny be committed in consequence thereof.*—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 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.

Sect. 133. *Abetting Assault by Soldier, &c.*—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.

Sect. 134. *Abetting such Assault, if the Assault be committed.*—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

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.

Sect. 135. *Abetting Desertion.*—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.

Sect. 136. *Harbouring a Deserter.*—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.

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

Sect. 137. *Deserter concealed on Merchant Vessel.*—The master, or person in charge of a merchant 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.

Sect. 138. *Abetting Act of Insubordination.*—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.

Sect. 138A. *Application of Chapter to Indian Marine.*—**The foregoing sections of this chapter shall apply as if Her Majesty's Indian Marine Service were comprised in the navy of the Queen.**

Sect. 139. *Exception of Persons subject to Articles of War.*—**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.**

The offences enumerated in Sects. 131, 132, 134, *are triable by the Court of Session; that in Sect.* 133, *by the Court of Session, Presidency Magistrate or a Magistrate of the first class; those in Sects.* 135 *to* 138, *by a Presidency Magistrate or a Magistrate of the first or second class. Persons committing the offences described in this chapter may be arrested without a warrant, except in the case of offenders under Sects.* 137; *and a warrant shall issue in the first instance, except in respect of offences under Sect.* 137, *and in that case a summons. Under Sects.* 131 *to* 134, *defendants are not bailable, but under Sects.* 135 *to* 138 *they are. Not com-*

Evidence.

All that is necessary in respect of these offences has already been provided by the general chapter on the subject of abetment, p. 114. The necessity for this chapter in the Code is thus explained in the Report of the Indian Law Commissioners: "It is obvious that a person who, not being himself subject to military law, exhorts or assists those who are subject to military law to commit gross breaches of discipline, is a proper subject of punishment. But the general law respecting the abetting of offences will not reach such a person; nor, framed as it is, would it be desirable that it should reach him. It would not reach him, because the military delinquency which he has abetted is not punishable by this Code, and, therefore, is not, in our legal nomenclature, an offence. Nor is it desirable that the punishment of a person not military who has abetted a military offence should be fixed according to the

principles on which we have proceeded in framing the law of abetment. We have provided that the punishment of an abettor of an offence shall be equal or proportional to the punishment of the person who commits the offence. And this seems to us a sound principal when applied only to the punishments provided by the Code. But the military penal law is, and necessarily must be, far more severe than that under which the body of the people live. The severity of the military penal law can be justified only by reasons drawn from the peculiar habits and duties of soldiers, and from the peculiar relation in which they stand to the Government. The extension of such severity to persons not members of the military profession appears to us altogether unwarrantable. If a person not military who abets a breach of military discipine should be made liable to a punishment, regulated according to our general rules, by the punishment to which such a breach of discipline renders a soldier liable, the whole symmetry of the penal law would be destroyed. He who would induce a soldier to disobey any order of a commanding officer would be liable to be punished more severely than a dacoit, a professional thug, a ravisher, or a kidnapper."

WEARING THE DRESS OF A SOLDIER.

Sect. 140. *Wearing the Dress of a Soldier.*—**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 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.**

Triable by any Magistrate. A summons should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

Prove that the accused wore some military dress in use in some portion of the Queen's service, and that he was not entitled to

wear it. This section does not, however, prohibit or render punishable the mere wearing of any garb or dress or token; but the wearing must be shewn to have been for the purpose of inducing people to believe that the wearer was at the time of wearing actually in the service to which the garb or token belonged, and not merely for the purpose of representing that he had been in such service. Much less does the Code prohibit the wearing of cast-off uniforms for the mere purpose of clothing.

CHAPTER VIII.

OFFENCES AGAINST THE PUBLIC TRANQUILLITY.

UNLAWFUL ASSEMBLY.

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

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 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.**

Sect. 142. *Being a Member of an Unlawful Assembly.*—**Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly or continues in it, is said to be a member of an unlawful assembly.**

Sect. 143. *Punishment.*—**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.**

Sect. 144. *Joining Unlawful Assembly armed.*—**Whoever, being armed with any deadly weapon, or with anything which, being used as 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.**

Sect. 145. *Joining or continuing in an Unlawful Assembly, knowing that it has been commanded to disperse.*—**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.**

Triable by any Magistrate. A summons should issue in the first instance under Sect. 143 ; *a warrant under Sects.* 144 *and* 145. *Police officers may arrest without warrant. Defendants are bailable. Not compoundable.*

Charge under Sect. 144.

That you, on or about the day of , at , being armed with a deadly weapon, to wit, a gun, *or* a certain thing which, used as a weapon of offence, is likely to cause death, to wit, a life-preserver, together with other persons to the number of five, were a member of an unlawful assembly, and that you have thereby committed an offence punishable under Sect. 144 of the Indian Penal Code, and within, &c.

Evidence.

Prove the assembly of five or more persons for any one of the objects enumerated in Sect. 141, *ante*, p. 157, which renders the assembly unlawful in its inception ; or that the assembly, having come together for a lawful object, at some period during its con-

tinuance, one of these objects was adopted as its common purpose, by which it will be changed from a lawful to an unlawful assembly. In Sect. 141, *ante*, p. 157, the word "offence" denotes anything punishable under the Penal Code, or under any special or local law, provided the thing punishable under such special or local law is punishable with imprisonment for six months or upwards, whether with, or without fine; Sect. 40, *ante*, p. 38.

It is necessary also to prove that the defendant was aware of the object for which the meeting assembled, or of the object which was adopted during its continuance. This may be shewn from the defendant's acts, or from those of the assembly, done in his presence, or from words spoken in his hearing, or from any other facts from which it may reasonably be inferred that he was cognisant of the object of the meeting. Finally, prove that the accused intentionally joined or continued in the assembly after he knew its character. If the accused joined merely from curiosity, to hear what was going on, and as soon as he had found out its object, went away; or if, being in the crowd, he was unable to extricate himself, he will not be guilty of the offence mentioned in this section; nor, if he joined under compulsion, or was kept in the assembly by force; but if, after having joined by compulsion, he took any active part in the proceedings, or did not leave as soon as the coercion ceased, he would be guilty of the offence of being a member of an unlawful assembly.

If it be proved that the accused, in addition to being a member of an unlawful assembly, was also armed with a gun or other deadly weapon, or with anything which might be used as a weapon of offence, and which when so used was likely to cause death, he will be guilty of the higher offence of being an armed member of an unlawful assembly, and liable to punishment under Sect. 144; see *ante*, p. 158.

Under English law, every man may in a *peaceable* manner assemble a meet company to do any lawful thing, or to remove or cast down any common nuisance done to them, and that before any prejudice received thereby, and for that purpose may also enter into the other man's ground. But, if, in removing any

such nuisance, the persons so assembled shall use any threatening words, or any other behaviour in apparent disturbance of the peace, then it will amount to a riot; *Dalt. J. P.* 445, 446; *i. e.*, a riot under English law. The law as thus laid down has been applied in India to the case of an unlawful assembly and riot under the Penal Code; *Ganouri* v. *Emp.*, *I. L. R.* 16 *Cal.* 206. If a number of persons assemble for a lawful purpose, and with the intention of carrying it out lawfully, the assembly does not become unlawful because they knew they would be opposed, and had good reason to believe that a breach of the peace would be committed *by those who opposed them*; *Beatty* v. *Gillbanks*, 9 *Q. B. D.* 308; *Sundram* v. *Reg.*, *I. L. R.* 6 *Mad.* 203. If a number of persons assembled for a lawful purpose, suddenly, and without any previous intention or design, quarrel with an intruder, that does not change the meeting into an unlawful assembly; *Khajah Nooral* v. *Fabre-Tonnerre*, 24 *W. R. Cr.* 26. So the illegal acts of one or two members of a legal assembly, not acquiesced in by the others do not change the character of the assembly; *Reg.* v. *Dinobundo*, 9 *W. R. Cr.* 19.

Where a person has been in possession of property for four or five days, although his possession may be wrongful, another person, although he is the rightful owner is not entitled to go in force and turn him out; *Moher Sheikh* v. *Emp.*, *I. L. R.* 21 *Calc.* 392.

No charge of being a member of an unlawful assembly can be maintained where the intention of the accused parties was not to enforce a right, but to maintain undisturbed the actual subsisting enjoyment of a right which was at that time being exercised; *Birjoo Singh* v. *Khub Lall*, 19 *W. R. Cr.* 66; *In re Sunker Singh*, 23 *W. R. Cr.* 25. But where, on the trial of certain persons charged with being members of an unlawful assembly, it was proved that there was a long standing dispute between the accused and certain other parties regarding the possession of certain land, that neither of the parties was in undisturbed possession of the land, that the accused went to sow the land with indigo accompanied by a body of men armed with *lattees*, that

they were prepared to use force, if necessary, and that the *lattials* kept off the opposite party by brandishing their weapons, while the land was sowed; it was held that the accused were rightly convicted under Sect. 142; *In re Peary Mohun*, *I. L. R.* 9 *Cal.* 639. Where one village faction assembled to prevent a prohibited procession of another faction passing over a piece of vacant ground in the main street of the village, not the exclusive property, nor in the exclusive possession of that faction and refused to disperse on being lawfully ordered to do so, the assembly thereupon became an unlawful one; *Emp.* v. *Tirakadu*, *I. L. R.* 14 *Mad.* 126. Mere numbers, however, will not make an assembly unlawful when the object is to procure some public result, if the means by which that result is to be attained be lawful. But where the defendants assembled and forcibly interrupted a procession, it was held that that act was forbidden by cl. 4 of Sect. 141, *ante*, p. 157, although they acted upon the ground that the procession was a nuisance or annoyance to them or their community; 5 *Madras H. C. Rep. App.* 6. Where, however, the accused, who were servants of B, found the servants of A attempting to erect a building on land in the joint possession of A and B, and on which it had been declared by a court of law that A had no right to erect any building, and thrust aside the servants of A, throwing one man to the ground, and demolished the erection; it was held that the accused were merely exercising the right of abating a private nuisance and were not committing an offence under Sect. 141; *Emp.* v. *Rajcomar Singh*, *I. L. R.* 3 *Cal.* 573; but where there is a dispute about a civil right, and one party is exercising that right, the opposite party has no excuse for interfering with the exercise of that right by using criminal force; *Ganouri* v. *Emp.*, *I. L. R.* 16 *Cl.* 206. Meetings for the purpose of eliciting, declaring, or altering public opinion on any matter are perfectly legal; and if, further, it is the intention of the promoters to get up a petition to Government, the meeting will have the additional sanction of the Bill of Rights—1 Wm. and Mary, s. 2, c. 2—which declares "that it is the right of the subjects to petition the King, and that all commitments and prosecutions for such petitions are illegal." But meetings which are held under the cloak of petition,

ing or public discussion merely for the purpose of intimidation will be illegal, in spite of the apparent legality of their object.

BEING MEMBER OF UNLAWFUL ASSEMBLY AFTER COMMAND TO DISPERSE.

Charge.

That you, on or about the day of , at , joined (*or* continued in) an unlawful assembly, knowing at the time you so joined (*or* continued in) such assembly that the said assembly had been commanded to disperse, in the manner prescribed by law, to wit, by (*here state how the assembly was ordered to disperse*), and that you thereby committed an offence punishable under Sect. 145 of the Indian Penal Code, and within, &c.

Evidence.

Prove the existence of an unlawful assembly, that such assembly had been commanded to disperse in the manner prescribed by the Criminal Procedure Code, 1882, Sect. 127, *i. e.*, by a magistrate or officer in charge of a police station—and that the accused joined or still continued in, the assembly, after such command to disperse. The same remarks as to the liability of persons in the assembly apply in this case as in the previous one. It is necessary, however, that persons should be very careful how they join an assembly, as it is very difficult to separate the acts of one person from those of the crowd, and innocent individuals may thus be mixed up with the guilty, in such a way as to become legally responsible for the acts of the assembly as a whole.

RIOTING.

Sect. 146. *Riot.*—**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.**

Sect. 147. *Punishment for Rioting.*—**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.**

Sect. 148. *Rioting armed with a Deadly Weapon.*—**Whoever is guilty of rioting, being armed with a deadly weapon, or with anything 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 three years, or with fine, or with both.**

Sect. 149. *Offence committed in prosecution of Common Object.*—**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.**

Offences under Sect. 147 *are triable by any Magistrate; those under Sect.* 148, *by the Court of Session, Presidency Magistrate, or Magistrate of the first class; those under Sect.* 149, *by the Court by which the offence committed is triable. A warrant should issue in the first instance under Sect.* 147, *a summons under Sect.* 148. *Police officers may arrest without a warrant, and defendants are bailable under Sects.* 147 *and* 148. *Under Sect.* 149, *these particulars depend upon the limitations laid down in respect of the offence committed. Not compoundable.*

Charge.

That you, on or about the day of , at , (being armed with a deadly weapon, to wit, a gun *or* with a certain thing which, used as a weapon of offence, is likely to produce death, to wit, a life-preserver), committed the offence of rioting; and that you thereby committed an offence punishable under Sect. 147 (*or* 148) of the Indian Penal Code, and within, &c.

Evidence.

Prove the existence of an unlawful assembly, and the common object with which it assembled, which ought to be specifically charged, and clearly found; *Sabir* v. *Emp.*, *I. L. R.* 22 *Cal.* 276; prove also that the assembly used force or violence in the prose-

cution of the common object, or that some member of the assembly used force or violence in the prosecution of such object, and that the accused was a member of the assembly. If the charge be one of rioting armed, prove further that the accused was armed with a gun or other deadly weapon, or with something which, if used as a weapon of offence, would be likely to cause death. Whether or not a *lattee* is a deadly weapon is a matter of fact to be determined on the special circumstances of each case; *Emp.* v. *Nathu*, *I. L. R.* 15 *All.* 19. For a definition of what constitutes force, see Sect. 349 of the Penal Code. In order to support a conviction under this section, it is necessary that the convicted persons should have been members of an unlawful assembly. Where, therefore, the common object of an assembly of more than five persons was to resist by force an unlawful trespass upon land, and the Sessions Judge convicted all the persons but four, on the ground that they had exceeded their right of private defence, it was held that the conviction could not be supported, as the accused were not members of an unlawful assembly; *In re Kalee Mundle*, 10 *C. L. R.* 278; see, also, *In re Sunker Singh*, 23 *W. R. Cr.* 25, *ante*, p. 160; *In re Toolsee Singh*, 10 *W. R. Cr.* 64; and *Reg.* v. *Guru Charan*, 6 *Ben. L. R. App.* 9, *post*, p. 167. A landlord who had not tendered to his tenant such a *patta* as the latter was bound to accept under the Madras Rent Recovery Act, distrained his cattle with the assistance of the police for arrears of rent. The tenant with others, after the cattle had been seized and removed, obstructed their further removal, and it was held they had been guilty of rioting; *Emp.* v. *Ramayya*, *I. L. R.* 13 *Mad.* 148. Under the English law, if speeches of a riotous character be made, the speakers are guilty of rioting, although they leave the meeting before the actual disturbance takes place, provided it occur immediately; *R.* v. *Sharpe*, 3 *Cox Crim. Ca.* 288; and so doubtless under the present sections they would be also; or they might be charged, under Sect. 153, with wantonly provoking to riot, if the particular form of words has been made punishable under the Code, or has been prohibited in any other way by law, or furnishes ground for a civil action.

Sect. 149 does not *create* an offence but is declaratory of a principle of the common law which prevailed in England; *Emp.* v. *Bisheshur*, *I. L. R.* 9 *All.* at p. 649. It was never intended that every member of an unlawful assembly is to be responsible for *every* offence committed by any particular member while prosecuting their common object; but only for such offences as it can be shewn the members contemplated would or might be committed in furtherance of their common design; or such offences as must or might naturally, and not by a sudden and unpremeditated act, arise from the prosecution of their common object; *Reg.* v. *Sabid Ali*, 20 *W. R. Cr.* 5, and 11 *B. L. R.* 347; *Jahiruddin* v. *Emp.*, *I. L. R.* 22 *Cal.* 306. Thus, if an assembly is convened for the purpose of overawing the Governor-General, and in furtherance of that object attempts to force an entry into the Government House, and in the course of resistance to such attempt any one guarding the doors is killed, each one in the assembly is guilty of murder; but if, on the road from the place of meeting to the Government House, one of the assembly picks a bystander's pocket, the thief alone is guilty, and no one else in the assembly necessarily partakes of his guilt. In accordance with this, where the accused men were members of an unlawful assembly, the common object of which was the abduction of a certain woman, and all bore arms, and during the prosecution of that object the woman's daughter interfered to prevent the abduction of her mother, and was killed by one of the accused, it was held that each of the members was guilty of the offence of murder, all being prepared to resist any attempt which might be made to prevent them from accomplishing their design; *In re Golam Arfin*, 4 *Ben. L. R. App.* 47 and 13 *W. R. Cr.* 33. But where a large body of men belonging to one faction waylaid another body of men belonging to another faction, and a fight ensued, in the course of which a member of the first faction was wounded, and retired to the side of the road, taking no further part in the affray, and after such retirement a member of the second faction was killed, it was held by *Norman*, J. (whose opinion prevailed), that the wounded man had ceased to be a member of the unlawful assembly when he retired wounded, and

that he could not, under Sect. 149, be made liable for the subsequent murder; *Reg.* v. *Kabil Cazee*, 3 *Ben. L. R. A. Cr. J.* 1. Where a prisoner can only be held constructively guilty of murder under Sect. 34 of the Penal Code, it is doubtful whether he can be said to have committed murder within the meaning of Sect. 149, so as to make other persons acting with him, by a double construction, guilty of murder; *In re Jhuboo Mahton*, *I. L. R.* 8 *Cal.* 739. In a charge under this section the facts necessary to bring it under the section should be shortly stated, and the charge should wind up by an allegation that the accused has committed an offence punishable under the section relating to the particular offence charged to have been committed, and under this section, and not under this section only, as it does not provide a punishment, but only declares that under certain circumstances an accused person is guilty of an offence actually committed by some one else. Where a person is only constructively guilty, under Sect. 149, of grievous hurt committed by another member of an unlawful assembly, but did not himself commit that offence, the Courts in India are at variance as to whether it is legal to pass upon him a separate sentence for the offence of rioting, and also one for voluntarily causing grievous hurt; see *ante*, p. 54.

Where there has been no unlawful assembly, but a sudden quarrel and an affray, from which resulted grievous hurt, and consequent death, there can only be conviction for an affray, and not one for rioting; *Reg.* v. *Phoollee Misser*, 12 *W. R. Cr.* 72. In this case the question whether any one of the accused was guilty of culpable homicide does not seem to have been considered by the court.

Where a riot took place, both parties turning out armed with deadly weapons, it cannot be said that there was any right of private defence on either side, as both parties well knew beforehand what was likely to take place. An indigo factory has no right forcibly to attempt to sow indigo in land already sown with corn, although it was indigo contract land; and villagers have no right to oppose such forcible sowing by force, especially when a police station is near at hand; *Reg.* v. *Jeolull*, 3 *R. C. C.*

Cr. 21, and 2 *Madras Jurist*, 168. It is also immaterial under such circumstances which party was the first to attack, unless it is shown that the other party was acting within the limits of the right of private defence: *In re Kalee Beparee*, 1 *C. L. R.* 521. But where, in investigating a case of dispute as to land between two parties, under Chapter XXII. of Act XXV. of 1861 (the old Code of Criminal Procedure), the magistrate found that one party was in possession and the other party was attempting to turn them out, and there being a charge against both parties of rioting, under Sect. 147, convicted and punished both, the High Court held that the party in possession was protected by Sect. 104 of the Penal Code in maintaining their possession; *In re Toolsee Singh*, 2 *Ben. L. R. A. Cr. J.* 16, and 10 *W. R. Cr.* 61. So, too, where the prisoners, in resisting a sudden attack made upon them by certain persons for the purpose of cutting their crops, not having time to complain to the police, inflicted a wound on one of the other party with a bamboo, from the effects of which he died, the High Court held that the force used and the injuries inflicted were not such as to exceed their right of private defence of their property; *Reg.* v. *Guru Charan*, 6 *Ben. L. R. App.* 9.

A plea of right to possession is no answer to a charge of rioting by making a forcible entry on land cultivated by a trespasser, who is in possession and opposes the entry; *Appavu Nayak* v. *Reg.*, *I. L. R.* 6 *Mad.* 245. Where several Hindus, acting in concert, forcibly removed an ox and two cows from the possession of a Mahomedan, not for the purpose of causing wrongful gain to themselves, or wrongful loss to the owner, but for the purpose of preventing the killing of the cattle; it was held that the offence which they had committed was that of rioting; *Emp.* v. *Raghunath*, *I. L. R.* 15 *All.* 22.

Rioting, armed with a deadly weapon, is a distinct offence from stabbing a person on whose premises the riot takes place, and each may be separately punished; *Reg.* v. *Kallachand*, *Calcutta H. C.*, 2 *Madras Jurist*, 282; *and Emp.* v. *Ram Adhin*, *I. L. R.* 2 *All.* 139; and is a distinct offence only in regard to the person who is so armed; *Sabir* v. *Emp. I. L. R.* 22 *Calc.* 276. But

where the prisoners were charged with rioting, being armed with deadly weapons, and with causing hurt by shooting, and their conviction for the latter offence rested solely on the fact of their belonging to a party, by one of whom (not in custody) firearms were used, it was held to be wrong, under the old Procedure Code, to pass a cumulative sentence, and to punish the prisoners both for the rioting and the causing hurt, but that the punishment should have been for one or other of these two offences; *Reg.* v. *Durzoolla*, 9 *W. R. Crim.* 33; and see, also, *Reg.* v. *Dina Sheikh*, 10 *W. R. Crim.* 63. But a cumulative sentence would now be good. Where two opposite factions commit a riot, it is irregular to treat both parties as constituting one unlawful assembly, and to try them together, as they had not one common object within the meaning of Sect. 141; each party should be committed for trial and tried separately; *Reg.* v. *Durzoola*, 9 *W. R. Cr.* 33; and *Reg.* v. *Suroop Chunder*, 12 *W. R. Cr.* 75; *Buchu Moollah* v. *Sia Ram*, *I. L. R.* 14 *Calc.* 358; *Emp.* v. *Chanda Bhimja*, *I. L. R.* 20 *Calc.* 537.

Thirteen persons were charged with rioting, twelve were acquitted and one convicted. *Quære*, whether the verdict can be sustained when the evidence points only to the thirteen arraigned and to no others, seeing that the Code says that five men at least must be concerned in order to constitute a riot; *Reg.* v. *Chinnapa Chetty*, 2 *Madras Jurist*, 169.

In the High Court in Bengal it has been ruled that "it is quite enough to charge the prisoner with the offence of rioting punishable under Sect. 147 of the Indian Penal Code", but where "the committing officer has resolved the crime into its elementary facts in the charge, all that combined to constitute the offence should have been charged"; 1 *W. R. Cr. L.* 10, 4 *R. J. and P.* 413. As respects the High Court in Madras, Mr. Mayne says that their tendency is "to resolve such technical terms into their elements, so as to explain to the prisoner what he is charged with."

In a charge under Sect. 149, the common object of the unlawful assembly should be stated; 1 *R. C. C. Circ.*, 8, 16.

HIRING PERSONS TO ASSIST IN AN UNLAWFUL ASSEMBLY, &c.

Sect. 150. *Hiring, &c., Persons to join an Unlawful Assembly.*—**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.**

Sect. 151. See p. 171.

Sect. 152. See p. 172.

Sect. 153. See p. 173

Sects. 154 to 156. See pp. 175 and 176.

Sect. 157. See p. 179.

Sect. 158. *Being hired to take part in, &c., an Unlawful Assembly, &c.*—**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 Sect. 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 anything 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.**

Offenders under Sect. 150 *are triable by the Court by which the offence committed is triable; those under Sect.* 158 *by a Presidency Magistrate or a Magistrate of the first or second class. Under Sect.* 158, *a summons should issue in the first instance, unless the hiring be to go armed, then a warrant. Police officers may arrest without a warrant. Under Sect.* 158 *defendants are bailable; under Sect.* 150

they are bailable if the offence committed is bailable, otherwise not. Under Sect. 150, *the issue of a warrant or summons will depend upon the offence committed. Not compoundable.*

Evidence.

In the case of a charge against the person hiring another, prove the hiring, engagement, or employment of some person to become a member of an unlawful assembly. The hiring must be complete, *i. e.*, both hirer and hired must have come to an agreement upon the subject-matter of the agreement; it will not be sufficient that an offer merely of hiring, &c., should have been made, for the section mentions nothing about an attempt to hire, and by its wording evidently intends that there should be a *locus pœnitentiæ*, so that a person asking another to do certain acts may be able to retract what he had said, and refuse to hire before the person applied to has consented to do what he has asked; in this the present section differs from Sect. 158, which allows no such *locus pœnitentiæ*. Should, however, the complete hiring, &c., be not proved, the defendant may still be charged with an attempt to hire under Sect. 511 of the Penal Code. If the accused did not himself hire, prove that he promoted or connived at the hiring by some other person. The word promote refers to cases of active assistance in hiring, and must be positively proved. Connivance is a passive allowance of something by a person who is legally bound and physically able to prevent that thing being done. It will, therefore, be necessary to prove this negative offence of connivance by the concurrence of three things: *first*, that the person accused was legally bound to prevent the hiring; *second*, that he was physically able to prevent it; *third*, that he did not prevent it, or do all that lay in his power towards preventing it. In this case, as in the last, a complete hiring must be proved; and if it be not proved, no charge of an attempt can be made against the defendant, as it is manifest a man cannot attempt to connive, he must either connive, or else not connive. But it is not necessary to prove that the person hired took any part in an unlawful assembly, unless it is desired to prove that he committed some offence in pursuance of such hiring.

In the case of a charge of hiring under Sect. 150, if the full offence be proved, the person hired is guilty under Sect. 158. In order, however, to bring the defendant within the latter section, it is sufficient if he offers himself, or attempts to be hired to do or assist in doing any of the acts specified in Sect. 141, *ante*, p. 157. In the event of the defendant being proved to have offered to go armed, he is guilty of a more serious offence, and is liable to a severer punishment. There is no similar provision for the case of a person who engages another to go armed, and this is only met by the latter clause of Sect. 150, *ante*, p. 169, which provides that in the event of the person hired committing any offence in pursuance of the common object of the unlawful assembly, the hirer shall be liable to punishment in the same way as if he had himself been a member of the unlawful assembly, or himself had committed the offence. In this case the following will be the form of the

Charge.

That you, the said A B, on or about the day of , at , hired one C D to become a member of such unlawful assembly, and that the said C D, as a member of such unlawful assembly, and in pursuance of such hiring, voluntarily caused grievous hurt to one E F; and that you, the said A B, have thereby committed an offence punishable under Sects. 150 and 325 of the Indian Penal Code, and within, &c.

JOINING ASSEMBLY OF FIVE.

Sect. 151. *Joining Assembly of Five.*—**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.**

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

Triable by any Magistrate. A summons should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

Prove that there was an assembly of five persons at the least, that such assembly was likely to cause a disturbance of the public peace, and that the assembly had been lawfully commanded to disperse, *i. e.*, by a magistrate or an officer in charge of a police station. Prove that after such command the accused either joined or continued in the assembly. If the assembly be not merely one likely to disturb the public, but one collected for any of the purposes enumerated in Sect. 141, *ante*, p. 157, then the accused will be a member of an unlawful assembly, and be amenable under that section.

Where the object of three persons only was to draw a crowd and their action was such as was calculated to, and did, draw a crowd of fifty or sixty persons, likely to cause a disturbance of the public peace, it was held that the gathering constituted an assembly of five or more persons within this section, and that a refusal to disperse, after being lawfully commanded so to do, rendered every member of the gathering liable to conviction under this section; *Emp.* v. *Tucker*, *I. L. R.* 7 *Bom.* 42.

RESISTING PUBLIC SERVANT.

Sect. 152. *Assaulting, &c., Public Servant in suppressing Riot, &c.*—**Whoever assaults or threatens to assault, or obstructs or threatens 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 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.**

Triable by the Court of Session, Presidency Magistrate, or Magistrate of the first class. A warrant should issue in the first instance.

Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

This section appears to contemplate an assault or obstruction to some particular public servant, not merely the obstruction of a body of police in the performance of their duty; *Ferasat* v. *Emp.*, *I. L. R.* 19 *Cal.* p. 110.

PROVOKING TO RIOT.

Sect. 153. *Wantonly provoking to Riot.*—**Whoever maliguantly or wantonly, by doing anything 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.**

Triable by any Magistrate. If the riot be committed a warrant should issue in the first instance, otherwise a summons. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

This section is very vague and comprehensive in its terms. Until a case arises under it, it is impossible to draw a charge, or define with accuracy what evidence will be required to sustain it. The first thing, however, will be to prove that some illegal act was done, *i. e.*, some act which is punishable under the Penal Code, or which is prohibited by law, or which forms the object of a civil action. Then this act must be done either malignantly or wantonly. The word malignantly, I conceive, signifies more than maliciously. An act which is malignant is also malicious, but every malicious act is not malignant.

Malitia, in its proper or legal sense, is different from that sense which it bears in common speech. In common acceptation it signifies a desire of revenge, or a settled anger against a particular person; but this is not the legal sense: and *Lord Holt*, C. J., says:—"Some have been led into mistakes by not well considering what the passion of malice is; they have construed it to be a rancour of mind lodged in the person killing for some considerable time before the commission of the fact, which is a mistake arising from not well distinguishing between *hatred* and *malice*. *Envy*, *hatred*, and *malice* are three distinct passions of the mind"; *Kel.* 127. Amongst the Romans, and in the civil law, *malitia* appears to have imported a mixture of fraud, and of that which is opposite to simplicity and honesty. Cicero speaks of it in *De Naturâ Deorum*, *lib.* 3, *s.* 18, as "*versuta et fallax nocendi ratio.*" Malice, "in its legal sense, denotes a wrongful act done intentionally without just cause or excuse"; *per Littledale*, J., in *M'Pherson* v. *Daniels*, 10 *B. and C.* 272. *Best*, J., in *Rex* v. *Harvey*, 2 *B. and C.* 268, also says:—"We must settle what is meant by the term malice. The legal import of this term differs from its acceptation in common conversation. It is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind"; *Russell on Crimes*, 5 *Edit.*, i. 642. Malignant, beyond this, imports extreme malevolence or enmity, a general disposition to do harm, in the mind of the person who perpetrates the act to which the term is applied; see *per Ranade*, J., in *Emp.* v. *Kahanji Dharamsi*, *I. L. R.* 18 *Bomb.* at p. 775. Whether in practice there will be held to be any distinction between maliciously and malignantly remains to be seen.

Wantonly means, without any lawful object, almost without any definite object, but out of a spirit either of pure mischief or fun. The use of this word in connection with malignantly very much weakens the force of the latter.

Then the act must be one which is likely to cause a riot. But by whom is the rioting to be committed? Riot involves an unlawful assembly and force, used in prosecution of the object of the

assembly. Now, an assembly of five or more to resist provocative acts, and force used in such resistance, would in very many cases be perfectly justifiable. Therefore, it would seem that the operation of this section must be confined to a very small number of cases, or else that the riot must be on behalf of him who does the illegal act, and that others to the number of five, assembled together for one of the objects prohibited in Sect. 141 and stirred up by his acts, must join in its commission.

Where the provocation charged consisted of a poem in praise of some of the parties to a riot which had already taken place, and which, it was alleged, acted as a provocation to future rioting, it was held that the meaning should be gathered from the whole of the poem, and not from isolated passages selected by the prosecution; *Emp.* v. *Kahanji Dharamsi*, *I. L. R.* 18 *Bomb.* 758; following *The Dean of St. Asaph's Case*, 21 *Howell's State Trials*, 847, 1002.

OFFENCES OF OWNERS AND OCCUPIERS OF LAND.

Sect. 154. *Owner, &c., of Land on which an Unlawful Assembly is held.*—**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 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, 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.**

Sect. 155. *Liability of Person for whose Benefit a Riot is committed.*—**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.

Sect. 156. *Liability of Agent of Owner for whose Benefit a Riot is committed.*—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.

Triable by a Presidency Magistrate or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

Sect. 154 is to meet the case of an unlawful assembly or a riot taking place on land, there being no connection between the cause of the assembly or riot and the owner of the land; Sects. 155 and 156 provide for the case of a riot for the benefit of the owner of the land on which it takes place. To bring a defendant within

the first of these sections, it will be necessary to prove that a riot or unlawful assembly did take place on land belonging to the defendant, either as owner or occupier, or in which he has or claims an interest. What interest is sufficient to support the charge is not defined, but it must be such an interest as will give the defendant a right to interfere in the management of the land, or to go upon it, else he might be punished for not suppressing the riot when he had no power to go upon the land for that purpose. The son of a tenant in tail under a marriage settlement, or the reversioner expectant upon the determination of a life estate, it is submitted, would not be persons having or claiming an interest in land under this section.

In the next place, it must be shewn that the fact that the unlawful assembly or riot was about to take place, or was actually taking place, came to the knowledge of the defendant, or his agent or manager, either by direct proof, or by evidence from which the knowledge might be inferred. Then it must be proved that neither the defendant nor his agent or manager gave information to the principal officer at the nearest police station. This provision fixes definitely the officer to whom the information must be given, and makes the proof of this portion of the offence easy, which is not so in the case of a concealment of a design to wage war under Sect. 123. If, however, the defendant gave information to any officer at the police station, it could scarcely be said that he had not done what was required of him. Finally, it must be shewn that neither the defendant, nor his manager or agent, used all lawful means in their power to prevent the assembly taking place, or if it had already begun, to disperse or suppress it; see *Reg.* v. *Surroop Chunder*, 12 *W. R. Cr.* 75. The words of the section are very wide, sufficiently so to include such a case as the following: An unlawful assembly takes place on land unknown to the owner, but known to, and perhaps aided and abetted by, the owner's agent. The agent does not obey the directions of this section, and stop the unlawful assembly. Is the owner liable to the fine? Under the strict letter of the section he is, but surely such could not have been the intention the of

framers of the Code. In England, in the case of *Reg.* v. *Stephens*, 10 *Cox Crim. C.* 340, a man was made liable criminally for a nuisance committed by his servants; but the nuisance arose in the course of the defendant's trade, and had continued a long time, although the course of business which created the nuisance had been positively forbidden by him. It has also been held that an owner is punishable if his land is made filthy by other persons while it is in his occupation, but not if he has sublet it; *Reg.* v. *Parbutty Churn*, 3 *W. R. Cr.* 57. In the present case, however, the act or omission which constitutes the offence may be an isolated one, and unconnected with anything else, and the owner is supposed to be away from the land, and so to a certain extent not in occupation. A non-resident partner who has taken no active share in the management of the estate cannot be convicted in addition to the resident partner; *In re Radha Nath*, 7 *C. L. R.* 289; but an owner can be convicted even if he did not know of the likelihood of a riot taking place, if it is shewn that his manager knew; *Emp.* v. *Payag*, *I. L. R.* 12 *All.* 550.

With respect to Sects. 155 and 156, the evidence will be very similiar to that required to support a charge under Sect. 154. The defendant must have an interest in the land, &c., which, however, need not be so large as in the previous case, as the riot is assumed to be for his benefit; therefore, *any* interest will be sufficient; *Reg.* v. *Harnath Roy*, 3 *W. R. Cr.* 54. The riot, too, must be proved to have been committed with reference to some particular land, &c., and for the benefit of the owner of such land, &c., and that he, or his agent, knowing of the likelihood of the riot occurring, did not use all lawful means to prevent it. Under the latter of these two sections, the agent or manager is made liable as well as the owner.

In order to convict a manager under Sect. 156, it is necessary to prove that a riot was committed, that it was committed for the benefit of the owner or occupier of the land, and finally that the manager knew that the riot was likely to be committed

and did not use all lawful means to prevent it; *Brae* v. *Emp.*, *I. L. R.* 10 *Cal.* 338.

HARBOURING PERSONS HIRED.

Sect. 157. *Harbouring, &c., Persons hired for an Unlawful Assembly* —**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 to be hired, engaged, or employed, to join or become members of an unlawful assembly, shall be punished with imprisonment for a term which may extend to six months, or with fine, or with both.**

Sect. 158. See p. 169.

Triable by a Presidency Magistrate or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

It is not enough to shew that some of accused's servants have been taken from a district where men have a well-known character as *lattials*, and had been in his service sometime before a riot was perpetrated by them; *In re Radha Nath*, 7 *C. L. R.* 289. There must be a harbouring, reception, or assembly with a knowledge that the persons so harboured, received or assembled have been, or are about to be hired, &c., *for the purpose* of joining an unlawful assembly.

AFFRAY.

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

Sect. 160. *Punishment for committing Affray.*—**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.**

Triable by any Magistrate. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

Prove that the defendant fought with another person in a public place, for if it be in private, it is an assault merely, and not an affray; 1 *Hawk, c.* 28, *s.* 1. Also, no quarrelsome or threatening words whatever will amount to an affray; *id. s.* 3; nor indeed do mere words amount to an assault. This section is simply an enactment of the English common law.

A *chabutra* to which the public had no right of access, and to which they were not permitted to have *access*, is not a public place; *Emp.* v. *Sri Lall, I. L. R.* 17 *All.* 166.

On conviction, the defendants may be ordered to find sureties to keep the peace in addition to any other punishment.

CHAPTER IX.

OFFENCES BY OR RELATING TO PUBLIC SERVANTS.

BRIBERY.

Sect. 161. *Public Servant taking Illegal Gratification.*- **Whoever, being or expecting to be a public servant, accepts or obtains or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification other than legal remuneration, as a motive or reward for doing or forbearing to do any official act, or for shewing or forbearing to shew, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or dis-service 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 includes 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 favour of Z. A has committed an 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 shewing favour 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.

Sect. 162. *Taking a Gratification, in order, by Corrupt or Illegal Means, to influence a Public Servant.*—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 shew favour or disfavour to any person, or to render or attempt to render any service or dis-service 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.

Sect. 163. *Taking a Gratification for the Exercise of Personal Influence.*—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 to shew favour or disfavour to any person, or to render or attempt to render any service or dis-service 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 simple imprisonment for a term which may extend to one year, or with fine, or with both.

Illustrations.

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 service and claims of the memorialist; a paid agent for a condemned criminal, who lays before the Gov-

ernment statements tending to shew that the condemnation was unjust—are not within this section, inasmuch as they do not exercise or profess to exercise personal influence.

Sect. 164. *Punishment for Abetment by Public Servant of the Offences above defined.*—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.

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.

Sect. 165. *Public Servant obtaining Valuable Thing without Consideration.*—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 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 imprisonment 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.**

Offences under Sects. 161, 162, *and* 164 *are triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class; those under Sect.* 163 *by a Presidency Magistrate, or a Magistrate of the first class; and those under Sect.* 165 *by a Presidency Magistrate, or a Magistrate of the first or second class. A summons is to be issued in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect.* 197, *Cr. P. C.*, 1882, *when the accused is one of the public servants described therein.*

Charge under Sect. 161.

1. That on or about the day of , A B, then being (or expecting to be) a public servant, to wit, obtained for himself from one C D a gratification other than legal

remuneration, to wit, as a motive for doing an official act, to wit, . and that he thereby committed an offence punishable under Sect. 161 of the Indian Penal Code, and within, &c.

2. That on the day and year aforesaid, the said A B, then being (or expecting to be) a public servant as aforesaid, obtained for himself from the said C D a gratification other than legal remuneration, to wit, the said as a reward for shewing in the exercise of his official functions favour to the said C D, and that he thereby committed an offence punishable under Sect. 161 of the Indian Penal Code, and within, &c.

Evidence.

Under Sect. 161 the prosecution must prove that the accused at the time of the commission of the alleged offence was, or expected to be, a public servant; that he obtained or attempted to obtain, or agreed to accept, a gratification, *i.e.*, some favour, for himself, or some one else; and that the object was that he should thereby be influenced in his official conduct. It must be noted that the meaning of the word "gratification" is very wide; if an official induced a man to marry his illegitimate daughter, for whom he wanted to provide, on the promise that he would get him a good post under Government, there seems to be no reason why that should not amount to obtaining an illegal gratification.

Under Sect. 162 the accused will be an outsider, and the proof will run on the same lines as under the last section, but the object for which the gratification is given is that the accused was to use corrupt or illegal means towards a public servant to accomplish a certain object. Sect. 163 only differs from Sect. 162, in that the accused is to use his *personal* influence, and not corrupt or illegal means.

The use of mere personal influence will not be sufficient to bring any person within these sections, nor any amount of persuasion. Influence must be accompanied by gratification, or must be the result of gratification. If persuasion were changed into threats, then that would constitute an offence under Sect. 189.

The words of all these sections exclude the defence that the gratification bargained for is to go to some third person, or that an officer is protected if he agrees to allow his official acts to be swayed by a gratification to be used for advancing some public object, such as a charity, science or religion. Therefore, a revenue and police patel who agrees to accept money for the benefit of the village temple, as a motive for restoring some village *Mahars* to office, is guilty of an offence under Sect. 161; *Emp.* v. *Appaji*, *B. R.* 16 January, 1896.

A person receiving "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," as described in the fourth explanation to Sect. 161, *ante*, p. 182, will not only have committed an offence under that section, but will also be guilty of cheating—in the latter case, by virtue of the definition of cheating given in Sect. 415, and in the former, by virtue of that definition, coupled with illustration *f*, annexed to Sect. 415.

With reference to this class of cases, it will be well to quote from Lord Mansfield's judgment in the case of *Rex* v. *Woodfall*, 5 *Burrows*, 2667, what he says as to intent: "Where an act in itself indifferent, if done with a particular intent becomes criminal; there the intent must be proved and found: but, where the act is in itself unlawful, the proof of justification lies on the defendant, and in failure thereof, the law implies a criminal intent."

The definition of the word "judge" is given in Sect. 19, *ante*, p. 26, and that of "public servant" in Sect. 21, *ante*, p. 27. Act IX. of 1890, Sect. 137, Sub-sect. 1, extends the meaning of the words "Government and public servant" so as to include railway companies and their servants respectively, so far as relates to this chapter, but for no other purpose. This provision was introduced in order to put a stop to the large amount of bribery which was constantly taking place among railway servants in respect of contracts, and work done under contracts, &c.

Act I. of 1876 provides that every telegraph officer shall be deemed to be a public servant for the purposes of these five sections.

To ask for a bribe is to attempt to obtain it; and a bribe may be asked for as effectually in implicit as in explicit terms. Therefore, where B, who was employed as a clerk in the Pension Department, in an interview with A, who was an applicant for a pension, after referring to his own influence in that department, and instancing two cases in which, by that influence, increased pensions had been obtained, proceeded to intimate that anything might be obtained by *kar-rawai*, and on the overture being rejected, concluded by declaring that A would rue the rejection of B's suggestions: it was held that the offence of attempting to obtain a bribe had been completed; *Emp.* v. *Baldeo Sahai*, *I. L. R.* 2 *All.* 253. A person who accepts, as a private person, a gratification for exerting his influence with a public servant is punishable under Sect. 162; *Reg.* v. *Oboy Churn*, 3 *W. R. Cr.* 19.

K, a police officer employed in a criminal court to read the diaries of cases investigated by the police, and to bring up in order each case for trial with the accused and witnesses, after a case of theft had been decided, in which the accused were convicted, and a sum of money, the proceeds of the theft, had been made over to the prosecutor, asked for and received from the prosecutor, a portion of such money, not as a reward or motive for doing any of the acts described in Sect. 161, but as a *dasturi*; and it was held that K was not punishable under Sect. 161, but under Sect. 165; *Emp.* v. *Kampta Prasad*, *I. L. R.* 1 *All.* 530.

Where a complainant charged a person, who was one of the public servants mentioned in Sect. 167 of the Criminal Procedure Code, 1865, with committing acts which, if committed by a private individual, would have amounted to extortion, it was held that it was not illegal to treat the charge as one for extortion, and to proceed with the trial without having previously received the proper sanction for the prosecution, though it might have been more judicious to have treated it as an offence under Sect. 161 of the Penal Code, and obtained the necessary sanction; *Reg.* v. *Parshram Keshav*, 7 *Bom. H. C. Rep. C. C.* 61.

These sections apply *directly* to the persons who do, or would eventually, receive the gratification, but those who offer a gratifi-

cation which is not accepted are guilty, under English law, of an attempt to bribe, which offence is complete as soon as the offer is made; *Rex* v. *Vaughan*, 4 *Burr.*, p. 2501. Under the Penal Code, the person offering the bribe would at the moment of offering it be guilty of the offence of abetting the receipt of an illegal gratification, by inciting the person to whom it was offered to receive it. If the bribe was accepted, the offerer would be guilty of abetment, both by inciting and aiding.

The statute 5 and 6 Edwd. VI. c. 16 provides that any person who pays or offers money, &c., for an office shall immediately upon such payment or offer be adjudged incapable of occupying such office. This statute was, in *Rex* v. *Vaughan*, 4 *Burr.*, p. 2500, held not to extend to the Colonies; but subsequently, the statute 49 Geo. III. c. 126 extended its provisions to the Colonies and to all persons in the service of the East India Company; and further made the receipt or payment of money for an office a misdemeanour, and provided that if any chief officer of a Colony, &c., was guilty of an offence under the statute, he should be tried for the same in the Court of Queen's Bench at Westminster. The statute 21 and 22 Vict. c. 106, s. 64, further provides that all Acts, then applicable to servants of the East India Company, shall apply to all officers continued or appointed under that Act. Consequently all persons giving or offering a bribe for appointment to an office under Government in India become at once incapable of holding that office, even though appointed to it, and are liable, even though the bribe be not accepted, to be punished for a misdemeanour in attempting to bribe.

Under Sect. 165 the only matter to be proved, after it is shewn that the accused is a public servant, is that he obtained, or attempted to obtain, or agreed to accept some *valuable* thing for nothing, or for a consideration which left him a profit, and that the person with whom he had the transaction was one with whom he was directly or indirectly transacting official business, or was likely to do so.

DISOBEDIENCE BY PUBLIC SERVANTS.

Sect. 166. *Disobedience by Public Servant with intent to cause Injury.*—**Whoever, being a public servant, knowingly dis-**

obeys 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.

Illustrations.

A, being an officer directed by law to take property in execution, in order to satisfy a decree pronounced in Z's favour 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.

Sect. 167. *Framing Incorrect Document.*—**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.**

Offences under Sect. 166 *are triable by a Presidency Magistrate, or a Magistrate of the first or second class; those under Sect.* 167 *by the Court of Session, a Presidency Magistrate, or by a Magistrate of the first class. Defendants are bailable. Police officers may not arrest without a warrant. A summons should issue in the first instance. Not compoundable. Sanction required under Sect.* 197, *Cr. P. C.*, 1882, *for the prosecution of the public servants described therein.*

Evidence.

Prove that the defendant is a public servant, and that he did the act laid in the charge. Prove, also, that the act has done injury, or that it was likely to the knowledge of the defendant to do

injury, or that he intended that it should cause injury to some person. If it is one which was likely to do injury, the knowledge of the defendant may be inferred, especially if, from his official position, he ought to know what the result of his act would be likely to be. The injury must be, within reasonable limits, the direct result of the act. Thus, the mistranslation of a document so as to convict a prisoner would come within Sect. 167, as the conviction would be the immediate result of the act; but a mistranslation so as to acquit a prisoner would not, as the injury caused by the result to the Queen, the nominal prosecutor, or to the real prosecutor, would not be sufficiently direct and immediate. Such a case would be met by Sect. 218.

For other cases of disobedience by public servants, see Sects. 217-220, *post*.

Act XV. of 1872, Sect. 72, provides that a Marriage Registrar issuing a certificate for marriage at the times specified therein shall be deemed to have committed an offence under Sect. 166.

PUBLIC SERVANT TRADING, &c.

Sect. 168. *Public Servant engaging in Trade.*—**Whoever, being a public servant, and being legally bound, as such public servant, 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.**

Sect. 169. *Public Servant unlawfully bidding for Property.*—**Whoever, being a public servant, and being legally bound, as such public servant, 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.**

Offences under these Sects. are triable by a Presidency Magistrate, or a Magistrate of the first class. Defendants are bailable. Police officers may not arrest without a warrant. A summons should issue in the first instance. Not compoundable. Sanction required under Sect. 197, *Cr. P. C.*, 1882, *for the prosecution of the public servants described therein.*

Charge of Trading.

That you, on or about the day of , at , being a public servant, to wit, , and being as such public servant legally bound not to engage in trade, did engage in trade; and that you have thereby committed an offence punishable under Sect. 168 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the defendant was a public servant at the time of the commission of the alleged offence. The fact of his being prohibited to trade or to purchase certain property is a matter of which judicial notice will be taken by the courts, as it will appear from regulations or Acts. The following are some of the Acts by which trading is prohibited to public servants :—Persons employed in the collection of revenue or administration of justice in Bengal, Behar, and Orissa, 33 Geo. III c. 52, s. 137; Administrator-General, Act II of 1874, Sect. 10; Forest Officers, Act VII of 1878, Sect. 74; Police Officers, Act V of 1861, Sect. 10; Act XXIV of 1859, Sect. 19; and Bom. Act VII of 1867, Sect. 11; Officers of Presidency Banks, Act XI of 1876, Sect. 34; and Act V of 1879, Sect. 3; Revenue Officers, Bom. Act V of 1879, Sect. 31; Mad. Reg. I of 1803, Sect. 40; Mad. Reg. II of 1803, Sect. 64; and Beng. Reg. II of 1793, Sect. 18; Judges and Officers of the Presidency Court of Small Causes, Act XV of 1882, Sect. 15; Officers of the High Court and Insolvent Court, Act XV of 1848, Sects. 1 to 3.

PRETENDING TO BE A PUBLIC SERVANT.

Sect. 170. *Personating a Public Servant.*—**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 colour 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.

Sect. 171. *Wearing Garb of Public Servant.*—**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.**

Triable by any Magistrate. Police officers may arrest without a warrant. Defendants are bailable. A warrant should issue in the first instance under Sect. 170, *and a summons under Sect.* 171. *Not compoundable.*

Evidence.

The remarks on Sect. 140, *ante*, p. 155, are also applicable to Sect. 171. If property be obtained by means of the assumed garb, it will be cheating, although nothing pass in words; *R.* v. *Barnard*, 7 *C. and P.* 784 ; and the same will be the result if a person committing an offence under Sect. 170 obtains any property, or otherwise brings his acts within the definition of cheating.

CHAPTER X.

OF CONTEMPT OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

DISOBEDIENCE TO SUMMONS, &c.

Sect. 172. *Absconding to avoid Service of Summons.*—**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 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.**

Sect. 173. *Preventing Service of Summons.*—**Whoever in any manner intentionally prevents the serving on himself, or 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.

Sect. 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 Calcutta, 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.

Sect. 175. *Omission to produce a Document.*—**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.**

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.

Offences under Sects. 173 *and* 175 *are triable by a Presidency Magistrate, or a Magistrate of the first or second class, except under Sect.* 175, *in cases where the offence is committed in a Court, and then by that Court, subject to the provisions of Chap. XXXV., Cr. P. C.,* 1882; *offences under Sects.* 172 *and* 174 *are triable by any Magistrate. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect.* 195 (*a*), *Cr. P. C.,* 1882.

Evidence.

Under Sect. 172 a question might arise, whether a person hearing that a summons was about to be applied for against him, and absconding before it was issued, would be guilty of an offence. Looking, however, to the fact that the absconding is an offence because it is a contempt of the lawful authority of a public servant, which, of course, cannot be contemned until it has been exercised, and also taking into consideration the words of the latter half of the section, the most reasonable construction is, that there must be some judicial action on the part of the public servant before this offence can be committed, such as an application to him for

the issue of a summons, which he has granted; and it has been decided in Madras, in conformity with the foregoing opinion, that to abscond, in order to avoid service of a summons which has not been issued, is not an offence under this section, but that it must be shewn that a summons, notice, or order has actually been issued, and that the accused knew or had reason to believe that this was the case; *Madapusi Srinivasa* v. *Reg.*, *I. L. R.* 4 *Mad.* 393. As to the latter point, see also *Reg.* v. *Ramtonoo Singh*, 12 *W. R. Cr.* 49. Absconding does not necessarily imply change of place, but may be effected by concealment. If a person conceals himself before process issues and remains concealed after it has issued, he absconds; *Madapusi Srinivasa* v. *Reg.*, *ubi sup.*

The statement by a magistrate that a summons might issue has been held equivalent to its actual issue, as far as respects an application, which must be made within a certain time in order to be acted on afterwards; *Potts* v. *Cumbridge*, 27 *L. J. N. S. M. C.* 62.

A warrant is neither a summons, notice, or order under this section, as it is addressed to the officer who has to execute it, and not to the person whose attendance is required; *Reg.* v. *Womesh Chunder*, 5 *W. R. Cr.* 71; and absconding to avoid arrest does not come under Sect. 172; *Emp.* v. *Lakshmi*, *B. R.* 24*th February* 1881; see, also, *Reg.* v. *Zahoor*, 4 *N. W. R.* 97.

Under Sect. 173 the summons must have issued, and be about to be served, or the proclamation must be about to be made, in order to the commission of an offence, or else the summons, if not to be served personally, must be about to be affixed to some lawful place. In these cases the intentional nature of the act charged will be inferred from the act itself, and the mode in which it is done. The refusal by an accused person to sign a summons intended to be served upon him, does not constitute the offence of intentionally preventing the service of a summons on himself; *Reg.* v. *Kalya*, 5 *Bom. H. C. Rep. C. C.* 34; followed in *In re Bhoobuneshwar*, *I. L. R.* 3 *Cal.* 621; and in *Emp.* v. *Krishna Gobind*, *I. L. R.* 20 *Cal.* 358. The refusal to receive a summons is not a preventing of the service of the summons, for if

it be tendered and refused, the service is good ; *Reg.* v. *Khusal Purbhudas, B. R.* 15*th July* 1869; *Reg.* v. *Punamalai, I. L. R.* 5 *Mad.* 199. After service of a summons the throwing it down by an accused is no offence ; *Reg.* v. *Arumuga Nadan, ib.* 200, n.

Under Sects. 174 and 175 it must be shewn that a summons, notice, or order has issued from some court or public servant authorised to issue it, or that a proclamation has been made by the proper authority, commanding the defendant to appear at a certain time and place, with or without a document; *In re Shib Persad Chuckerbutty*, 17 *W. R. Cr.* 38; 7 *Mad. H. C. Rep. Cr. R.* 14, 43. Where a summons did not mention the place or the time of day at which the person summoned was required to attend, it was held that he could not be convicted under Sect. 174 for non-attendance in obedience to the summons; *Emp.* v. *Ram Saran, I. L. R.* 5 *All.* 7 ; 7 *Mad. H. C. Rep. Cr. R.* 14, 43. It is not an offence under Sect. 174 to disobey a summons issued by a British Magistrate directing the person summoned to appear before him at a place outside British India; *Emp.* v. *Paranga, I. L. R.* 16 *Mad.* 463. It must then be shewn that the summons has been served upon him, or that the proclamation has come to his notice, and proof must be given that he was not present at the time and place mentioned in the summons or proclamation, or that being present, he refused to deliver up the documents required. His omission to attend must be intentional, or his departure must be wilful ; *In re Sutherland*, 14 *W. R. Cr.* 20 ; where a witness was summoned for a particular day, but, not being at home, did not receive or hear of the summons till after that day, it was held that he could not be fined for non-attendance, because he did not afterwards appear and state his reason for non-attendance ; *Reg.* v. *Ungun Lall*, 1 *N. W. Ed.* 1873, 303; but if it is proved that a summons was served upon him, and that he understood it, and knew when and where to attend, his absence will be inferred by the court to be intentional, unless and until he can shew it was accidental, or unless the circumstances adduced in evidence themselves shew it to be such ; but the court in these cases ought not to be hasty in drawing an inference unfavourable to the accused, but to search for facts from which the intentional absence

may be positively inferred. The accused was summoned by a magistrate to appear on a certain day at 10 A. M. to answer a criminal charge, and attended at the proper time, but not finding the Magistrate in Court, waited a few minutes only and then left, posting up a notice on the wall of the Court stating that he had attended in Court, and giving the reason for his leaving. The Magistrate, who had been engaged in other public business, took his seat at 11, and the defendant, not answering then to his name, was prosecuted and convicted under this section. The defendant contended that he had obeyed the summons, as it did not direct him not to depart without the leave of the Court, but it was held that the purpose of the attendance was not fulfilled until the charge was answered, and that, as the accused had not waited a reasonable time, he was rightly convicted; *Emp.* v. *Kisan Bapu*, *I. L. R.* 10 *Bom.* 93. This case differs from *In re Sutherland*, 14 *W. R. Cr.* 20, in the time during which the defendant waited. In the case of a refusal or omssion to produce a document, he must have been served with a *subpœna duces tecum* to produce that document, or else be in court with the document in his possession, and must in either case be asked for it, and his refusal to produce it, or his not accounting for its non-production, will be evidence of intentional omission. It must also be shewn that the document was one which he was legally bound to *produce* in court, for although there are many documents which a witness is bound to produce in court for the court to examine, if necessary, and determine whether they ought to be delivered up or shewn to the party requiring their production, yet there are others, such as State documents, which the court has no right to inspect, but must accept their description from the officer who has the custody of them. If the case be one of a person who is bound by any general law to deliver any document or class of documents to a public servant, the mere omission to conform to the requirements of the law may amount to an intentional omission, but the surrounding circumstances must be very strong to justify a conviction without a previous demand on the part of the person to whom it is to be delivered.

Under the old Code it was held that the mere shewing of a summons to a witness is not a sufficient service; the original should be left with him, or else shewn to him, and a copy left with him; *Reg.* v. *Karsanlal Danatram*, 5 *Bom. H. C. Rep. C. C.* 20. For the rules for the service of a summons at present in force, see Sects. 68 to 70, Cr. P. Code, 1882. Even although in an Act there may be no provision for an original and duplicate summons, and that the latter should be left with the person summoned, yet the summons should be left with, and not merely shewn to, the person on whom it is to be served and then taken away; *In re Kuppan*, *I. L. R.* 11 *Mad.* 137. A witness was summoned to attend on a certain day to give evidence before the judge of a Small Cause Court; but before that day the case was postponed, and no fresh summons or notification of postponement was served upon the witness; consequently, he did not attend when the case was heard, and was fined; but it was held that, not having been re-summoned, the witness was not bound to attend; *In re Sreenath Ghose*, 10 *W. R. Cr.* 33. The accused was summoned as a witness in a case to be heard on the 27th May. The summons was not served personally on the accused, but affixed to the door of his house. On the appointed day the case was not taken up, but was adjourned by public proclamation till the 5th June, and on this latter day the accused failed to attend. There was no evidence that the summons had been brought to the knowledge of the defendant, so as to require him to attend on the first occasion, and it was held that there was no evidence of the commission of an offence under Sect. 174. It was also held that the adjournment of a case by proclamation is irregular, and that a magistrate ought to give special notice to the parties of the date to which a case is adjourned; 6 *Mad. H. C. Rep. App.* 29. A verbal order, however, given to a person in court to attend on a subsequent day is sufficient; *Reg.* v. *Guman Parthan*, *B. R.* 12*th June* 1873; 5 *Mad. H. C. Rep. App.* 15; and so is the verbal order of a Village Magistrate in Madras, although no process has previously been issued for the person's attendance; 7 *Mad. H. C.*

If the summons be to attend *either* in person *or* by agent, greater care will be necessary in proving the intentional omission, as the party summoned may have instructed an agent, and the agent may have omitted to attend; and if any inferior servant of a court be refused permission to attend in answer to the summons of another court, that is not an intentional disobedience; *In re Sreenath Ghose, ubi sup.*

Sect. 174 does not apply to the case of a defendant escaping from custody under a warrant in execution of a decree of a civil court; *Reg.* v. *Sardar Pathu*, 1 *Bom. H. C. Rep.* 38. Disobedience to a proclamation would be punishable under this section; 1 *R. C. C. Cr.* 61; and an accused person who has forfeited his bail bond may be proceeded against under this section, although his sureties have paid the amount of their recognisances; *Reg.* v. *Tajeemuldy Lahoree*, 10 *W. R. Cr.* 4.

A magistrate cannot take cognisance of an offence under Sect. 174 committed against his own court, but is bound to send the case for trial before another Magistrate; *Reg.* v. *Chunder Shekar Roy*, 13 *W. R. Cr.* 66. A *Mahalkari*, invested with the powers of a second class subordinate magistrate, cannot issue a summons under Sect. 8 of Act XI of 1813; and, therefore, a person cannot be convicted under Sect. 174 of the Penal Code for having disobeyed a summons so issued; *Reg.* v. *Venkaji Bhaskar*, 8 *Bom. H. C. Rep. C. C.* 19. Further, the chairman of a municipal commission, appointed under Act XXVI of 1850, although a public servant, is not legally competent, as such, to issue an order for attendance before himself; consequently, the disobedience of such an order is not an offence under this section; *Reg* v. *Purshoʻam Valji*, 5 *Bom. H. C. Rep. C. C.* 33. In certain cases, however, the municipal authorities may issue summonses, disobedience to which is punishable under one or other of these sections; see Mad. Act V of 1878, s. 165; Bom Act III of 1872, s. 112.

By the Criminal Tribes Act, 1871, Act XXVII of 1871, Sect. 9, any member of any such tribe, gang, or class who, without lawful excuse, the burden of proving which shall lie upon him, shall fail to appear according to such notice as is provided in the

Act, or who shall intentionally omit to furnish such information as is provided for by that Act, or who shall furnish, as true, information on the subject which he knows, or has reason to believe, to be false, shall be deemed guilty under the first parts of Sects. 174, or 176, or 177 of the Indian Penal Code respectively, as the case may be.

A person disobeying the summons of a Coroner to attend and give evidence is guilty of an offence under Sect. 174 ; Act IV of 1871, Sect. 17. A person failing to attend before the Collector in respect of land he is about to acquire is guilty of an offence under Sect. 175 ; Act X of 1870, Sect. 10.

OMISSION TO GIVE INFORMATION, &c.

Sect. 176. *Omission to give Notice or Information.*—**Whoever, being legally bound to give any notice, or to furnish any information on any subject to any public servant, as such, intentionally omits to give such notice, or to furnish such information in the 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 of 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.**

Sect. 177. *Furnishing False Information.*—**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.

"*Explanation.*—In section 176 and in this section the word 'offence' includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460; and the word 'offender' includes any person who is alleged to have been guilty of any such act."

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 dacoity in the house of Z, a wealthy merchant residing in a neighbouring place, and being bound under Clause 5, Sect. 7, Regulation III, 1821, of the Bengal Code, to give early and punctual information of the above fact to 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.

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance.

Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect. 195, *Cr. P. C.*, 1882.

Evidence.

These sections only apply to persons upon whom by law an obligation is imposed to furnish certain information to public servants, and who *intentionally* commit a breach of such obligation; *In re Phool Chund*, 16 *W. R. Cr.* 35; see, also, *Emp.* v. *Appayya*, *I. L. R.* 14 *Mad.* 484; but they should not be put in force if the public servants have already obtained the information from other sources; *Emp.* v. *Sashi Bhusan*, *I. L. R.* 4 *Cal.* 623; *In re Pandya*, *I. L. R.* 7 *Mad.* 436; *Emp.* v. *Gopal Singh*, *I. L. R.* 20 *Cal.* 316; followed in *Emp.* v. *Sada Nandha*, *B. R.* 11th September 1893. The explanation to Sect. 177 was added by Act III. of 1894.

The legal obligation to furnish information arises under various Acts relating to the public revenue, as, for instance, the Income Tax Act, which requires returns to be made, information to be furnished, &c. So also the Registration Act provides that every person shall be legally bound to furnish information as to the execution, &c., of documents tendered for registration to the registering officer when required so to do. Other laws also require persons to give notice of various matters to public servants. Sect. 41 of the Criminal Procedure Code, 1882, for instance, requires all persons to give information of certain offences therein specified. Such laws as those last mentioned will often be found to be excepted from the operation of the Penal Code by the fifth section, as being special or local laws in which provision is made for the punishment of infractions of their provisions.

Under Sect. 277 of the Indian Succession Act, and Sect. 98 of the Probate and Administration Act, 1881, as amended by Act VI of 1889, Sects. 7 and 15, an executor or administrator who intentionally omits to exhibit an inventory or account of the assets of the estate come to his hands, on being required so to do by the Court, commits an offence under this section.

The latter portion of these two sections, 176 and 177, may include many acts which are similar to those provided for by Sects. 118-120, *ante*, pp. 134 to 136.

In order to support a conviction under Sect. 176 against a person for not giving information of an occurrence falling within the provisions of Sect. 45, cl. (*d*), of the Criminal Procedure Code, 1882, it is not necessary to shew that the death actually occurred on his land, when the circumstances disclosed shew that a dead body was found on the land of the accused under circumstances denoting that the death in all probability was sudden, unnatural, or suspicious, the finding of the body on the land being a circumstance from which the court was justified in inferring that the death took place there; *Matuki Misser* v. *Emp.*, *I. L. R.* 11 *Cal.* 619. A village moonsif is bound by Sect. 8 of Reg. XI of 1816, which provides that "heads of villages shall reciprocally communicate any information which they may receive of offences committed; . . . . and shall co-operate in all things for the apprehension of the offenders, and the general security of the country"; and is, therefore, bound to report all offences, although not enumerated in Sect. 89 of the Criminal Procedure Code, 1872; (Sec. 44 of Act X. of 1882) 3 *Mad. H. C. Rep. App.* 31; 2 *Mad. Jur.* 289. The owner or occupier of a house in a village is not bound under Sect. 45, *Cr. P. C.*, 1882, to report the occurrence therein of any sudden death; *Emp.* v. *Achutha*, *I. L. R.* 12 Mad. 92.

When a charge is made of neglect to inform the police of the presence of a proclaimed offender, it must be proved that the offender was actually proclaimed, and that the proclamation came to the knowledge of the accused; *In re Pandya*, *I. L. R.* 7 *Mad.* 436.

A *Burnam* is a private person in respect of Sect. 176 and Sect. 202, there being no law binding him in any special way to report or prevent crime; he is, therefore, not punishable for not reporting the commission of a crime not enumerated in that section of the Criminal Procedure Code before mentioned; 3 *Mad. H. C. Rep. App.* 31; 2 *Mad. Jur.* 289. Sect. 177 does not apply to the case of *any person* who, examined by a police officer, makes a

false statement, but only to cases where, by law, landholders or village watchmen are bound to give information, and to other analogous cases; *Reg.* v. *Lukhee Singh*, 12 *W. R. Cr.* 23. Where a person, not legally bound to furnish information of an offence, falsely informs the police that such an offence has been committed, without intending to cause injury or annoyance to any particular person, he has committed no offence under Sect. 177; *Reg.* v. *Saraji Mohun*, *B. R.* 10*th July* 1873. Sect. 177 embraces every case in which a subordinate may seek to impose *false* information upon his superior; therefore, where certain vaccinators made false returns to their superiors, it was held that as the defendants were public servants, and part of the duties they undertook was to make true returns to their official superior, to make false returns was an offence; 6 *Mad. H. C. Rep. App.* 48. See, also, *In re Phool Chund*, 16 *W. R. Cr.* 35. To make a false entry in a diary kept by a Government servant and sent to his official superior in pursuance of departmental order is an offence within Sect. 177; *In re Virasami*, *I. L. R.* 4 *Mad.* 144. The case of *In re Virasami* was disapproved of in *Emp.* v. *Appayya*, *I. L. R.* 14 *Mad.* 484, and it was there held that a person was "legally bound" to do whatever it was illegal for him to omit, as defined in Sect. 43, *ante*, p. 39, and nothing else; and that mere disobedience of departmental rules not having the force of law is not "illegal."

In order to bring an accused under the second branch of Sect. 177, it is necessary that the false information given should be with respect to the commission of some particular offence, and not of offences in general; *Panatulla* v. *Emp.*, *I. L. R.* 15 *Cal.* 386; therefore, a constable whose duty it was to ascertain on his rounds whether certain notoriously bad characters were in their houses or not, falsely reported that they were, it was held that the offence fell within the first branch of this section; *ib.*

A man named Yesu gave the accused four annas with which to purchase for him (Yesu) a stamp. When the stamp-collector asked the accused for his name, he said, "Yesu," instead of giving his own name. It was held that this amounted to the offence of giving

false information under Sect. 177, and was not cheating by personation; *Reg.* v. *Raghoji*, 3 *Bom. H. C. Rep. C. C.* 42. This decision was under the Stamp Act, 1862, which required the stamp vendor to write the name of the purchaser on the back of the stamp, though it did not require the purchaser to give his own name. The Stamp Act, 1879, does not contain a similar provision; consequently, it has since been held that the purchaser of a stamped paper, not being bound by any law or rule having the force of law to furnish information to the stamp vendor, is not punishable under Sect. 177, if he gives a false name; *In re Paramaya*, *B. R.* 19*th February* 1885. A certain person attempted to get himself admitted into the police of a district by giving certain information, which he knew to be false, to the District Superintendent of Police; it was held that he had not committed an offence under Sect. 177; *Emp.* v. *Dwarka Persad*, *I. L. R.* 6 *All.* 97.

In these two sections the word "offence" denotes anything punishable under the Penal Code, or under any special or local law, provided that the thing punishable under such special local law is punishable with imprisonment for six months or upwards, whether with or without fine; Sect. 40, *ante*, p. 38.

See *ante*, p. 201, for a note on the Criminal Tribes Act. A eunuch refusing to give information or giving false information as to his property is punishable under these sections; Act XXVII of 1871, Sect. 30.

REFUSING TO TAKE OATH, &c.

Sect. 178. *Refusing to take Oath.*—**Whoever refuses to bind himself by an oath 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.**

Sect. 179. *Refusal to answer Questions.*—**Whoever, being legally bound to state the truth on any subject to any**

public servant, refuses to answer any question demanded of him 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.

Sect. 180. *Refusal to sign Statement.*—**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.**

Triable by the Court in which the offence is committed, subject to the provisions of Chap. XXXV of the Criminal Procedure Code, 1882, or if not committed in a Court, by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect. 195, Cr. P. C., 1882.

Evidence.

Prove the tendering of the oath, the demand of the question, or the requirement of the signature, as the case may be. The mere omission on the part of any person to do any one of these acts is not punishable; there must have been a positive refusal, which necessitates a previous demand, before a conviction can take place. The power of a public servant to require the doing of such acts is fixed by public authority, and will, therefore, in most cases, be a matter of which the court will take judicial notice.

Under Sect. 165 of the Indian Evidence Act, 1872, a judge may ask any question he pleases about any irrelevant fact, if he does so in order to discover or to obtain proper proof of relevant facts. Where, however, an irrelevant question is asked, not with that object, but with a view to a subsequent criminal proceeding

against the person asked, and he objects to answer it, the objection is reasonable, and he cannot be convicted under this section; *Emp.* v. *Hari Lakshman, I. L. R.* 10 *Bom.* 185. See, also, *In re Ganesh Narayan, I. L. R.* 13 *Bom.* 600.

A refusal by an accused person to sign a statement made by him in answer to questions put by the Court does not come under Sect. 180; *Emp.* v. *Sirsapa, I. L. R.* 4 *Bom.* 15.

Persons refusing to give evidence under the Public Gambling Act are punishable under Sects. 178 and 179; Bombay Act III. of 1866, Sect. 9. A witness at a Coroner's inquisition refusing to sign his deposition is punishable under Sect. 180; Act IV. of 1871, Sect. 20; but not a witness refusing to sign a deposition in any other case; 6 *Mad. H. C. Rep. App.* 14.

It is provided by the Indian Oaths Act, 1873, that Sect. 178 is to be read as if the words "or affirmation" were inserted after the word "oath."

FALSE STATEMENT ON OATH.

Sect. 181. *False Statement on Oath.*—**Whoever, being legally bound by an oath to state the truth on any subject to any public servant or other person authorised 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 know 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.**

Triable by the Court of Session, Presidency Magistrate or Magistrate of the first class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect. 195, *Cr. P. C.*, 1882.

Charge.

That you, on or about the day of , at , being legally bound by an oath to state the truth on a certain subject,

to wit, , to a public servant (*or* person) authorised by law to administer such oath, to wit, , did make to such public servant (*or* person) as aforesaid, touching that subject, a statement which was false, and which you knew at the time you so made it to be false, to wit, ; and that you have thereby committed an offence punishable under Sect. 181 of the Indian Penal Code, and within, &c.

Evidence.

The evidence under this section will be the same as that under Sect. 193, except that the false statement must be made in the course of proceedings other than judicial proceedings; *Reg.* v. *Buloram*, 7 *W. R. Cr.* 104. The word oath is defined in Sect. 51, *ante*, p. 40. The Oaths Act, 1873, provides that this section is to be read as if the words "or affirmation" were inserted after the word "oath."

A person is not legally bound to state the truth, where the officer who administers the oath is trying a case wholly beyond his jurisdiction; *Reg.* v. *Andy Chetty*, 2 *Mad. H. C. Rep.* 438; *Emp.* v. *Niaz Ali*, *I. L. R.* 5 *All.* 17. Nor is a person bound by law to state the truth when before an officer who, although empowered to conduct an enquiry, is not empowered to administer an oath to that person. A pleader, whose conduct was being enquired into under the Legal Practitioners' Act, ought not to be called upon to make a statement on solemn affirmation, but if he does so make any statement he cannot be convicted under this section, if he states what is untrue; *Kotha Subba* v. *Reg.*, *I. L. R.* 6 *Mad.* 252.

Where a false statment is made in a stage of a judicial proceeding, the accused ought not to be convicted by a magistrate under this section, but ought to be committed for trial to the Court of Session, and a conviction under this section is illegal; *Reg.* v. *Nusuroodden*, 11 *W. R. Cr.* 24; *Reg.* v. *Dayalji Endarji*, 8 *Bom. H. C. Rep. C. C.* 21; see, also, *Reg.* v. *Heeramun*, 8 *W. R. Cr.* 30. The High Court at Madras, however, on the 4th November 1868 ruled that a conviction under this section was good, although the offence fell under Sect. 193, 4 *Mad. H. C. Rep. App.* 18.

The making of a false return on oath of a service of a summons comes under Sect. 193, *post*, p. 228, and not under this section; *Reg.* v. *Shama Churn*, 8 *W. R. Cr.* 27; so does also a false statement made on solemn affirmation before an Income-Tax Commissioner, as it is a statement in a judicial proceeding under the Income-Tax Act, 1870; *Reg.* v. *Dayalji Endarji*, 8 *Bom. H. C. Rep. C. C.* 21.

A sentence under this section which awards no imprisonment is illegal; 4 *Mad. H. C. Rep. App.* 18.

FALSE INFORMATION.

Sect. 182. *False Information with Intent to cause Injury.*— **Whoever gives to any public servant any information which he knows or believes to be false, intending thereby to cause or knowing it to be likely that he will thereby cause, such public servant—**

(*a*) to do or omit anything 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, or

(*b*) to use the lawful power of such public servant to the injury or annoyance of any 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.

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 dismiss 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.**

(*c*) **A falsely informs a policeman that he has been assaulted and robbed in the neighbourhood of a particular village. He does not mention the name of any person as one of his assailants, but knows it to be likely that in consequence of this information the police will make enquiries and institute searches in the village to the annoyance of the villagers or some of them. A has committed an offence under this section.**

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect. 195, *Cr. P. C.*, 1882.

Evidence.

This section now appears as amended by Act III. of 1895.

The fact that the accused gave the information must first be proved, then that the information was false, and finally that he knew or believed that such information was false.

If the charge be under the former part of the section, it is sufficient further to shew that the accused intended that the public servant to whom the false information is given should do or omit to do something which he ought not to do or omit to do if the true facts were known to him. The gist of the offence is not what action may or may not be taken by the public servant, but the intention or knowledge (to be inferred from his conduct) of the person supplying such information; *Emp.* v. *Budh Sen*, *I. L. R.* 13 *All.* 351. Thus, where the first prisoner informed

the Assistant Collector that he had passed a certain examination, intending to induce the Assistant Collector to give him an appointment; and the second prisoner had passed the examination in the name of the first, and handed to him the certificate of the fact; it was held that the case fell under this section; *Emp.* v. *Ganesh*, *I. L. R.* 13 *Bom.* 506, in which the case of *In re Goolam Ahmed*, *I. L. R.* 14 *Cal.* 314, is discussed and dissented from, in so far as it rules that, under this part of this section, the act or omission of the public servants must be in respect of a third person; see, also, *Emp.* v. *Dwarka Prasad*, *I. L. R.* 6 *All.* 97; *Emp.* v. *Budh Sen*, *ubi supra*; and *Emp.* v. *Soshi*, *I. L. R.*, 15 *All.* 210; in which the case of *Emp.* v. *Ganesh* is approved of. Where persons appeared before a village registrar and identified one B as W, in consequence of which a case was executed and registered by B in the name of W, it was held that these persons were punishable under this section; *Emp.* v. *Bala Kashala*, *B. R.* 18th June 1895.

If the charge is under the latter portion of the section, it must further be proved that the accused gave the information to a public servant, intending that that public servant in consequence of the information so given him should act officially to the injury or annoyance of some third person.

Ill. (*c*) shews that it will not be necessary to prove that the accused intended his information to cause the public servant to act directly against a particular third person as was ruled in *In re Goolam Ahmed Kaji*, *I. L. R.* 14 *Cal.* 314, which is consequently overruled by the illustration, as is, also, *Reg.* v. *Suraji*, *B. R.* 10th July 1873. The ruling in the former case had already been dissented from, both in Bombay and Allahabad.

It will not be sufficient if the public servant misinformed is only competent to pass on the information to his superior, but cannot act directly or immediately against the person informed against; *Reg.* v. *Periannam*, *I. L. R.* 4 *Mad.* 241. M falsely informed the collector of a district that certain *zamindars* had usurped possession of certain land belonging to Government. It was held that inasmuch as that was no more than an expres-

sion of a private person's opinion that the collector might, if he chose, sustain a civil suit against the *zamindars*, and as the result, had the collector agreed with the informant, would not have been that the collector would have used his lawful power as collector or magistrate to the injury of such *Zamindars*, M had not committed any offence under this section ; *Emp.* v. *Madho*, *I. L. R.* 4 *All.* 498. Where a person attempted to obtain his recruitment in the police by giving certain false information about himself to the District Superintendent, it was held that he had not committed any offence under this section ; *Emp.* v. *Dwarka Prasad*, *I. L. R.* 6 *All.* 97.

It was not intended by the Legislature that the provisions of this section should be enforced merely at the instance of private persons ; consequently, where A, out of malice to B, gives to C, a public servant, false information intended to injure B, a public servant under C, B cannot prosecute A criminally without C's consent ; *In re Moulvy Mahomed Abdool Lateef*, 5 *B. L. R. Cr.* 37, and 9 *W. R. Cr.* 31 ; but if C's consent to the prosecution be given, then B can prosecute ; *Emp.* v. *Jugal Kishore*, *I. L. R.* 8 *All.* 382 ; the right to prosecute is not confined to the person to whom the complaint is made as ruled in *Emp.* v. *Radhakishen*, *I. L. R.* 5 *All.* 36. It is not necessary to get any sanction if the complaint is made by the public servant to whom the false information was given ; *Poonit Singh*, v. *Madho Bhut*, *I. L. R.* 13 *Cal.* 270 ; see, also, the notes to Sect. 211, *post*.

False information of the kind referred to in this section, if given to a person who is not a public servant, is defamation ; *Emp.* v. *Santaram*, *B. R.* 12*th January* 1887.

If false statements are made at the same time about more than one person, the accused should only be charged with one offence, and not with separate offences in respect of each person he names; *Poonit Singh* v. *Madho Bhut*, *ubi sup.*

OBSTRUCTION OF AND OMISSION TO ASSIST PUBLIC SERVANT.

Sect. 183. *Resistance to the taking of Property by Public Servant.*—**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.

Sect. 184. *Obstructing Sale of Property by Authority of a Public Servant.*—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.

Sect. 185. *Illegal Purchase or Bid for Property.*—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.

Sect. 186. *Obstructing Public Servant in Discharge of his Public Functions.*—Whoever voluntarily obstructs any public 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.

Sect. 187. *Omission to assist Public Servant.*—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.

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect. 195, *Cr. P. C.*, 1882.

Evidence.

Resistance to the taking of any property by a public servant is only punishable when the taking is by lawful authority, and when the defendant knows or has reason to believe that the taking is by or by order of a public servant. So, in order to convict a person of obstructing a public servant, it must be shewn that he was in the exercise of his public functions and justified in the act which he was doing; *Lilla Singh* v. *Emp.*, *I. L. R.* 22 *Cal.* 286. But it must be remembered that there is no right of private defence against an act which does not reasonably cause fear of death or grievous hurt, done by a public servant acting in good faith, although the act may not be strictly justifiable by law; see *Reg.* v. *Vyankatrav*, 7 *Bom. H. C. Rep. C. C.* 50; but this does not extend to a case where an act or order is entirely *ultra vires*, and, therefore, illegal; *Emp.* v. *Tulsiram*, *I. L. R.* 18 *Bom.* 168. The mere refusal by a person to hand over to a bailiff money alleged to be in his pocket is not resistance to the taking of the money, under Sect 183; *Emp.* v. *Alibhai*, *B. R.* 27*th September* 1888; nor is the mere failure to comply with the request for obedience to an order which the person making the request has to carry out; *Emp.* v. *Sommanna*, *I. L. R.* 15 *Mad.* 221.

An obstruction to be an offence must have been caused voluntarily within the definition contained in Sect. 39 *ante*, p. 38; there must have been some overt act of obstruction; *Emp.* v. *Sommanna, ubi supra.* Escaping from custody is not obstructing a public servant in the discharge of his public functions under Sect. 186; *Reg.* v. *Poshu*, 2 *Bom. H. C. Rep.* 128. Where a measuring clerk employed under the Revenue Survey went to the shop of the accused and said he wanted to measure his house, and the accused said he could not go with him then, that he did not want his house measured, but that if he liked to call in the morning when he was at his house, he would allow him to measure it; it was held that the refusal to go with the clerk was not causing an obstruction; *Reg.* v. *Bhagtilas*, 5 *Bom. H. C. Rep. Cr.* 51. A mere oral statement by the person appearing to be the owner of property attached by a bailiff in execution of a decree to the effect that he would not allow the bailiff to take it away unless he entered it as his property does not amount to an offence under Sect. 183; *Emp.* v. *Husain*, *I. L. R.* 15 *Bom.* 564. Spreading a false report as to the results of vaccination, and thereby preventing people from bringing their children to be vaccinated, is not an obstruction of a public servant in the discharge of his duties, under Sect. 186; *Emp.* v. *Thimmachi*, *I. L. R.* 15 *Mad.* 93.

The resistance of the process of a civil court is punishable under Sect. 186 by a court of criminal jurisdiction; *Reg.* v. *Bhagai Dafadar*, 2 *Ben. L. R. F. B.* 21, and 10 *W. R. Cr.* 43, overruling *Reg.* v. *Chander Kant*, 9 *W. R. Cr.* 63, in which it had been held that a Magistrate had not jurisdiction to fine for resistance to the process of a civil court but the civil court only. The case of *Reg.* v. *Bhagai Dafadar* has been followed in that of *In re Mani Chandra*, 2 *Ben. L. R. A. C. J.* 188. If a bailiff break the doors of a third person to execute decree against a judgment-debtor he is a trespasser, if it turn out that neither the person nor the goods of the debtor are in the house, and, under such circumstances, the owner of the house does not, by obstructing the bailiff, render himself liable to punishment under Sect. 183 or Sect. 186; *Reg.*

v. *Gazi*, 7 *Bom. H. C. Rep. C. C.* 83. Nor is a cart-owner liable under Sect. 186 for refusing to give his cart on hire to a Government officer; *Reg.* v. *Dhori Kullan*, 9 *Bom. H. C. Rep.* 165. A magistrate directed a landholder "to find a clue" in a case of theft within five days, and to assist the police; it was held that such order was not authorized by Act X of 1872, Sects. 90 and 91, and that the conviction of the landholder under Sects. 187 and 188 of this Code was not sustainable; *Emp.* v. *Bakshi Ram*, *I. L. R.* 3 *All.* 201.

Where a Mamlatdar, not being able to execute a decree for possession in consequence of both parties being found to be in joint possession of the land in dispute which did not correspond to the description given in the plaint, referred the matter to the Collector for advice, and the Collector sent a surveyor to measure the land, and, after ascertaining the respective shares of the parties, to put the decree-holder in possession of his share; it was held that the action of the Collector was altogether *ultra vires*, and that the defendant could not be prosecuted, under Sect. 186, for preventing the surveyor from measuring the land; *Emp.* v. *Tulsiram*, *I. L. R.* 13 *Bom.* 168.

A Municipal servant is not discharging a public function in putting down pegs and strings to mark out a road, unless the road is public property vested in the Municipality; and if there is a *bonâ fide* dispute between any person and the Municipality as to the ownership of the road, that person does not commit an offence under Sect. 186 by pulling up the pegs and cutting the strings; *Emp.* v. *Sagun*, *B. R.* 5*th April* 1888.

A person nominated by a Collector under Sect. 69 of the Bengal Tenancy Act for the purpose of making a division of crops between the landlord and tenant is not a public servant within the meaning of Sect. 186; *Chatter Lal* v. *Thacoor Pershad*, *I. L. R.* 18 *Cal.* 518.

The nazir of a court has power to delegate the execution of a warrant of attachment addressed to him to a peon, who thereupon becomes for that purpose a public servant; *Dharam Chand* v. *Emp.*, *I. L. R.* 22 *Cal.* 596; *Sheo Progash* v. *Bhoop Narain*, *ib.* 759.

A person obstructing an officer in execution of his duty under the Foreigners' Act is punishable under Sect. 186; *Act* III *of* 1864, *Sect.* 3.

Public servants unlawfully buying or bidding for property are punishable under Sect. 169. A mock bidding for a lease of a ferry, put up for sale by auction by a magistrate, has been held to come under Sect. 185; 5 *R. J. and P.* 38.

Quære, whether a mouzadar is a public servant; *Reg.* v. *Soorjaram*, 8 *W. R. Cr.* 66. An officer executing the warrant of a Marine Court is a public servant; within the meaning of Sect. 186; *Act* IV. of 1875, *Sect.* 15.

Assaulting or causing hurt to a public servant in the discharge of his duty is punished by Sect. 152; threatening a public servant, by Sect. 189; and insulting or interrupting him in a judicial proceeding, by Sect. 228.

Persons bound to furnish information to public servants, and not doing so, bring themselves within Sects. 176 and 177.

The word "offence" in Sec. 187, denotes anything punishable under the Penal Code or under any special or local law; *Sect.* 40, *ante*, p. 38.

A person refusing to perform the duties of census officer is punishable under Sect. 187, *Act* XIV *of* 1880, *Sect.* 5.

DISOBEDIENCE OF ORDER OF PUBLIC SERVANT.

Sect. 188. *Disobedience to an Order duly promulgated by a Public Servant.*—**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 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.

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect. 195, *Cr. P. C.*, 1882.

Evidence.

The first fact to be proved is that an order has been issued against the defendant, which he is in law bound to obey; and for that, it must be issued by a public servant, it must be one which that servant was competent to issue, and there must be no flaw in the order itself or in the mode of its issue, for disobedience of an order promulgated by a public servant having no authority in that behalf is not an offence under this section; *In re Surjanarain Das, I. L. R.* 6 *Cal.* 88. Thus under Bombay Act V of 1864 a mamlatdar has no power to order a defendant not to allow water from his house to fall on his neighbour's premises; *Reg.* v. *Bhau Vithu*, 3 *Bom. H. C. Rep. C. C.* 53; nor to direct a person to keep

a gateway open; *Reg.* v. *Khandoji Tanaji*, 5 *Bom. H. C. Rep. C. C.* 21; but he has jurisdiction to order a door to be broken open if that is necessary to give possession of property; *Baji Dev.* v. *Sadashiv Bhaishankar*, 5 *Bom. H. C. Rep. A. C. J.* 158; and to order a person to keep open a right of way to a privy; *Reg.* v. *Krishna Shet*, 5 *Bom. H. C. Rep. C. C.* 46. A magistrate can order the priests of a temple to widen and heighten the doorway so as to obviate the dangers arising from the crowds of pilgrims which frequent it, and improve the ventilation; *Reg.* v. *Ram Chandra* 6 *Bom. H. C. Rep. Cr.* 36; but he has no power to issue a general order prohibiting the public from frequenting the roads and public places of resort between the hours of 9 P. M. and sunrise; *In re Komul Kisto Bonick*, 12 *C. L. R.* 231; see, also, *Emp.* v. *Suckoo*, *B. R.* 18*th July* 1889; but under Beng. Reg. VI of 1819 a magistrate may prohibit a ferry-boat being employed in the immediate vicinity of a public ferry; *Muthra* v. *Jawahir*, *I. L. R.* 1 *All.* 527. For cases of orders abating local nuisances, see *Reg.* v. *Dalsukram*, 2 *Bom. H. C. Rep.* 384; and orders for preventing a breach of the peace; *In re Surjanarain*, *I. L. R.* 6 *Cal.* 88; orders made on the report of an imperfectly constituted jury *Emp.* v. *Bhairub Chunder*, 10 *C. L. R.* 193.

Where a magistrate makes a conditional order under Sect. 133, Cr. P. C., 1882, directing a person to do an act, and that person does not appear and shew cause against the order, or ask for the appointment of a jury to try whether the order is reasonable and proper, in consequence of which the order is made absolute, it is not competent for him when charged, under Sect. 188, with disobedience of the final order, to go behind it and shew that the order ought never to have been made, because, the order having been *lawfully* made, the disobedience of that order constitutes the offence; *Emp.* v. *Narayana*, *I. L. R.* 12 *Mad.* 475; *Emp.* v. *Bishambardal*, *I. L. R.* 13 *All.* 577.

This section clearly contemplates the case of an order being made upon some particular person, and that person disobeying the order. The illustration, however, somewhat extends the section by applying it to the case of an order made against a particular class of persons, but even with this extension, it is evident that

the order must be one which orders a person or a definite class of persons to do or not to do a certain act; *In re Amiraddi*, 3 *B. L. R. A. Cr.* 45; *Emp.* v. *Maneckchand*, *B. R.* 1*st September* 1887; and evidence must be given that the order was directed against the accused person or persons; *In re Nobo Kishore*, 7 *C. L. R.* 291. An order was promulgated by a magistrate in 1876, directing a religious procession to proceed by a certain specified route, and for several years subsequently, the procession, as a matter of fact, did go by that route, although no new orders were made by the magistrate in those years. In 1886, the procession went by a different route; and it was held that those who took the procession by that route could not be convicted under this section of disobeying the order of 1876, as it was only a temporary one; *Emp.* v. *Sheodin*, *I. L. R.* 10 *All.* 115. Where a magistrate by an order prohibits the holding of a new *hát* contiguous to, and on the same day as an old *hát*, a person who frequents the new *hát*, not as proprietor or manager, but as a buyer or seller, cannot be convicted under this section; *Paibutty Charan* v. *Emp.*, *I. L. R.* 16 *Cal.* 9. In this case the point as to whether such an order was legal or not does not seem to have been raised. An order that, owing to the prevalence of cholera, the inhabitants of a town should not give caste dinners was posted in several parts of the town, including the street in which the accused lived, and was also read out in the town. Subsequently, the accused gave a caste dinner and was convicted under this section; but the conviction was held to be illegal as Sect. 144, Cr. P. C., 1882, was confined to giving a direction that a particular person should abstain from acts of a certain character, or that the public should abstain from certain acts when frequenting certain places; and further that this order was not addressed to the accused, nor brought directly to his notice; *Emp.* v. *Lakhmidas*, *I. L. R.* 14 *Bom.* 165; see, also, *Emp.* v. *Harilal*, *ib.* 180. An order under this section is only binding upon the parties to it; consequently, where an order was made as between A and B and three persons then tenants of B, it was held that it was not binding upon subsequent tenants of B; *In re Gopal Burnawar*, 3 *B. L. R. A. Cr.* 18.

If the order was one which had to be promulgated, it must be shewn that it was promulgated by a public servant lawfully empowered to promulgate it; *Reg.* v. *Subun Singh*, 23 *W. R. Cr.* 57. It must also be shewn that the accused knew that an order had been promulgated by a public servant directing such accused to abstain from a certain act; *Reg.* v. *Ramtonoo Singh*, 12 *W. R. Cr.* 49; *Muthra* v. *Jawahir*, *I. L. R.* 1 *All.* 527; *Emp.* v. *Lakhmidas*, *I. L. R.* 14 *Bom.* 165. A was declared by an order of a magistrate to be in possession of certain land, and B and all others were ordered not to interfere with A's possession. Subsequently B, and an assignee of his, and some of B's servants, interfered with A, and attempted to oust him from possession, all being aware of the orders of the magistrate; it was held that all the accused could be rightly convicted under this section; *Goluck Chandra* v. *Kali Charan*, *I. L. R.* 13 *Cal.* 175.

Evidence must also be produced to shew that the disobedience has caused, or tends to cause, obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury, to some person lawfully employed, or that it caused, or tended to cause, a riot or affray, or danger to human life, health, or safety; 4 *Mad. H. C. Rep. App.* 5; and *Reg.* v. *Nandkumar Bose*, 3 *Ben. L. R. App.* 149.

This section does not justify a magistrate in interfering with the exercise by a landholder of any of his civil rights, merely because such exercise might require vigilance on the part of the police, and might, in the absence of such vigilance, lead to an affray; and it has been held, under this section, that an order prohibiting a *zamindar* from holding a market upon his estate, was not a legal order; 5 *R. J. and P.* 155. In *Lalla Mitter* v. *Raj Coomar*, 18 *W. R. Cr.* 22; it was held that a magistrate could prohibit the rival owners of two neighbouring *hâts* from holding them for a limited period on certain days, where the exercise of the right would cause an affray.

The wording of this section, as to the description of punishment to be awarded to each class of offences, is so clear that one would have supposed that no magistrate could go wrong. Nevertheless, the High Court of Bombay have had to decide that

rigorous imprisonment can only be awarded in cases coming within the terms of the latter part; *Reg.* v. *Ratanrav bin Mahadevrav Chavan*, 3 *Bom. H. C. Rep. C. C.* 32.

Parties to civil suits failing to comply with orders to answer interrogatories, or for discovery, production, or inspection of documents, the order for which has been personally served upon them, are punishable under this section; Act XIV of 1882, Sect. 136. The High Court in Calcutta seem to have overlooked this section and decided too widely that Sect. 188 did not apply to orders made in a civil suit, though they were right in holding that it did not apply to disobedience to an injunction: *In re Chandra Kanta*, *I. L. R.* 6 *Cal.* 445; 7 *C. L. R.* 350.

The disobedience of the order of a magistrate prohibiting a local nuisance is punishable under this section: Act X of 1882, Sects. 136, 140; but such an order must be made against a definite individual, and not be merely a general proclamation, in order that disobedience to such an order may fall under this section; *Emp.* v. *Manekchand*, *B. R.* 1*st September* 1887.

THREAT OF INJURY TO PUBLIC SERVANT, &c.

Sect. 189. *Threat of Injury to a Public Servant.*—**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.**

Sect. 190. *Threat of Injury to any other Person.*—**Whoever holds out any threat of injury to any person for the purpose of inducing that person to refrain or desist 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.**

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

The threat used ought to be set out with reasonable certainty in the charge, in order to afford the prisoner the opportunity of properly answering it; and it is further necessary that the words used in making the alleged threat should be strictly proved, in order that the Court may be able to judge whether the words used amounted to a threat, or whether they were only such a remonstrance as might be perfectly justifiable; *Emp.* v. *Maheshri Bukhsh*, *I. L. R.* 8 *All.* 380.

Where a priest, knowing that a civil suit was pending against A for the possession of certain church property, excommunicated him for withholding it; it was held not to be an offence under Sect. 190; *In re De Cruz*, *I. L. R.* 8 *Mad.* 140.

See, also, the notes to Sect. 503, *post*, which defines the offence of criminal intimidation.

CHAPTER XI.

FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

FALSE EVIDENCE.

Sect. 191. *False Evidence.*—**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 anything 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.**

Sect. 192. *Fabricating False Evidence.*—**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."**

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 handwriting, 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 police are likely to search. A has fabricated false evidence.**

Sect. 193. *Punishment for false Evidence.*—**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 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 Requests 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 enquiry 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 enquiry 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.

Sect. 194. *Giving, &c., False Evidence to convict of a Capital Offence.*—**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 the law of British India or England, 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 in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.**

Sect. 195. *Giving &c., False Evidence to convict of offence punishable with Transportation, &c.*—**Whoever gives or fabri-**

cates 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 the law of British India or England 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.

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.

Sect. 196. *Using Evidence known to be False.*—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.

Sect. 197. *Issuing or signing a False Certificate.*—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.

Sect. 198. *Using as a True Certificate one known to be False in a Material Point.*—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.

Sect. 199. *False Statement in Declaration receivable as Evidence.*—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 authorised 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.

Sect. 200. *Using as True any such Declaration.*—**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.**

Explanation.—**A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of Sects. 199 and 200.**

Note.

By Act VI of 1864, for a second offence under Sects. 193, 194 and 195, whipping may be added as a punishment.

Offences under Sects. 194 *and* 195 *are triable by the Court of Session; those under Sects.* 193 *and* 196-200 *by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class. A warrant should be issued in the first instance. Police officers may not arrest without a warrant. Defendants are bailable, except under Sects.* 194 *and* 195, *when they are not bailable, and under Sect.* 196, *when the question of bail depends upon whether the offence of giving the evidence referred to is bailable or not. Not compoundable. Sanction required under Sect.* 195, *Cr. P. C.,* 1882, *for the prosecution of offences under Sects.* 193 *to* 196, 199 *and* 200, *when an offence is committed in relation to a proceeding in any Court.*

Charge.

That you, the said A B, on the day of ,being summoned as a witness in , being a judicial proceeding then pending before the , and being bound by an oath to state the truth, intentionally gave false evidence by knowingly and

falsely stating that you had seen one Mooljee sign a certain document marked A, whereas in truth, and in fact, you had not seen the said Mooljee sign the said document, and that you, the said A B, have thereby committed an offence punishable under Sect. 193 of the Indian Penal Code, and within, &c.

Evidence.

The term "false evidence," it should be noted, is not confined to statements which can be received as evidence of a fact under the Evidence Act, but includes every statement which comes under the terms of Sect. 191, whether that statement can be received in a court as evidence of a fact or not. It is a technical term, and must not be read as meaning only "evidence" which is false.

In the preceding sections there are three principal heads under which offences relating to false evidence are classed—(1) giving false evidence, or using false or fabricated evidence; (2) fabricating false evidence; and (3) issuing or making a certificate or declaration in which there is a false statement.

In charges under these sections, except under Sect. 197, if the false evidence were given at a trial, or in the course of a judicial proceeding, it must be proved that such a trial did take place, or that there was such a judicial proceeding; *Reg.* v. *Fatik Biswas*, 1 *Ben. L. R. A. Cr. J.* 13; and the charge should shew not only the judicial proceeding in which the prisoner is accused of having given false evidence, but the particular stage of the proceeding at which the evidence was given; *ib.* 15. The proper way to prove that the judicial proceeding took place is to produce the record thereof; *ib.* 15; *S. C. sub nom. Reg.* v. *Fulteali Biswas*, 10 *W. R. Cr.* 37. This case was followed in *Reg.* v. *Maharaj Misser*, 7 *Ben. L. R. App.* 66, and 16 *W. R. Cr.* 47; see, also, *Reg.* v. *Ravji Taju*, 8 *Bom. H. C. Rep. C. C.* 37. Where a summons was granted upon an information, and upon the hearing of the summons the perjury assigned was committed, and at the trial the information was produced, but not the summons, it was held that the information was not sufficient, but that the summons ought to have been produced; *Reg.* v. *Whybrow*, 8 *Cox C. C.* 438.

So, too, where a defendant was indicted for perjury alleged to have been committed on the hearing of an affiliation summons, it was held that to support the indictment it was necessary to give evidence of the charge made by the mother either by producing the original order made thereon, or by giving secondary evidence of the summons after notice to produce it; and that in the absence of such notice it was not sufficient to produce the minutes of the proceedings by the clerk of the justices, those minutes being of no greater authority than the notes of a short-hand writer; *Reg.* v. *Newal*, 6 *Cox C. C.* 21. On the trial of an indictment for perjury alleged to have been committed before magistrates on the hearing of a case punishable on summary conviction, the conviction by the magistrates is not receivable in evidence, because it is irrelevant; *Reg.* v. *Goodfellow*, *Car. and M.* 569.

The Penal Code gives no definition of what is meant by "a stage of a judicial proceeding," but only cites a few instances. The definition of a judicial proceeding is, however, given in Sect. 4 of the Criminal Procedure Code, 1882, as a proceeding in the course of which evidence is, or may be, legally taken. Any person upon whom a duty is cast to do a certain act if certain circumstances exist, must enquire whether those circumstances do exist, but such an enquiry is not in itself a judicial enquiry or a judicial proceeding; see *Reg.* v. *Price*, *L. R.* 6 *Q. B.* at p. 418; in order to make an enquiry a judicial proceeding, it must be one in which the object is to determine a jural relation between one person and another, or a group of persons, or between him and the public generally; *Emp.* v. *Tulja*, *I. L. R.* 12 *Bom.* at p. 42; where it was held that a Sub-Registrar acting under Sect. 41 of the Registration Act, 1877, was not a Court; but in Madras a *Full Bench* has held that a Registrar, acting under Sects. 73-75 of the same Act, is a Court; *Atchayya* v. *Gangayya*, *I. L. R.* 15 *Mad.* 138, following *In re Venkatachella*, *I. L. R.* 10 *Mad.* 154; dissented from in *Emp.* v. *Ram Lal*, *I. L. R.* 15 *All.* 141. A Magistrate making an enquiry before issuing an order under Sect. 144, Cr. P. C., is acting in a stage of a judicial proceeding; *Emp.* v. *Tirunarasimha*, *I. L. R.* 19 *Mad.* 18.

Under the English law, the following decisions have taken place as to what is false swearing in a judicial proceeding: If a defendant swear falsely when examined as a witness upon a trial or in an answer to a bill in equity; 5 *Mod.* 348; 3 *Inst.* 166; or in depositions in a court of equity; 5 *Mod.* 348; or in an affidavit in the Courts of Queen's Bench, Common Pleas, &c.; 1 *Rol. Rep.* 79, *per Coke*, C. J.; or upon a commission for the examination of witnesses; *Cro. Car.* 99; or in justifying bail in any of the courts; or upon an examination before a magistrate; or in a judicial proceeding in a court baron; 5 *Mod.* 348; 1 *Mod.* 55, *per Twisden*, J.; or ecclesiastical court; 5 *Mod.* 348; or any other court, whether of record or not; see 1 *Hawk, c.* 27, *s.* 3; also before a local marine board acting under 17 & 18 Vict. c. 104, s. 241; *Reg.* v. *Tomlinson*, 12 *Jur. N. S.* 945. An enquiry into the income of a person under the Income-Tax Act, 1870, is by that Act a judicial proceeding; *Reg.* v. *Dayalji Endarji*, 8 *Bom. H. C. Rep. C. C.* 21. Sect. 235 of the Civil Procedure Code requires a decree-holder to state what payments have been made on account of his decree, and whether the same has been adjusted, even though such adjustment has not been certified to the Court; *Paupaya* v. *Narasimha*, *I. L. R.* 2 *Mad.* 216; therefore, if a judgment-creditor falsely states while making application for execution that there has been no adjustment, and it turns out that there has been an adjustment out of court which has not been certified, he is guilty of giving false evidence in a stage of a judicial proceeding; *Emp.* v. *Bapuji*, *I. L. R.* 10 *Bom.* 288. A coroner's inquest is a judicial proceeding; Act IV of 1871, Sect. 8. The examination of a plaintiff in reference to the matters of his claim, is an investigation directed by law, and is, therefore, a stage of a judicial proceeding; *Reg.* v. *Mata Dayal*, 4 *N. W.* 6. An enquiry by a magistrate in order to find out the writer of an anonymous letter charging certain persons with murder, but without any reference to the truth or otherwise of the charge is not a stage of a judicial proceeding; *Reg.* v. *Bykunt Nath*, 5 *W. R. Cr.* 72.

The matter in which the false evidence is given must be within the jurisdiction of the person before whom it is sworn, or else it is

not given in a judicial proceeding; see *Reg.* v. *Andy Chetty*, 2 *Mad. H. C. Rep.* 438. A statement made to, and taken down by, a police constable under Sect. 161, Cr. P. C., is not in a stage of a judicial proceeding; *Emp.* v. *Ismail*, *I. L. R.* 11 *Bom.* 659; nor is one before a Third Class Magistrate under Sect. 164, Cr. P. C., in the course of a police investigation; *Emp.* v. *Bharma*, *I. L. R.* 11 *Bom.* 702. Evidence given before a police *patel* is not evidence given in a stage of a judicial proceeding; *Emp.* v. *Irbasapa*, *I. L. R.* 4 *Bom.* 479.

A *femme sole* having recovered judgment in a county court, afterwards married, and subsequently to her marriage issued a judgment summons out of the London Small Debts Court, within the jurisdiction of which the defendant was living. The judgment summons was headed as in the plaint note in the county court, and objection being made on behalf of the defendant, the judge amended it by striking out the name of the original plaintiff, and substituting the names of her husband and herself as joint plaintiffs. The defendant was then examined, and at the conclusion of his evidence the judge ordered him to be prosecuted for perjury, on which charge he was afterwards tried and found guilty. On reference to the Court of Criminal Appeal, it was held that the amendment was not within the jurisdiction of the judge, and that there being no cause in the altered name, the conviction could not be supported; *Reg.* v. *Pearce*, 9 *Jur. N. S.* 647. The Bengal Tenancy Act does not authorize a proceeding calling upon a person to shew cause why he should not make over papers belonging to an estate of which a common manager has been appointed; consequently a person giving false evidence in such a proceeding cannot be convicted under Sect. 193; *Abdul Majid* v. *Krishna Lal*, *I. L. R.* 20 *Cal.* 724. The accused was convicted of intentionally giving false evidence in a judicial proceeding. The proceedings at the trial at which the alleged false evidence was given were subsequently set aside in consequence of the sanction for the prosecution not being sufficient; and it was held that the conviction of the accused must be reversed, as the alleged false evidence was not given in a judicial proceed-

ng; *Reg.* v. *Ravji Taju*, 8 *Bom. H. C. Rep C. C.* 37. Where a magistrate illegally tenders a pardon to an accomplice, and afterwards takes his evidence in the case in which he was formerly an accused, such evidence is not given in a stage of a judicial proceeding; *Reg.* v. *Hanmanta*, *I. L. R.* 1 *Bom.* pp. 617 and 618; *Emp.* v. *Dala Jiva*, *I. L. R.* 10 *Bom.* 190.

The Collector is the person authorized to make inquiries into applications for refunds for spoiled stamps, and if he delegates the inquiry to a deputy Collector, the latter is not entitled to put the witnesses on oath, and false evidence given before him is not given in a judicial proceeding; *Emp.* v. *Niaz Ali*, *I. L. R.* 5 *All.* 17. Where a man died leaving some money in the hands of the telegraph authorities and P claimed it as his heir, and the matter was referred to the District Judge for investigation, it was held that the proceedings before the District Judge were not a stage of a judicial proceeding; *Emp.* v. *Chait Ram*, *I. L. R.* 6 *All.* 103. But a false statement on oath to the secretary of a Government Savings Bank is punishable under Sect. 193; Act V of 1873, Sect. 7. A village munsif in Madras can administer an oath to a witness, and, consequently, a witness giving false evidence before him can be punished therefor; *Emp.* v. *Venkayya*, *I. L. R.* 11 *Mad.* 375.

Where a district Registrar deputed a deputy Magistrate to make certain enquiries in regard to the registration of a document, but conferred no registering power on him, and a false statement was made before him, it was held that this did not constitute an offence punishable under Sect. 193. *Radhika* v. *Lal Mohan*, *I. L. R.* 20 *Cal.* 719.

Where a bankrupt has been summoned to be examined by the court, the Registrar in such case constituting the court, and has been sworn by the Registrar, but the examination took place in a room in which the Registrar was not present, the examination is not before the court, and perjury cannot be assigned upon the evidence given in such examination; *Reg.* v. *Lloyd*, 19 *Q. B. D.* 213.

If, however, there is only an irregularity in the proceedings, the evidence is still in a judicial proceeding. Where a woman made no information on oath against the putative father of her child, and the father before the magistrate did not object to the irregularity, it was held that he could be convicted on false evidence given by him before the Magistrate; *Reg.* v. *Berry*, 8 *Cox Crim. C.* 121. So, where a constable illegally brought a person before a magistrate and swore falsely against him, the illegality was held not to be a bar to the conviction of the constable; *Reg.* v. *Hughes*, 4 *Q. B. D.* 614. So, too, if an officer having authority, misconceives the basis upon which his authority rests, a person giving false evidence before him can be convicted; *Emp.* v. *Balesar*, *I. L. R.* 10 *Cal.* 604.

It must then be shewn that the accused was bound by an oath or affirmation or by some express provision of law to state the truth, or that he was bound by law to make a declaration upon some subject. Before the passing of the Oaths Act, it was held that it must be proved that the defendant was sworn, or put under an obligation to speak the truth, similar to that of an oath; or that there was some express provision of law requiring him to speak the truth. And where a witness was at the beginning of the day solemnly affirmed once for all to speak the truth in all causes coming before the court on that day, it was held that he could be convicted of giving false evidence in a suit which came on that day, although he was not affirmed to speak the truth in that suit after it was called on for hearing, and the names of the cases in the day's list were not mentioned when the affirmation was administered; *Reg.* v. *Venkatachalam Pillai*, 2 *Mad. H. C. Rep.* 43. A native or other witness who professes the Christian religion must have been put under the sanction of an oath upon the Holy Gospels, in order that he might be charged with the offence of giving false evidence; an affirmation under Act V of 1840 was not sufficient, as that Act applies only to those who are Hindoos and Mahomedans, both by birth and religion; *Reg.* v. *Vedamutu*, 4 *Mad. H. C. Rep.* 185; and *Mad. Jur.* 71.

But now by Sect. 13 of the Oaths Act X of 1873, "No omission to take any oath or make any affirmation, no substitu-

tion of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding, or render inadmissible any evidence whatever in or in respect of which such omission, substitution, or irregularity took place *or shall affect the obligation of a witness to state the truth.*" And it has been held by a *Full Bench* ruling at Calcutta, *Jackson*, J., dissenting that the word "omission" includes *any* omission, and is not confined simply to accidental or negligent omissions; *Reg.* v. *Sewa Bhogta*, 23 *W. R. Cr.* 12; and the High Court at Calcutta has ruled that the offence of giving false evidence under Sect. 193 may be committed although the accused was neither sworn nor affirmed; *Govind* v. *Emp.*, *I. L. R.* 19 *Cal.* 355. Sect. 10 of the Oaths Act further provides that "every person giving evidence on any subject before any court or person hereby authorized to administer oaths and affirmations shall be bound to speak the truth." Thus, it would appear that in cases where formerly it was necessary to prove the defendant had been sworn, or put under an obligation to speak the truth, such proof is now unnecessary, the above section of the Oaths Act being an express provision of law, obliging the defendant in such cases to speak the truth; but still, where the defendant has as a matter of fact been sworn or affirmed, that fact should be proved, until it has been distinctly ruled to be unnecessary.

Sects. 118 and 119 of the Cr. P. C., 1872, contained no provision requiring persons who gave information to the police to give true information; consequently, it was held that a person giving false information to the police under the provisions of those sections could not be prosecuted for giving false evidence; *Emp.* v. *Kassimkhan*, *I. L. R.* 7 *Cal.* 121; 8 *C. L. R.* 300; but Sect. 161 of the Cr. P. C., 1882, requires that such information should be true, and it has, consequently, been held that a person giving false answers to questions by the police under the provisions of that section, commits the offence of giving false evidence in a stage of a judicial proceeding; *Emp.* v. *Parashram*, *I. L. R.* 8 *Bom.* 216, which, however, has been overruled in so far as it

determines that such a statement was made in the course of a judicial proceeding; *Emp.* v. *Ismal*, *I. L. R.* 11 *Bom.* 659, following *Emp.* v. *Bharma*, *ib.* 702 (*F. B.*); see, also, *Nathu Sheik* v. *Emp.*, *I. L. R.* 10 *Cal.* 405; *Emp.* v. *Bhagwantia*, *I. L. R.* 15 *All.* 11. It must further be proved that the information alleged to be false was given in answer to questions put by the investigating police officer, and that the officer was at the time making an investigation under Chap. XIV. Cr. P. C.; *Emp.* v. *Baikanta*, *I. L. R.* 16 *Cal.* 349. Where a magistrate takes the statement of a person who is a witness in a criminal proceeding under Sect. 164, Cr. P. C. on oath, a charge of giving false evidence in a judicial proceeding will lie against such person; *Emp.* v. *Alagu*, *I. L. R.* 16 *Mad.* 421. A person examined by the police in respect of an offence alleged to have been committed by him is not bound to speak the truth under Sect. 161, Cr. P. C.; *Emp.* v. *Usuphkhan*, *B. R.* 6*th October* 1892.

A person who files a written statement in a civil suit is bound by law to state the truth; *Emp.* v. *Mehrban Singh*, *I. L. R.* 6 *All.* 626.

In the case of persons other than witnesses in a stage of a judicial proceeding, or those who by law are required to state the truth on a given subject, a false statement does not become false evidence merely because it is made on oath. A petition not requiring verification cannot, from the fact of its being unnecessarily verified, be made the subject of a prosecution for giving false evidence; *Reg.* v. *Kartick Chunder*, 9 *W. R. Cr.* 58; 5 *R. C. C. Cr.* 58; *In re Kasi Chunder*, *I. L. R.* 6 *Cal.* 440. A made an application for a new trial under Sect. 21 of Act XI of 1865, and filed a memorandum of his grounds, verified as a plaint, which is not required by the Act, and therein knowingly made a false statement; but it was held that he had not committed an offence under either Sect. 191 or Sect. 192, as the false statement was not made in the course of a judicial proceeding; *In re Haran Mandal*, 2. *Ben. L. R. A. Cr. J.* 1, and 10 *W. R. Cr.* 31. In an enquiry, under the Legal Practitioners' Act, into the conduct of a pleader, it is not competent for the

court conducting the enquiry to take a statement from him on oath or solemn affirmation, consequently, the pleader cannot be charged with giving false evidence in respect of any untrue statement he may make in the course of the enquiry; *Kotha Subba Chetty* v. *Reg.*, *I. L. R.* 6 *Mad.* 252.

To prove that the person who administered the oath had authority to do so, it is merely necessary to prove that he performed the duties of a certain office, without shewing his appointment; *R.* v. *Verelst*, 3 *Camp.* 432; and (if the court will not judicially notice it) that the person lawfully exercising the duties of that office has authority to administer an oath. A deputy magistrate has no power to administer an oath to a person making a declaration in the form of an affidavit; *In re Ishwar Chunder*, *I. L. R.* 14 *Cal.* 653.

The matter sworn must be proved; and it must also be proved that the defendant stated it; *Reg.* v. *Denonath Bujjar*, 9 *W. R. Cr.* 52; *Reg.* v. *Sadhoo*, 13 *W. R. Cr.* 56. If in writing, and in existence, it must be produced. Upon proof that the writing has been lost or destroyed, secondary evidence may be given of its contents, and of the defendant's signature to it; *Reg.* v. *Miles*, 2 *F. and F.* 10. If the statement on which the prosecution is founded was oral, the former evidence of the defendant must be proved by the testimony of some person who was present. It is sufficient for this purpose, if the witness state from recollection the evidence the defendant gave, though he did not take it down in writing, and cannot say with certainty that it was all the evidence given by the defendant, if he can say with certainty that it was all he gave on that point, and that he said nothing to qualify it; *R.* v. *Rowley*, 1 *Mood. C. C.* 111; *R.* v. *Munton*, 3 *C. and P.* 498. It is not necessary to produce the judge's notes if the words spoken by the accused can be established by witnesses present at the trial; *Reg.* v. *Morgan*, 6 *Cox, C. C.* 107; for the notes of evidence taken by a judge in a trial are not admissible in evidence to prove what was said at that trial; *Reg.* v. *Child*, 5 *Cox, C. C.* 197; though any notes taken at the trial may be used to refresh the memory of the person who took them, and may also be used as corroborative evidence to support the

testimony of the witness. If, however, the law requires that certain evidence should be taken down, or recorded in a particular manner, then that record ought to be in court and be used at any rate for the purpose of refreshing the memory of the person who took it down, who is, of course, the fittest person to testify as to what the defendant said on the occasion. The failure of the civil court to make a note or memorandum of the evidence of the accused given before it does not vitiate the depositions, if the evidence itself was duly recorded in the language in which it was given in such court; *Reg.* v. *Beharee Lall Bose*, 9 *W. R. Cr.* 69. The knowledge of the Sessions Judge of the handwriting of a judicial officer, before whom a statement was alleged to have been made, which signature was attached to a deposition, is no evidence of a statement contained in that deposition having ever been made; *Reg.* v. *Patik Biswas*, 1 *Ben. L. R. A. Cr.* 13. So, too, the evidence of a writer in the Judicial Commissioner's office, to the effect that "the document shewn to him (the deposition of the accused) is a deposition taken before the Assistant Commissioner, it appears to have been taken in due form and upon solemn affirmation, and is attested by the signature of the Assistant Commissioner," is not sufficient evidence of the prisoner having duly deposed; *Reg.* v. *Mati Khowa*, 3 *Ben. L. R. A. Cr. J.* 36, and 12 *W. R. Cr.* 31.

The whole of the evidence ought to be read, not merely the few words charged as false evidence, as it is quite possible that there may be something in another part of the evidence which materially modifies the words charged, so as to shew that they are not false. In England it has been held that if the perjury has been committed at the trial of a cause, the prosecutor must prove all the evidence given by the defendant; *Reg.* v. *Jones*, *Peake*, 51; or at any rate all the evidence given by the defendant referable to the fact on which the perjury is assigned; *Reg.* v. *Rowley*, *R. and M.* 299; unless the point upon which the perjury is assigned arose upon the defendant's cross-examination; *Reg.* v. *Dowlin*, *Peake*, 227.

False evidence given in the course of a judicial proceeding need not be in respect of a material point, and, therefore, an indictment

for giving false evidence, although it does not allege the materiality of the matter charged as false, is good if it allege sufficiently the subject-matter of the offence; *Reg.* v. *Aidrus Sahib*, 1 *Mad. H. C. Rep.* 38; *Reg.* v. *Mahomed Hossein*, 16 *W. R. Cr.* 37; *Reg.* v. *Shib Prosad Giri*, 19 *W. R. Cr.* 69; *Reg.* v. *Damodhar Ramchandra*, 5 *Bom. H. C. Rep. C. C.* 68; but the averment that he *intentionally* gave false evidence, *i.e.*, that he gave false evidence with the direct and express intention of deceiving, is very material. *Reg.* v. *Maharaj Misser*, 7 *Ben. L. R. App.* 66; and see, also, *Reg.* v. *Mahomed Hossein*, *ubi sup.*; and must be proved at the trial; *Reg.* v. *Denonath Bujjur*, 9 *W. R. Cr.* 52; *Reg.* v. *Sidhoo*, 13 *W. R. Cr.* 56. If, however, the evidence be proved to be false, and false to the knowledge of the accused, the intention to give false evidence will be sufficiently proved; *Reg.* v. *Amere Ali*, 3 *N. W.* 133.

Although under the Penal Code, it is not necessary that the false evidence should have been given on a material point, yet the question of materiality may have a bearing upon the question as to whether the false statement was made intentionally; for, *e. g.*, a man might be swearing truly to a very material fact, and yet unintentionally swear that the fact took place on a wrong day, where the day itself was not material. Thus, though a false statement of an immaterial fact may amount to the offence of giving false evidence, yet the immateriality of the fact may be strong proof that the false statement was not intentional, and unless the false statement is made intentionally the offence of giving false evidence is not completed. A few of the English cases on the materiality of answers given are, therefore, subjoined. If a witness be asked whether goods were paid for on a certain day, and he answer in the affirmative, if the goods were really paid for, though not on that day, it will not be perjury under the English law, 2 *Rol. Rep.* 41, 42, unless the day be material. So, if a man swear that J S beat another with a sword, and it turn out that he beat him with a stick, this is not perjury, for all that was material was the battery; *Hetley*, 97; see 1 *Hawk, c.* 27, *s.* 8. So every question in cross-examination which goes to the

witness's credit (as whether he has before been convicted of felony; *Reg.* v. *Lavey*, 3 *C. and K.* 26) is material for this purpose; *Reg.* v. *Overton*, 2 *Mood, C. C.* 263; in fact every false statement wilfully and corruptly made by a witness as to matters which affect his credit is material; *Reg.* v. *Baker* [1895], *Q. B.* 797. So, where an *alibi* is being proved, it may be material to inquire where the witness was sleeping on a certain night, with a view to shew, in contradiction to his testimony, that he was in prison at the time he said he was at home; *Reg.* v. *Tyson*, *Central Criminal Court*, 13*th June* 1867. Evidence of the payment of money by the putative father of a bastard child within twelve months before the issuing of an affiliation summons against him on the hearing of the summons is material; *Reg.* v. *Berry*, 1 *Bell, C. C.* 46. The question of materiality may sometimes be for the jury, or the court as a jury; as where the assignment of perjury, alleged to have been committed on the hearing of an affiliation summons against the defendant was in his swearing "that he had never kissed" the prosecutrix; *Reg.* v. *Goddard*, 2 *F. and F.* 361. Where a prisoner charged with robbery before a magistrate, having cross-examined the prosecutor as to whether he had not the day before that of the alleged robbery met him (the prisoner) in company with M, and proposed to him to commit a burglary, and the prosecutor having denied this, the prisoner called M to prove it; it was held that M's evidence was not material to the issue; *Reg.* v. *Murray*, 1 *F. and F.* 80.

It is next necessary to consider what must be proved in respect to the falsity of the alleged evidence, and the knowledge and belief of the accused in respect thereof. In the case of *Reg.* v. *Ahmed Ally*, 11 *W. R. Cr.* p. 27, *Norman*, J., in delivering judgment says:—"It appears to us that the true rule is that no man can be convicted of giving false evidence *except upon proof of facts which, if accepted as true*, shew not merely that it is incredible, but *that it is impossible that the statement of the party accused made upon oath can be true.* If the inference from the facts proved falls short of this, it seems to us that there is nothing on which a conviction can stand; because, assuming all that is proved

to be true, it is still *possible* that no crime was committed." But as legitimate evidence for that purpose, the law makes no distinction between the testimony of a witness directly falsifying the statement of the accused and the contradictory statement of the person charged, although not upon oath. Such a statement, when satisfactorily proved is as good evidence in proof of the charge as the criminatory statement of a person charged with the commission of any other offence, and on precisely the same ground That it is an admission inconsistent with his innocence; *Reg.* v. *Ross*, 6 *Mod. H. C. Rep.* 342; see, also, *Reg.* v. *Hook*, 27 *L. J. N. S. M. C.* 222. Beyond this the Penal Code requires the prosecution to prove that the accused knew or believed that the statement he made was false at the time of making it, or that he did not believe it to be true. In this last requirement the Penal Code goes beyond the English law, inasmuch as it imposes upon a witness the necessity of forming a definite belief as to the truth of his evidence before he gives it, and prevents him from sheltering himself under the plea of carelessness or inadvertence. A man, before he gets into the witness-box, must *believe* that all the evidence he is about to give is true, otherwise he gives false evidence. That this is an extension of the English law will be seen from the statement in Archbold as to what is perjury under that law: "The matter sworn must be either false in fact, or if true, the defendant must not have known it to be so; 1 *Hawk.* c. 27, s. 6; 3 *Inst.* 166; *Palmer*, 294. As for instance, if a man swear that J N revoked his will in his presence, if he really had revoked it, but it were unknown to the witness that he had done so, it is perjury; *Hedley*, 97." The state of the prisoner's mind at the time he gave the alleged false evidence, of course, cannot be proved directly; but surrounding circumstances will ordinarily furnish sufficient facts, from which it can be inferred that he knew or believed his evidence to be false, or did not believe it to be true.

If the defendant has always adhered to one statement, some one or more of the charges of false evidence must be proved by two witnesses: one witness alone is not sufficient, because in that case there is only oath against oath; and the

presumption of law being in favour of the innocence of the prisoner, he must be acquitted; *R.* v. *Muscot*, 10 *Mod.* 194. But if the charge of giving false evidence be directly proved by one witness, and strong circumstantial evidence be given by another, or be established by written documents, this, it seems, would be sufficient; *R.* v. *Lee*, 3 *Russ.* on Crimes, 5th edit., p. 72; see, also, *Reg.* v. *Boulter*, 2 *Den. C. C.* 396; but in England the mere contradiction of one oath of the defendant by another is not enough; *Reg* v. *Harris*, 5 *B. and Ald.* 926; *Reg* v. *Wheatland*, 8 *C. and P.* 238. In this latter case, upon an indictment for perjury in giving evidence before the Quarter Sessions, the prosecutor produced the examination of the defendant before the magistrate in which he deposed in the direct negative to everything he had sworn before the court; but *Gurney*, B., held this was not sufficient *per se*, without other evidence, to shew that the statement before the court was false and that before the magistrate true.

In India, however, under some circumstances, a defendant who has made two contradictory statements, one of which must be false, can be convicted of giving false evidence under Sect. 193 of the Penal Code without the court or jury finding by direct evidence *which* of such statements is false; for though Sect. 236 of the Criminal Procedure Code does not provide for an alternative finding where the conviction is for one of two offences under the *same* part of the *same* section, and where it is not decided which of the two said offences it is that the accused is guilty of, yet Schedule V provides for a charge of giving false evidence being framed in the alternative, and this alternative charge would be useless if the court or jury were bound to state which particular statement was false. There have been contradictory decisions as to this. In Calcutta the matter is now set at rest by a *Full Bench* ruling in the case of *Reg.* v. *Mahomed Humayoon Shah*, 21 *W. R. Cr.* 72; 13 *B. L. R.* 324. In this case it was decided that when a charge is framed containing two contradictory statements of such a nature that the specific offence of intentionally giving false evidence is disclosed by the two taken together, it must be matter of evidence whether the contradictory statements contained in the

charge are *per se* so irreconcilable that one of them is necessarily false, and also that the prisoner in making them, intentionally spoke falsely in regard to one of them; and this evidence it is for the jury or court to decide on. See, also, *Reg.* v. *Mussamut Zumeerun*, 6 *W. R. Cr.* 65; *B. L. R.* (sup. vol.) *F. B.* 521; and *Habibulla* v. *Emp. I. L. R.* 10 *Cal.* 937, in which the two preceding cases were discussed and acted on. In Madras it has been held, following the case of *Reg.* v. *Mussamut Zumeerun*, that proof of contradictory statements on oath or solemn affirmation without evidence as to which is false is sufficient to justify a conviction for giving false evidence; *In re Palany Chetty*, 4 *Mad. H. C. Rep.* 51. In Bombay the only case reported is that of *Reg.* v. *Ganoji Pandjee*, 5 *Bom. H. C. Rep. C. C.* 49, in which it was decided that where a person makes two contradictory statements in the course of a judicial proceeding, he may be tried and convicted of giving false evidence on a single alternative charge, if there is evidence to show which statement is false. Since then it has been held that where an accused person made a statement before a Magistrate contradicting one made by him to the Police, and there was no available evidence except the two contradictory statements, separate charges could not be framed and the accused could not be convicted in the alternative of giving false evidence in a judicial proceeding before the Magistrate, or of giving false evidence before a Police officer making an investigation under Chap. XIV of the Cr. P. C.; *Emp.* v. *Mugapa*, *I. L. R.* 18 *Bom.* 877 (*F. B.*). At Allahabad, it was for some time held that the fact that an accused has made one statement on oath at one time, and a directly contradictory one, also on oath, at another, is not sufficient to warrant a conviction for giving false evidence, but that the charge must not only allege which of such statements is false, but the prosecutor must be prepared with confirmatory evidence to establish the falsity of that which is impeached as untrue; *Emp.* v. *Niaz Ali*, *I. L. R.* 5 *All.* 17; subsequently, however, in the cases of *Emp.* v. *Ghulet*, *I. L. R.* 7 *All.* 44, the case just referred to was overruled and the practice of the court assimilated to that of the High Court in Calcutta, as set forth in the cases before referred to.

In order to obtain a conviction on an alternative charge in respect of contradictory statements, both the statements must have been on oath; or else they must have been made under circumstances in which the law requires a person to speak the truth, or one under these circumstances, and one on oath; *Emp* v. *Baikanta*, *I.L.R.*16 *Cal.* 349. Where the accused made a statement to a public servant which might possibly have amounted to an offence under Sect. 182, and subsequently before a Magistrate gave evidence which was supposed to be contradictory to his former statement; it was held that, even supposing such contradiction existed, he could not be convicted under Sect. 193 on an alternative charge; *Emp.* v. *Ramji Sajnvarav*, *I. L. R.* 10 *Bom.* 124; nor could he be convicted on a charge in which he was charged with having committed an offence, either under Sect. 182 or else under Sect. 193; *ib.*

Where a prisoner is charged separately with having given false evidence with regard to two statements directly opposed to each other, a plea of guilty on one does not involve an acquittal on the other; *Reg.* v. *Hossain Ali*, 8 *B. L. R. App.* 25.

Falsely deposing in the name of another person is giving false evidence, not cheating by personation; *Reg.* v. *Prema Bhicka*, 1 *Bom. H. C. Rep.* 89.

The making of a false return on oath of the service of a summons is an offence under Sect. 193, and not Sect. 181, being evidence given in a judicial proceeding; *Reg.* v. *Shama Churn Roy*, 8 *W. R. Cr.* 27; the giving of false evidence otherwise than in a judicial proceeding is punishable under the latter clause of Section 193, provided it has been given under the sanction of the law; *In re Andheen Roy*, 14 *W. R. Cr.* 24.

On a trial for murder, a witness had stated on oath that a person other than the prisoner had committed it; whilst before the magistrate he had stated, as was the fact, that the prisoner was the guilty party. In making such statement on the trial, the witness was guilty of an offence under Sect. 193, and not under Sect. 194, as he did not know that he would, nor did he intend to, cause a conviction for murder; *Reg.* v. *Hardyal*, 3 *Ben. L. R. A. Cr. J.* 35.

Sect. 191 includes all cases in which a party is expressly bound to make a statement and a true statement, but it does not apply to merely voluntary statements such as form the basis of a contract, nor to false statements in a complaint to the police; 2 *R. J. and P.* 25. It is not necessary, however, that these statements be made in a court of justice to come under the section as false evidence.

The practice in the High Courts is to set out the substance, and as nearly as possible the very words of the statement, which is charged as false. Where the charge did not distinctly set fourth the statement which was alleged to be false, but it appeared that the prisoners perfectly understood on their trial what was the alleged false statement, and had not been prejudiced on the trial in their defence by the defective form of the charge, the court refused to interfere; 4 *R. J. and P.* 359; *Reg.* v. *Boodhun Ahir*, 17 *W. R. Cr.* 32. But the High Court of Calcutta has directed that in all committals under Sects. 193-195, the particular statements on which perjury is assigned should be invariably inserted in the charge: 1 *R. C. C. Circ.* 15, 16. It has since been ruled that charges of giving false evidence should contain a distinct assertion with regard to *each* statement intended to be characterised as false; that it was made; that it is untrue in fact; and that the accused knew it was so when he made it: *Reg.* v. *Kalichurn Lahoree*, 9 *W. R. Cr.* 54; 5 *R. C. C. Cr.* 41; see, also, *In re Doulut Moonshee*, 8 *W. R. Cr.* 95; *Reg.* v. *Feojdar Roy*, 9 *W. R. Cr.* 14; and *Reg.* v. *Boodhun Ahir*, 17 *W. R. Cr.* 32. Where six prisoners were charged in the same charge as follows: "That you on or about the day of June, , at Tajpur, committed the offence of voluntarily giving false evidence in a stage of a judicial proceeding and that you have thereby," &c.; it was held that the charge was bad and defective,—*firstly*, as it charged a number of persons jointly with giving false evidence; *secondly*, as it did not shew what statements the accused persons made; *thirdly*, as it did not mention the day and year when the alleged offence was committed; *fourthly*, because it did not indicate the court or officer before whom the false evidence was given; *Reg.* v. *Maharaj Misser*, 7

Ben. L. R. App. 66, and 16 *W. R. Cr.* 47. In the case of *Reg.* v. *Kureem*, 11 *W. R. Cr.* 16, it was also held that the commitment and trial together of several persons who are charged with having given false evidence in the same proceeding should not be allowed, and that although prisoners may be committed together, the Court of Session has power to try them separately, and under the above circumstances should do so. Each act of giving false evidence by different persons, although in the course of the same judicial proceeding, is a separate offence, and a separate charge must necessarily be framed against each prisoner, and a separate trial must be held of each charge; 2 *Mad. Jur.* 290; *Reg.* v. *Khoab Lall*, 9 *W. R. Cr.* 66; *Reg.* v. *Bhavanishankar Haribhai*, 5 *Bom. H. C. Rep. C. C.* 55. But the making of any number of false statements in the same deposition is one aggregate case of giving false evidence, and charges of false evidence cannot be multiplied according to the number of false statements. These are merely evidences of the offence; and testing the matter by the law of evidence it is manifest that the whole deposition must be looked at, and, if necessary, one part qualified by the other; 6 *Mad. H. C. Rep. App.* 27.

The making of a false oath or signing a false notice or certificate to procure a marriage is punishable under Sect. 193; Act XV of 1872, Sect. 66.

Sections 194 *and* 195.—To render a person liable under these two sections, as distinguished from Sect. 193, the evidence must have been given or fabricated in the final stage, *i. e.*, the trial, and not in the preliminary enquiry into the case. The natural result of false evidence given before the magistrate holding the preliminary enquiry would be nothing graver than a committal of the accused persons to the Court of Session, and not necessarily a conviction, and it must be presumed that the accused intended the natural, that is the ordinary consequence; *Reg.* v. *Gokaldas Bhagwandas*, *B. R.* 22*nd January* 1874; but in *Reg.* v. *Nim Chand*, 20 *W. R.* at p. 43, it had previously been ruled that, under Sect. 194, the evidence need not have been given before a Court

of Justice, provided that the court can infer that it was the intention of the accused to stick to the false evidence right up to the trial of the case. Where, on the trial of a prisoner for murder, a witness stated before the Sessions Court, that another had committed the murder, whilst before the magistrate he had stated, as was the fact, that the prisoner had committed it; it was held that he was not guilty under Sect. 194; *Reg.* v. *Hardyal*, 3, *B. L. R. App. Cr.* 35.

In these two sections the word "offence" denotes anything punishable under the Penal Code, or under any special or local law; Sect. 40, *ante*, p. 38.

Fabricating False Evidence.—In a charge of fabricating false evidence, it is essential to prove that it was intended by the accused that the false circumstance should appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, that is, should appear as part of the legal evidence upon which the officer has to form his judgment; *Reg.* v. *Rajcoomar*, 1 *Ind. Jur. O. S.* 105; consequently, the making up falsely of accounts with the intention of producing them before a forest officer not empowered by law to hold an investigation and take evidence is not a fabrication of false evidence within Sect. 193; *Reg.* v. *Ramajirav*, 12 *Bom. H. C. Rep.* 1; but the making of a false entry, by a public servant, for the purpose of saving an estate from forfeiture of rent received in a public book kept by him for the purpose of informing the Collector as to the rents which had been paid into the Collectorate, or as to what estates were in arrears in their rents, so that the Collector might take steps to enforce payment, is a fabrication of false evidence; *In re Juggun Lall*, 7 *C. L. R.* 356. The making of a false report by the amin of a court, deputed to give possession of certain property, that he has been obstructed in so doing, does not amount to the fabrication of false evidence; *Emp.* v. *Ajudhia Prasad*, *I. L. R.* 17 *All.* 436. If a public servant, in charge of certain documents, having been required to produce them, and being unable to do so, fabricates and produces similar documents with the intention

set forth in Sect. 192, he will be guilty of an offence under Sect. 193; *Emp.* v. *Mazhar Husain*, *I. L. R.* 5 *All.* 553. Altering the date of a document, so as to enable it to be registered is fabricating false evidence; *In re Mir Ekrar Ali*, *I. L. R.* 6 *Cal.* 482; so, too, where the accused fabricated a letter in order to support a claim before a registrar to have a document registered; *Lakshmaji* v. *Emp.*, *I. L. R.* 7 *Mad.* 289. M instigated Z to personate C, and, in C's name, purchase a certain stamped paper, in consequence of which the stamp vendor endorsed C's name on the paper, as the purchaser thereof. M intended that such endorsement should be used against C in a judicial proceeding; it was held that the offence of fabricating false evidence had actually been committed, and that M was guilty of the abetment of such offence; *Emp.* v. *Mula*, *I. L. R.* 2 *All.* 105. A police officer who makes a false entry in his diary to support his assertion that he had forwarded certain documents, is not guilty of fabricating false evidence, as such entry could not be used as evidence of that fact in a judicial proceeding; *Emp.* v. *Gauri Shankar*, *I. L. R.* 6 *All.* 42.

Where a man burns his own house, and charges another with the act, he commits an offence under Sect. 211, and not under Sect. 193; *Reg.* v. *Bhagwan*, 8 *W. R. Cr.* 65. Where prisoners assist in concealing stolen property in a person's house and field in order that, being found there on a search, it may afford evidence against that person on a charge of theft, it was held that they were guilty of fabricating false evidence; *Emp.* v. *Rameshar*, *I. L. R.* 1 *All.* 379.

It must further be shewn that the circumstance was of such a nature as might cause the officer before whom it was to be given in evidence to entertain an erroneous opinion touching some material point on the case; consequently, the *materiality* of the fabricated evidence must be shewn; *Reg.* v. *Damodhar Ramchundra*, 5 *Bom. H. C. Rep. C. C.* 68. Therefore, it was held that a *vakeel* who presented a *vakalatnamah*, which falsely purported to have been signed before the *Adighari* of a village and to bear the signature of the *Adighari*, was not guilty of fabricating false evidence; *In re Kailasuni Putter*, 5 *Mad. H. C. Rep.* 373.

Using False Evidence.—This section does not apply to subornation of perjury, but to cases where false evidence has been used after it was in existence; *Reg.* v. *Suffurudeen*, 1 *Ind. Jur. O. S.* 122. L brought a suit upon a bond, and at the trial sought to support his claim by a letter fabricated for the purpose of enabling L to get the bond registered; it was held that, even if the latter was fabricated only for use before the registrar, that was no valid objection to a conviction under this section; *Lakshmaji* v. *Emp.*, *I. L. R.* 7 *Mad.* 289; see, also, *Reg.* v. *Oodun Lall*, 3 *W. R. Cr.* 17. These two cases were tried before a Session Court, and no question, therefore, was raised as to the jurisdiction of the tribunal; but where a similar case was tried before a magistrate, it was held that the offence fell under Sect. 471, and not under Sect. 196, and, consequently, that the magistrate had no jurisdiction to try the case; *Emp.* v. *Kherode Chunder Mozumdar*, *I. L. R.* 5 *Cal.* 717.

As Sect. 196 does not specify in so many words the amount of punishment, the charge should contain the words "punishable under Sects. 193 and 196 of the Indian Penal Code;" 2 *W. R. Cr. L.* 9.

Sections 197, 198, 199, and 200.—Under these sections the *materiality* of the false statement must be shewn in addition to the other requirements of the sections.

The word "declaration" in Sect. 199 means any statement of fact in the form simply of a declaration, which, for the purpose of proof of the fact declared, has by itself all the force of evidence given on oath, or solemn affirmation substituted for an oath; in short, a declaration receivable in lieu of personal *viva voce* testimony; *Reg.* v. *Vedamutu*, 4 *Mad. H. R. C. Rep.* p. 187, and 4 *Mad. Jur.* 72; *Abdul Majid* v. *Krishna Lal*, *I. L. R.* 20 *Cal.* 724; a statement made by a person for the purpose of obtaining a municipal license, is not such a declaration; *Chandi* v. *Abdur Rahiman*, *I. L. R.* 22 *Cal.* 131. There is no express provision of law which requires a court to receive a "verified application," *e. g.*, an application for execution, as "evidence of any fact;" consequently a person making a false statement in such an ap-

plication cannot be convicted under Sect. 199, but it does not prevent his conviction under Sect. 193; *Emp.* v. *Bapuji Dayaram*, *I. L. R.* 10 *Bom.* p. 299.

Making, signing or attesting any false declaration or certificate of marriage is punishable under Sect. 199; Act III of 1872, Sect. 21.

Sanction.—A Civil Court sanctioning a criminal prosecution for giving false evidence must distinctly state the exact words upon which the prosecution is to be based, and must not give such a sanction in general terms; *Reg.* v. *Kartik Chunder Halder*, 5 *B.C. C. Cr.* 58, and 9 *W. R. Cr.* 58. A sanction, however, is sufficient if it be to prosecute in respect of any false statement contained in two specified depositions; *Reg.* v. *Kadir Bux*, 11 *W. R. Cr.* 17. What is really necessary in a sanction is that it should inform the accused of what the Court considers to be false evidence, and the Magistrate of what he has to take cognizance; and while a sanction to prosecute in respect of evidence given in a very long deposition, without specifying the points, would be objectionable, yet, if the deposition were short and referred to one point only, such a form of sanction would seem to be unobjectionable. What is needed is a specification of the place where and the time when the false evidence was given, and in substance the assignments of perjury charged, as also the sections of the Penal Code under which proceedings are authorized; *In re Har Dial*, *I. L. R.* 6 *All.* 105; *In re Jivan Ambaidas*, *I. L. R.* 19 *Bomb.* 362. To a prosecution by a Sub-Registrar for an offence committed before him, the specific sanction of the Registrar is required; *Reg.* v. *Kalichurn Lahoree*, 5 *R. C. C. Cr.* 41; 9 *W. R. Cr.* 54.

Preliminary Enquiry.—At the preliminary enquiry, to ascertain whether the accused shall be committed to take his trial for giving false evidence, he must be present as an accused person, and have an opportunity of cross-examining the witnesses, and not merely be present as one of a number who give evidence on oath in respect to a certain subject-matter; *Reg.* v. *Kalichurn Lahoree*, 9 *W. R. Cr.* 54; 5 *R. C. C. Cr.* 41.

Abetment of False Evidence, &c.—There can be no abetment of false evidence unless the accused, not only desires or instigates the giving of certain evidence, but also knows or believes that that evidence is false; *Reg.* v. *Nim Chand*, *W.* 20 *R. Cr.* p. 44.

Where C falsely represented himself as U the writer of a document signed by U; and T, knowing that C was not U, and had not written such document, produced C as U and as the writer of the document, it was held that T ought to be convicted on a charge of abetting the giving of false evidence; *Reg.* v. *Chundi Churn*, 8 *W. R. Cr.* 5. A suppression of evidence is a giving of false evidence. A prisoner asked a witness to suppress certain facts in giving his evidence against him before a Magistrate on a charge of defamation. It was held that this amounted to an abetment of the offence of giving false evidence in a stage of a judicial proceeding, *Reg.* v. *Andy Chetty*, 2 *Mad. H. C. Rep.* 438.

DESTRUCTION OF EVIDENCE.

Sect. 201. *Causing Evidence to disappear, &c.*—**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 punishable 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.

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.

Triable by the Court of Session if the offence intended to be screened is capital; by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class, if such offence be punishable with transportation or imprisonment for ten years; and in the case of the offence to be screened being punishable with less than ten years' imprisonment, by a Presidency Magistrate, or a Magistrate of the first class, or the Court by which the original offence is triable. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Charge.

That you, the said A B, on or about the day of , at , knowing that a capital offence had been committed, to wit, that one C D had committed murder by causing the death of one E F, did, with the intention of screening the offender, to wit, the said C D, from legal punishment, cause certain evidence of the said offence to disappear, to wit, by removing the dead body of the said E F from the place where the murder was committed, and burying it secretly in the field of one G H, and that you, the said A B, have thereby committed an offence punishable under Sect. 201 of the Indian Penal Code, and within, &c.

This section refers, not to the principal offender, but to persons other than the actual criminals, who, by their causing evidence to disappear, assist the principal to escape the consequences of his offence; *Torap Ali* v. *Emp.*, *I. L. R.* 22 *Cal.* 638, and the cases

collected therein, but it is not illegal to convict, under this section, an accused, who is suspected, but not proved, to be the principal offender; *Emp.* v. *Limbya*, *B. R.* 8 October 1895.

In this section the word "offence" denotes anything punishable under the Penal Code, or under any special or local law where the thing punishable under such special or local law is punishable with imprisonment for six months or upwards, whether with or without fine; Sect. 40, *ante*, p. 38. See Sect. 203 for the explanation of what is included in the word "offence" in this section.

A prisoner pushed a woman, she fell into a boat, and died then and there. Afterwards the prisoner set the boat with the corpse in it afloat down the river, and so concealed the evidence of his offence. It was held that he was not guilty of the offence of causing evidence to disappear; *Reg.* v. *Ramsoonder Shootar*, 7 *W. R. Cr.* 52; 1 *R. C. C. Cnc.* 19; 2 *Mad. Jur.* 282; see, also, *Emp.* v. *Behala Bibi*, *I. L. R.* 6 *Cal.* 789; *Reg.* v. *Kasinath Dinkar*, 8 *Bom. H. C. Rep. C. C.* 126; and *Emp.* v. *Lalli*, *I. L. R.* 7 *All.* 749; *Emp.* v. *Dungar*, *I. L. R.* 8 *All.* 252. K and B having caused the death of J in B's field, removed J's body to his own field, and it was held that K could not be convicted under this section; *Emp.* v. *Kishna*, *I. L. R.* 2 *All.* 713; see, also, *Reg.* v. *Toolshee*, 5 *N. W. R.* 186. In a trial under this section, the accused made a statement to the effect that he was present at the commission of a murder by two other persons, that he himself took no part in the act, that in his presence one of the persons named pulled off a *razai* from the bed on which the deceased was sleeping, and that in his presence the *razai* was subsequently concealed in a stack. It was proved that the *razai* belonged to the deceased, and that it was found in the stack, and that it was pointed out to the police by the accused. The accused having been convicted of causing evidence of the murder to disappear, under this section, it was held that the conviction must be quashed, inasmuch as if the *razai* had not been concealed, its presence or existence would have been no evidence of the murder; *Emp.* v. *Lalli*, *I. L. R.* 7 *All.* 749. Where a person is present at the commission of a murder without being aware that such an act was about to be committed,

and without taking any part in it, but afterwards through fear assists in concealing the body, he is guilty under this section ; *Reg.* v. *Goberdhun Bera*, 6 *W. R. Cr.* 80. Before an accused can be convicted under this section it is necessary to shew that an offence, of which he is charged with having caused the evidence to disappear, has actually been committed, and also that the accused knew or had information sufficient to lead him to be aware that the offence had been committed ; *Matuki Misser* v. *Emp.*, *I. L. R.* 11 *Cal.* 619. If in fact no crime has been committed, there can be no conviction for causing evidence to disappear ; *Reg.* v. *Abdul Kadur*, *I. L. R.* 3 *All.* 279. Therefore, where a person has been killed in the lawful exercise of the right of private defence, and other parties have assisted the person who killed the other in disposing of the dead body, these are not guilty of causing the evidence of an offence to disappear ; *Reg.* v. *Pelko Nushyo*, 2 *W. R. Cr.* 43.

The proper order of proof on the part of the prosecution on a charge of giving false information is to prove—*first*, that the principal crime was committed ; *secondly*, that the prisoner gave information respecting the offence ; *thirdly*, that such information was false, and known to him to be so ; *fourthly*, that he then knew of the commission of the principal offence ; and *fifthly*, that his intention was to screen the principal offender ; *Reg.* v. *Subbramanya Pillai*, 3 *Mad. H. C. Rep.* 251.

The words "or having reason to believe" are introduced to cover cases where actual knowledge cannot be brought home to the accused, but where he is proved to have been acquainted with facts which must have caused him to be morally certain that an offence had been committed. A person has "reason to believe" only "if he has *sufficient cause* to believe," and a man cannot have in law sufficient cause to believe a thing which has never existed ; but supposing that it was not necessary in the first instance to prove more than that the accused believed an offence to have been committed, still, before he can be convicted, it must be proved that he concealed evidence of, or gave false information respecting, an *offence*, with intention to screen the *offender*, [illegible] there can be no offence or offender unless some criminal

act has been done; see *Reg.* v. *Joy Narain Patro*, 20 *W. R. Cr.* 66, which is inconsistent with *Reg.* v. *Hurdut Surma*, 8 *W. R. Cr.* 68.

OMITTING TO GIVE INFORMATION.

Sect. 202. *Omitting to give Information of an Offence.*—**Whoever, knowing or having reason to believe that an offence has been committed, intentionally omits to give any information respecting that offence 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.**

Sect. 203. *Giving False Information.*—**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.**

Explanation.—**In sections 201 and 202 and in this section the word "offence" includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, and 460.**

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance under Sect. 202; *a warrant under Sect.* 203. *Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.*

Charge under Sect. 203.

That on or about the day of , at , one C D committed the offence of theft; and you, the said A B, kowing that such offence had been committed, intentionally gave information which you knew or believed to be false; and that you have thereby committed an offence punishable under Sect. 203 of the Indian Penal Code, and within, &c.

Evidence.

The offence described in Sect. 202 will, in general, be committed by police officers and other public servants, though, under Sect. 44 of the Criminal Procedure Code, 1882, private individuals may be guilty, in respect of certain offences therein enumerated. In this section the word "offence" denotes anything punishable under the Penal Code, or under any special or local law, when the thing punishable under the special or local law is punishable with imprisonment for six months or upwards, whether with or without fine. Under Sect. 203 the word "offence" denotes anything punishable under the Penal Code, or under any special or local law; Sect. 40, *ante*, p. 38. The explanation to Sect. 203, applies the word "offence" in both these sections to certain acts committed out of British India.

The offence under Sect. 203 may, of course, be committed either by a private person or a public servant indifferently, but it differs from the offence of giving false information under Sect. 201, in that there is no necessity to prove that the defendant intended to screen the principal offender from legal punishment under the present section. To justify a conviction for giving false information, it is necessary that there should have been some offence committed; *Reg.* v. *Ram Ruchea*, 4 *W. R. Cr.* 29; that the accused should have known or have reason to believe that such offence had been committed, and that, so knowing or believing or having reason to believe that it had been committed, he should have given some information which he knew or believed to be false; *Reg.* v. *Joy Narain*, 20 *W. R. Cr.* 66. If an offence has been committed, it is sufficient that the accused knows of its commission, or has reason to believe it has been committed; but if no offence has been committed, it is obvious that he cannot know of its commission, and in many cases he would not have any reason to believe that an offence has been committed; but there are some cases in which an accused person may have reason to believe that an offence has been committed, as for instance, if he saw a person lying by the road-side dead with a wound on his head, which afterwards turns out to have been caused by his falling down in a fit, but

which if inflicted by any one else would amount to an offence; see *Reg.* v. *Cheetour*, 1 *W. R. Cr.* 18.

See, also, Sects. 176 and 177, *ante*, p. 202, which are wider than the present sections, which refer only to the cases where an offence has actually been committed; and Sects. 118 to 120, *ante*, pp. 134-136, which relate to the concealment of designs to commit offences.

SECRETING DOCUMENTS.

Sect. 204. *Secreting Documents.*—**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.**

Triable by a Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

Where the plaintiff in a suit referred to arbitration by consent, with a view to prevent a witness from referring to an endorsement on document, which tended to shew that the defendant had paid more than was alleged to have been paid by him, snatched up the document which was lying beside the arbitrator, ran away with it, and subsequently refused to produce it; it was held that the offence committed was not theft, but that of secreting a document under this section; *Subramania Ghanapatti* v. *Reg.* *I. L. R.* 3 *Mad.* 261.

PERSONATION.

Sect. 205. *False Personation.*—**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 description for a term which may extend to three years, or with fine, or with both.**

Triable by the Court of Session, a Presidency Magistrate, or Magistrate of the first class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect. 195, *Cr. P. C.*, 1882, *when offence is committed in relation to a proceeding in any Court.*

Charge.

That you, the said A B, on or about the day of , at , did falsely personate one C D, a defendant in , a suit before the Civil Judge of , and in such assumed character did admit that the said C D was indebted to one E F, the plaintiff in the said suit, in the sum of one thousand Rupees; and that you, the said A B, have thereby committed an offence punishable under Sect. 205 of the Indian Penal Code, and within, &c.

Evidence.

Prove the existence of a suit or criminal prosecution before an authority competent to have cognisance of such suit or prosecution, and that the defendant personated the plaintiff or defendant in the suit, or the prosecutor in the prosecution, or any witness, and under such assumed character did any of the acts set out in the above section. It is absolutely necessary to a conviction for false personation under this section, that the accused should have assumed the name and character of the person he is charged with having personated. The mere fact that he presented a petition in Court in the name of that individual who was ill is insufficient to shew any intention of falsely personating such person; *Reg.* v. *Narain*

Acharji, 8 *W. R. Cr.* 80. Nor is it enough to shew the assumption of a false name. It must also appear that the assumed name was used as a means of falsely representing some other individual. It is not an uncommon thing for men to pass under names not their own for the purpose of disguise, in some instances from blameless, in others from indifferent, or bad, motives. But whatever the motive, the use of an assumed name without anything more being done is not a criminal offence. The whole language of the section clearly imports the acting of the part of another person, the actor pretending that he is that person. There are other sections, as 140, 170, 171 (*ante*, pp. 155, 192, and 193), and Sect. 415 (*post*), under which the false assumption of appearance or character may be an offence, though no particular individual is meant to be represented or only an imaginary person, but it is not so here; *Reg.* v. *Kather Rowton*, 3 *Mad. Jur.* 146; *S. C. sub nom.*; *Reg.* v. *Kadar Ravutton*, 4 *Mad. H. C. Rep.* 18, dissenting from *Reg.* v. *Bittoo Kahar*, 1 *Ind. Jur. O. S.* 123.

It has been decided in *Reg.* v. *Prema Bhicka*, 1 *Bom. H. C. Rep.* 89, that a person falsely deposing in the name of another is guilty of giving false evidence, and not of cheating by personation; it is evident, however, that his act comes within the limits of, and is an offence under this section also, which includes making a statement.

Fraudulent gain or benefit is not an essential element of the offence created by this section, and a conviction is, therefore, sustainable, even where the personation is with the consent of the party personated; *Ex parte Suppakon*, 1 *Mad. H. C. Rep.* 450.

FRAUDULENT TRANSFERS, &c.

Sect. 206. *Fraudulent Removal, &c., of Property.*—**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.

Sect. 207. *Fraudulent Claim to Property.*—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.

Sect. 208. *Fraudulently suffering a Decree.*—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 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, 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 the sale of Z's property which may be made under A's decree. Z has committed an offence under this section.

Sect. 209. *Dishonestly making False Claim.*—Whoever fraudulently or dishonestly, or with intent to injure any person, 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.

Sect. 210. *Fraudulently obtaining a Decree.*—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 anything 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.

Offences under Sects. 206 and 207 are triable by a Presidency Magistrate, or a Magistrate of the first or second class; those under Sects. 208, 209, and 210 by a Presidency Magistrate or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect. 195, Cr. P. C., 1882, when offences committed in relation to a proceeding in any Court.

Charge of a Fraudulent Transfer.

That one C D was a creditor of you, the said A B, and had sued you, the said A B, in the Moonsiff's Court of , in O. S. of 1861, and had obtained judgment against you for the sum of one

thousand Rupees; and you, the said A B, 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 E F; and that you, the said A B, have thereby committed an offence punishable under Sect. 206 of the Indian Penal Code, and within, &c.

Charge of making a False Claim.

That you, the said A B, on or about the day of , commenced a suit in the Moonsiff's Court of , against one C D, and in the said suit falsely and fraudulently claimed to be the owner of certain jewels then in the possession of the said C D, with intent to injure the said C D; whereas you, the said A B, well knew that you were not the owner of the jewels so claimed by you, and that you, the said A B, have thereby committed an offence punishable under Sect. 209 of the Indian Penal Code, and within, &c.

Evidence.

The proof in this case will require to be the same practically as under Sects. 421-424, *post*, and all requisite remarks will be found there. The only distinction between the sections is in the mode of transfer; under some it is by means of a deed or such like instrument, under others by means of a fictitious suit. In all cases under these sections the act done must be charged and proved to have been done fraudulently or dishonestly; this may be effected by direct evidence applicable to the act charged, or the fraud or dishonesty may be shewn by evidence of other similar acts done by the accused under similar circumstances; *Emp.* v. *Vajiram*, *I. L. R.* 16 *Bom.* 414, and the cases cited by *Telang*, J., in his judgment.

Section 206.—Under this section it must be proved that a sentence has been pronounced imposing a fine, or a decree passed, or some other act done, or likely to be done, by a court imposing a liability with respect to money or property on the accused, and that the accused has fraudulently removed, &c., property in order to prevent it being made available in satisfaction of the fine or the decree; *In re Balmokoond*, 18 *W. R. Cr.* 65.

A person who fraudulently removes property, intending thereby to prevent it from being taken in execution of a decree made by a collector, commits an offence punishable under Sect. 206 of the Penal Code, and not under Act X. of 1859, Sect. 145; *Gour Chunder Chuckerbutty* v. *Kishen Mohun Singh*, 10 *W. R. Cr.* 46.

Section 210.—Where a person applies for the execution of a decree which has been already executed, his offence falls, not under Sect. 209, but 210; *Reg.* v. *Beegun Mahtoon*, 12 *W. R. Cr.* 37. The fact that a settlement of a decree has been made out of court and not certified to the court by the plaintiff, does not prevent the settlement being recognized in a criminal court, for Sect. 206 of the Civil Procedure Code, 1859, relates solely to the civil court in which the original suit was brought. It does not say that the settlement shall not be given in evidence in any court of justice, or in any court, civil or criminal; *ib.* And the same principle applies under the Code of 1877, as amended by Act XII. of 1879, and that of 1882, although they provide that no adjustment or settlement of a decree shall be recognized by *any* court unless it has been duly certified; *Reg.* v. *Muttaraman*, *I. L. R.* 4 *Mad.* 325; *Emp.* v. *Pillala*, *I. L. R.* 9 *Mad.* 101; *Emp.* v. *Bapuji Dayaram*, *I. L. R.* 10 *Bom.* 288. The word "satisfied" is to be understood in its ordinary meaning, and not as only referring to decrees the satisfaction of which has been certified to the court; *Emp.* v. *Bapuji Dayaram*, *I. L. R.* 10 *Bom.* 288; *Madhub* v. *Norodeep*, *I. L. R.* 16 *Cal.* 126. Now, however, by the amending Act of 1888, Sect. 258, C. P. C., has been altered, and the only courts prohibited from recognizing an uncertified satisfaction of a decree are those executing it.

FALSE CHARGE.

Sect. 211. *False Charge.*—**Whoever, with intent to cause injury to any person, institutes or causes to be instituted, any criminal proceeding against the said 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 punish-**

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

Triable by a Presidency Magistrate, or a Magistrate of the first class, unless the false charge be of an offence punishable with imprisonment for seven years, then by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class, but if with a more severe punishment, then by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect. 195, Cr. P. C., 1882, when the offence is committed in relation to any proceeding in any Court.

Charge.

That you, the said A B, on or about the day of , at , with intent to cause injury to one C D, appeared before the magistrate of , and then and there falsely charged the said C D with having committed an offence, to wit, with having committed a theft of fifty Rupees; you the said A B, at the time well knowing that the said C D had not committed a theft of the said money, and that there was no just or lawful ground for such charge against the said C D; and that you, the said A B, have thereby committed an offence punishable under Sect. 211 of the Indian Penal Code, and within, &c.

Evidence.

Under this section two different acts are provided for: 1*stly* making a false charge; 2*ndly*, instituting or causing to be instituted any criminal proceeding against a person; *Reg.* v. *Nobokisto Ghose*, 8 *W. R. Cr.* 87.

Prove that the defendant made a charge, or instituted, or caused to be instituted, a criminal proceeding against the complainant. A false charge need not have been made before a

magistrate, it may be made toa ny person; *Reg.* v. *Subbanna Gaundan*, 1 *Mad. H. C. Rep.* 30; *Ashrof Ali* v. *Emp.*, *I. L. R.* 5 *Cal.* 281; and there is no necessity for a prosecution to have followed on such charge; *Emp.* v. *Abul Hassan*, *I. L. R.* 1 *All.* 497; *Emp.* v. *Salik*, *ib.* 527. Statements, although false, made without any intention of seting the criminal law in motion, do not amount to a false charge; *In re Karigowda*, *I. L. R.* 19 *Bom.* 51. A man who burns down his own house and charges another with the act is guilty under this section; *Reg.* v. *Bhagwan*, 8 *W. R. Cr.* 65.

The institution of a criminal proceeding must be before some court or officer having jurisdiction to investigate the charge and dispose of it or send it up for trial; *In re Jamoona*, *I. L. R.* 6 *Cal.* 620. A false complaint to the police which they are competent to deal with is instituting a criminal proceeding; *Reg.* v. *Bonomally*, 5 *W. R. Cr.* 32. It was subsequently held that the actual institution of a criminal proceeding is essential to the application of the latter portion of the section, and if a person only makes a false charge, his case falls under the former part of the section, even though the charge which he makes is of an offence described in the latter portion; *Emp.* v. *Pitam Rai*, *I. L. R.* 5 *All.* 215: *Emp.* v. *Parahu*, *ib.* 598: followed in *Emp.* v. *Karim Baksh*, *I. L. R.* 11 *Cal.* 633; but this last case has been overruled by a *Full Bench* in Calcutta, and it has been held that a man, who sets the criminal law in motion by making a false charge of a cognizable offence to the police, institutes criminal proceedings; *Karim Baksh* v. *Emp.*, *I. L. R.* 17 *Cal.* 574. A man makes a charge when he complains to the police of a non-cognizable offence, or makes an application to an officer for sanction to prosecute, but he does not thereby institute criminal proceedings. Criminal proceedings are instituted, but no charge made of an offence, when proceedings are taken to compel security to be given to keep the peace, or when proceedings are taken against a person concealing himself, or without visible means of subsistence; *ib.* p. 579.

When a person interested in the matter informs a police officer that he has been informed that A has committed a certain offence, and then applies to have A's house searched, that amounts

to making a charge; *Reg.* v. *Hunooman Lall*, 19 *W. R. Cr.* 5; if not in fact to instituting a criminal proceeding. A police officer, though acting upon the information of an informer, may be said to institute a criminal proceeding against the person charged by him; and the consent of his superior officer to such charge will be no guarantee against the consequences of bad faith on his part; *Reg.* v. *Nobokisto Ghose*, 8 *W. R. Cr.* 87; see, also, *In re Nabodeep Chunder*, 11 *W. R. Cr.* 2; and *Gopi Mahableshvar* v. *Sheso Manju*, *I. L. R.* 12 *Bom.* 358. A dacoity having been committed in the house of the accused, he gave information to the police, and said that he suspected a certain person because he was his enemy; it was held that this did not amount to instituting a criminal proceeding; *In re Bramanund*, 8 *C. L. R.* 233; see, also, *Reg.* v. *Gopala Bhikaji*, *B. R.* 24*th April* 1873.

Prove that the charge is false in fact. No charge of falsely instituting a criminal proceeding can be proved while the original matter is still under investigation, as it may turn out that the court conducting the investigation may say that the charge made in the proceeding is a true one, but it is not necessary that the case should have been fully heard and dismissed; it is sufficient if it be not pending at the time of the trial: *Reg.* v. *Subbanna Gaundan*, 1 *Mad. H. C. Rep.* 30. The mere fact, however, that a case has been dismissed is not evidence of the falsity of the charge made therein, but this must be shewn by positive evidence; *Reg.* v. *Ram Dass Boistub*, 11 *W. R. Cr.* 35. Mere rashness in making a charge which is in fact believed is not an offence; *Reg.* v. *Prankishen*, 2 *R. C. C. Cr.* 11. It is for the prosecution, in the first instance, to make out a distinct case against the prisoner, and not for the latter to shew that he had just grounds for making the charge; *Reg.* v. *Nolokisto Ghose*, *ubi sup.*

Where a charge is made to the police of an offence which the police report is a false charge, and the prosecutor asks to have the matter investigated by the magistrate, the magistrate is justified in law in acting upon the police report, and directing the prosecutor to be charged with falsely instituting a criminal proceeding; but as a matter of sound judicial discretion, a magistrate should

not make such an order until some persons aggrieved by the previous charge has complained, or he has before him a police report based upon an investigation specially directed to the offence to be tried, and until it is clear that the original charge has been *heard* and *dismissed* or *abandoned*. And in order to shew whether that charge is abandoned or not, the person who made it should have the opportunity given him of supporting or abandoning it; *Emp.* v. *Sham Lall*, *I. L. R* 14 *Cal.* 707 (*F. B.*); *Emp.* v. *Raghu Tiwari*, *I. L. R.* 15 *All*, 336 In the Calcutta case the following previous cases were cited and considered; *Reg.* v. *Heera Lal Ghose*, 13 *W. R. Cr.* 37; *Government* v. *Karimdad*, *I. L. R.* 6 *Cal.* 496; *Emp.* v. *Shibo Bahara*, *ib.* 584; *Emp.* v. *Grish Chunder Nundi*, *I. L. R.* 7 *Cal.* 87; *Ramasami* v. *Emp.*, *I. L. R.* 7 *Mad.* 292; *In re Girdhari Mundul*, *I. L. R.* 8 *Cal.* 435; *In re Choolhaie Telee*, 2 *C. L. R.* 315; *In re Gangoo Shing*, *ib.* 389; *In re Biyogi Bhagut*, 4 *C L. R.* 134; *In re Russick Lall*, 7 *C. L. R.* 382; *Emp.* v. *Radha Kishen*, *I. L. R.* 5 *All* 36; and *Emp.* v. *Jamni*, *ib.* 387; and *Emp.* v. *Gangaram*, *I. L. R.* 8 *All.* 38; *secus Emp.* v. *Bhawani Prasad*, *I. L. R.* 4 *All.* 182; and *Gyan Chunder Roy* v. *Protap Chunder Das*, *I. L. R.* 7 *Cal.* 208. The fact that an offence alleged to have been committed has been compounded is not a conclusive answer to a charge against the prosecutor under this section; *Emp.* v. *Atar Ali*, *I. L. R.* 11 *Cal.* 79.

Intent to injure is an essential part of the offence; *Reg.* v. *Nobokisto Ghose*, *ubi sup.*; *Emp.* v. *Gopal Dhanuk*, *I. L. R.* 7 *Cal.* 96. The making of a charge which the accused *knew* to be false causes an irresistible presumption to arise that the intent was to injure, but as charges and complaints may be lawfully made on information which may be erroneous, though not to the knowledge of the accused, he should be allowed to shew the information on which he acted, and the judge, before convicting him, ought not only to be satisfied that the facts alleged as the ground for making the charge were in themselves untrue and insufficient; but also that they were known to be so by the accused when he made the charge; *Reg.* v. *Navalmal valad Umalmal*, 3 *Bom. H. C. Rep. C. C.* 16. The fact that an accuser is an official in a sub-

ordinate position will not shield him from the consequences of false and malicious charges made by him officially; *Reg.* v. *Rhaloy Nanth Biswas*, 2 *W. R. Cr.* 45.

It must further be proved that the accused knew the charge to be false; *Reg.* v. *Chidda*, 3 *N. W.* 327; or that he knew there was no just or lawful ground for making the charge or instituting the proceeding, or in the phraseology of English law no reasonable and probable cause; see *per Ranade*, J., in *Raghavendra* v. *Kashinathbhat*, *I. L. R.* 19 *Bom.* p. 725. Reasonable and probable cause is an honest belief in the guilt of the accused, based upon a full conviction founded upon reasonable grounds, of the existence of a state of facts which assuming them to be true would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the party charged was probably guilty of the crime imputed. There must be: *firstly*, an honest belief in the accuser in the guilt of the accused: *secondly*, such belief must be upon an honest conviction of the existence of the circumstances which led the accused to that conclusion; *thirdly*, such secondly-mentioned belief must be based upon reasonable grounds; by this is meant such grounds as would lead any fairly cautious man in the defendant's situation so to believe; *fourthly*, the circumstances so believed and relied upon must be such as amount to reasonable ground for belief in the guilt of the accused; *Hicks* v. *Faulkner*, 8 *Q. B. D.* 171.

The word "offence" in this section denotes anything punishable under the Penal Code, or under any special or local law; Sect. 40, *ante*, p. 38.

A charge under this section includes one under Sect. 182, and it is, therefore, open to a magistrate to proceed under either section, although in cases of a serious nature it may be proper to proceed under this section; *Bhokteram* v. *Heera Kolita*, *I. L. R.* 5 *Cal.* 184; *Ashraf Ali* v. *Emp.*, *ib.* 281. The former of these two Calcutta cases does not, however, seem to have been approved in Bombay in the case of *Emp.* v. *Arjun*, *I. L. R.* 7 *Bom.* 184, where a distinction was made between a case in which a person merely complained falsely of being robbed without mentioning the name of

any person by whom he had been robbed, and one in which he falsely charged a person by name as having robbed him. The former case was held to come under Sect. 182, and the latter under Sect. 211. A magistrate cannot give himself jurisdiction to try an offence under this section by treating it as one under Sect. 182; *Emp.* v. *Lakshman Bapu*, *B. R.* 12th July 1893.

When a person is convicted of a false charge, the nature of the false charge should be stated in the finding and entered in the calendar; *Reg.* v. *Arjoon*, 1 *Bom. H. C. Rep.* 87. The charge which the prosecutor actually intended to bring, and not that which is framed by the magistrate upon his evidence, must form the basis of a prosecution under this section. If he alleges an assault and theft, he cannot be indicted for making a false charge of dacoity; *Reg.* v. *Melon Meeah*, 3 *R. C. Cr. C.* 9.

Sanction for a prosecution under this section is only required where the charge is made before a court. A false complaint made to the police is not made to a court; *Government of Bengal* v. *Gokul Chundar Chowdhry*, 24 *W. R. Cr.* 41; *Ram Ranjan Bhamlari* v. *Madhub Ghose*, 25 *W. R. Cr.* 33. As to the authority required before commencing a prosecution in the case of a false charge against a public servant as such, see *In re Moulvy Mahomed Abdool Lateef*, 9 *W. R. Cr.* 31, and 5 *R. C. C. Cr.* 87.

HARBOURING.

Sect. 212. *Harbouring an Offender.*—**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 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.

"'Offence' in this section includes any act committed at any place out of British India, which, if committed in British India, would be punishable under any of the following sections, namely, 302, 304, 328, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460, and every such act shall, for the purposes of this section, be deemed to be punishable as if the accused person had been guilty of it in British India."

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.

Sects. 213 to 215. See *post*, pp. 277-279.

Sect. 216. *Harbouring an Offender who has escaped from Custody.*—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, shall be punished in the manner following, that is to say, if

the offence for which the person was in 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 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.

"Offence" in this section includes also any act or omission of which a person is alleged to have been guilty out of British India which, if he had been guilty of it in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or under the Fugitive Offenders' Act, 1881, or otherwise, liable to be apprehended or detained in custody in British India; and every such act or omission shall, for the purposes of this section, be deemed to be punished as if the accused person had been guilty of it in British India.

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.

Sect. 216A. *Penalty for harbouring robbers or dacoits.*—Whoever, knowing or having reason to believe that any persons are about to commit or have recently committed robbery or dacoity, harbours them or any of them, with the intention of facilitating the commission of such robbery or dacoity or of screening them or any of them from punishment, shall be punished with rigorous imprison-

ment for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—**For the purposes of this section it is immaterial whether the robbery or dacoity is intended to be committed, or has been committed, within or without British India.**

Exception.—**This provision does not extend to the case in which the harbour is by the husband or wife of the offender.**

Sect. 216B. *Definition of harbour.*—**In sections 212, 216 and 216A the word 'harbour' includes the supplying a person with shelter, food, drink, money, clothes, arms, ammunition or means of conveyance, or the assisting a person in any way to evade apprehension.**

Offences under Sects. 212 and 216 are triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class, if the offender harboured has committed a capital offence or one punishable with transportation or imprisonment for ten years; and if the offence committed by the person harboured is punishable with less than ten years' imprisonment, then by a Presidency Magistrate, a Magistrate of the first class, or by the Court by which the original offence is triable. Offences under Sect. 216A are triable by the Court of Session, a Presidency Magistrate or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.

Charge of Harbouring.

That on or about the day of , the offence of dacoity was committed in the village of by C D and others, and that you, the said A B, afterwards, to wit, on or about the day of , did harbour the said C D, well knowing (*or* having reason to believe) at the time you so harboured the said C D, that the said C D had committed the said offence of dacoity; and that you, the said A B, have thereby committed an offence punishable under Sect. 212 of the Indian Penal Code, and within, &c.

Evidence.

The prosecution, under Sect. 212, must prove that an offence has been committed; *Emp.* v. *Fateh Singh I. L. R.* 12 *All.* 432; see, also, *Emp.* v. *Abdul Kadir, I. L. R.* 3 *All.* 279, and *Matuki Misser* v. *Emp., I. L. R.* 11 *Cal.* 619; and that the principal offender is guilty of the offence with which he is charged, as in ordinary cases, and the harbourer is at liberty to prove the innocence of the principal, even although he may have previously to the trial of the harbourer pleaded guilty or been convicted in due form of law. Under Sect. 216, the prosecution must prove that the principal was lawfully in custody and escaped from such custody, in which case the accused may shew that the custody was not lawful. Or that an order for the apprehension of the principal had been issued by a public servant lawfully exercising his lawful powers, and then the defendant may prove that the order was not a lawful order, although it has been acted upon, and, as against the principal, confirmed.

It must be proved that the accused harboured or concealed the principal; as, for instance, that he concealed him in his house; *Hall.* 530, 551; or shut the door against his pursuers, until he should have an opportunity to escape; 1 *Hale*, 619. If he employ another person to harbour or conceal the offender, he will be equally guilty as if he did so himself; *R.* v. *Jarvis*, 2 *M. and Rob.* 40. There is no definition of what harbouring is in the English law-books. Sect. 216B, however, now provides what harbouring *includes*, but from the use of that word other acts than those therein enumerated may amount to harbouring. In England, offenders in this manner are called accessories after the fact, and a person is said to be such when, "knowing the felony to be committed by another, he receives, relieves, comforts, or assists the felon;" 1 *Hale*, 618.

It must also be proved that the accused, at the time he harboured or concealed the principal offender, knew that he had committed an offence, or came within any of the provisions of either of the above two sections. The concealment, therefore, of one who was supposed to be a runaway debtor would be no offence

under Sect. 212, unless by any special or local law such an act is brought within Sect. 40. It is also necessary that the offence should be complete at the time the harbouring takes place, for, if one wound another mortally, and after the wound given, but before death ensues, a person harbour the delinquent, this does not make him accessory to the homicide; 2 *Hawk.* c. 29, s. 35 4 *Bl. Com.* 38; nor render him guilty of harbouring or concealing a person who had committed murder; but a person charged under these sections with harbouring such an offender might, by the extensive powers of amendment given to the courts, be convicted of harbouring a person who had done grievous hurt.

In Sects. 212 and 216 the word "offence" denotes anything punishable under the Penal Code, or under any special or local law when the thing punishable under the special or local law is punishable thereunder with imprisonment for a term of six months or upwards, whether with or without fine; Sect. 40, *ante*, p. 38; and also the acts set forth in the definition of "offence" attached to these two sections respectively.

Although a wife or husband of the principal offender is not punishable for harbouring him or her, any other relative, even a son or daughter, is. But in these cases the intent must be proved very strongly, as the presumption would naturally be that the harbouring was simply in obedience to ordinary lawful commands or feelings, and the essence of this offence consists in the intention with which the act is done. Therefore, the bare receiving and assisting an offender, if done as a matter of mere humanity to a person in distress, and with no attempt or intention to screen him from justice, will be no offence.

GRATIFICATION FOR CONCEALMENT OF OFFENCES.

Sect. 213. *Taking Gifts, &c., to screen an Offender.* **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.

Sect. 214. *Offering Gift to screen Offender.*—Whoever gives, or causes, or offers, or agrees to give or cause, any gratification to any person, or to restore, or to cause the restoration of, any property to any person, in consideration of that person's concealing any 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 be 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.

Exception.—The provisions of Sects. 213 and 214 do not extend to any case in which the offence may lawfully be compounded.

Sect. 215. *Taking Reward to recover Stolen Property.*—**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 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.**

Sect. 216. See *ante*, p. 273.

Offences under Sects. 213 *and* 214 *are triable by the Court of Session, if the principal offence be capital; by the Court of Session, a Presidency Magistrate, or Magistrate of the first class, if the original offence be not capital, but punishable with transportation for life, or ten years' imprisonment; and if the principal offence be punishable with less than ten years' imprisonment, then by a Presidency Magistrate, a Magistrate of the first class, or the Court by which the original offence is triable; those under Sect.* 215 *are triable by a Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.*

Charge.

That on or about the day of , at , a certain person, to wit, C D, committed an offence punishable with death, to wit, the offence of murder, and that afterwards, to wit, on or about the day of , you, the said A B, did accept (*or* attempt to obtain, *or* agree to accept) a certain gratification for yourself, to wit, the sum of two hundred Rupees, in consideration of you, the said A B, concealing the said offence (*or* screening the said C D, from legal punishment for the said offence, *or* not proceeding against the said C D, for the purpose of bringing him to legal punishment); and that you, the said A B, have thereby committed an offence punishable under Sect. 218 of the Indian Penal Code, and within, &c.

Evidence.

In a charge under Sects. 213 and 214, the prosecution must prove that an offence has been committed; *Girish Myte* v. *Emp.*, 23 *cal* 420; *Emp.* v. *Saminatha*, *I. L. R.* 14 *Mad.* 400, following; *Emp.* v. *Abdul Kadir*, *I. L. R.* 3 *All.* 279; *Emp.* v. *Fateh Singh*, *I. L. R.* 12 *All.* 432; and *Matuki Misser* v. *Emp.*, *I. L. R.* 11 *Cal.* 619. In these sections the word "offence" denotes anything punishable under the Penal Code, or under any special or local law; Sect. 40, *ante*, p. 38. They must then shew that some gratification has been received or offered, or agreed to be received or given, or attempted to be obtained for one of the purposes set out in the preceding sections. The intent will be shewn by words spoken between the parties, or by contemporaneous acts, from which it may be inferred. Under Sects. 213 and 214, the offence therein constituted consists as much in the corrupt motive brought into play as in the delay to criminal justice; therefore, the mere concealment of an offence, or the omission to bring an offender to punishment, will be no offence *under these sections*, unless such conduct results from some gratification obtained or promised. The term gratification is not restricted to pecuniary gratifications, or gratifications which can be estimated in money. Under the English law, the offence of compounding a larceny can be committed by a person other than the owner of the goods stolen or a material witness for the prosecution; *Reg.* v. *Burgess*, 16 *Q. B. D.* 141; and the terms of these sections are equally wide.

Section 215 is intended for the punishment of persons who, being generally in league with thieves, or well aware of their proceedings, obtain money, &c., for the recovery of stolen property, without making any effort to bring the offenders to justice. In charges under this section, it must be proved that the moveable property was taken from the owner by some act which constitutes an offence under this Code; and also that the accused received, &c., a gratification, under pretence, or on account of helping any person to recover that property; and that he has not used all means in his power to cause the offender to be apprehended and convicted of the offence. It has been decided to be an offence to take money under pretence of helping a man to goods stolen from

him, though the defendant had no acquaintance with the felon and did not pretend that he had; and though he had no power to apprehend the felon; and though the goods were never restored and the defendant had no power to restore them; *R.* v. *Ledbitter*, 1 *Mood. C. C.* 76. And where A had his goods stolen, and B who knew the thieves received money from A, to endeavour to purchase the stolen property from the thieves for A, but not meaning to bring the thieves to justice, it was held that B was guilty of the felony of taking money on account of helping A to the return of stolen goods; *R.* v. *Pascoe*, 1 *Den. C. C.* 456; 2 *C. and K.* 927.

Under the first two sections, the offence is complete when the corrupt gratification is accepted, or even when there is an attempt to obtain, or an agreement to accept it; and a subsequent prosecution to conviction of the principal offender will not purge this offence; *R* v. *Stone*, 4 *C. and P.* 379; though it may go far to shew, in some cases, that the intent with which the gratification was obtained, &c., did not come within the words of the section. Under Sect. 215 a subsequent prosecution of the principal offender will shew that the accused has taken all the means in his power to cause that offender to be apprehended and convicted

The wording of the exception to Sect. 214, as altered by Act VIII. of 1882, Sect. 6, removes all doubts which arose under the former wording, and renders it unnecessary to cite any authorities as to what offences may now be compounded, as these are defined by Schedule II. to the Code of Criminal Procedure, 1882.

By the policy of the English law, no civil action can be brought in respect of any claim which arises out of a felony, if the person injured has failed in his duty of bringing or endeavouring to bring the offender to justice; *Ex parte Ball*, 10 *Ch. D.* 667; but the actual prosecution of the felon by the plaintiff is not a condition precedent to the accrual of the cause of action; *Midland Insurance Co.* v. *Smith*, 6 *Q. B. D.*, pp. 575 and 576, for the rule does not apply where the offender has been brought to justice at the instance of some other person injured by a similar offence, or where the prosecution is impossible by reason of the death of the offender,

or where he has escaped from the jurisdiction before a prosecution could have been commenced by the exercise of reasonable diligence; *Ex parte Ball, ubi supra*; see, also, *Wells* v. *Abraham*, *L. R.* 7 *Q. B.* 554. One, upon whom the duty of prosecuting for a public offence does not rest, may sue the offender for consequent damages, although there has been no prosecution; *Appleby* v. *Franklin*, 17 *Q. B. D.* 93. All the English cases on the subject will be found reviewed in *Jones* v. *Merionethshire Building Soc.* [1891] 2 *Ch.* 587.

It has further been ruled that, in India, a person injured by the commission of a non-compoundable offence is not bound to prosecute before he brings a civil action for the injury caused to him; *Shama Churn* v. *Bhola Nath*, 6 *W. R. Civ. Ref.* 9; *Viranna* v. *Nagayyah*, *I. L. R.* 3 *Mad.* 6; *Abdul Kawder* v. *Muhammad Mera*, *I. L. R.* 4 *Mad.* 410.

DISOBEDIENCE BY PUBLIC SERVANTS.

Sect. 217. *Public Servant disobeying a direction of Law, with Intent.*—**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.**

Sect. 218. *Public Servant framing Incorrect Record.*—**Whoever, being a public servant, and being, as such public servant, charged with preparation of any record or other writing, frames that record or writing in a manner which he knows is incorrect, with intent to cause, or knowing it to be likely that he will thereby cause, loss or injury to the public or 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.

Sect. 219. *Public Servant making Illegal Order.*—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.

Sect. 220. *Illegal Commitment for Trial.*—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.

Offences under Sect. 217 *are triable by a Presidency Magistrate or a Magistrate of the first or second class; those under the other sections by the Court of Session. Summons should issue in the first instance under Sect.* 217, *and a warrant in the other cases. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect.* 197, *Cr. P. C.,* 1882, *if the accused be a judge or public servant not removable from his office without the sanction of Government.*

Evidence.

Under Sect. 217, the direction of law disobeyed by the accused ought to be set out in the charge, and the way in which he disobeyed it distinctly stated; *Emp.* v. *Baban Khan, I. L. R.* 2 *Bom.* 142; and the direction of law referred to therein means a positive direction of law, and not the more general obligation, by which

every subject is bound not to stifle a prosecution; *In re Raminiki*, *I. L. R.* 1 *Mad.* 266; consequently, the direction of law must be distinctly proved, and the fact that the accused knew of it. If it was a direction of law relating to the duties of his office, the court will presume that he knew of it, until it is shewn that he did not. The same principles will apply to cases under the next three sections.

The intention of the accused is an essential ingredient of the offence; *Reg.* v. *Shama Churn*, 8 *W. R. Cr.* 27; and under Sect. 217 and the latter portion of Sect. 218 the actual guilt or innocence of the alleged offenders is immaterial, if the prisoner believes they are guilty and intends to screen them; *Reg.* v. *Hurdut Surma*, 8 *W. R. Cr.* 68. It is sufficient for the purpose of a conviction under Sect. 217 that the accused has knowingly disobeyed any direction of the law as to the way in which he is to conduct himself as a public servant, and that he has done so with the intention of saving a person from legal punishment, and it is not necessary further to shew that in point of fact the person so intended to be saved had committed an offence or was justly liable to punishment. A public servant charged under this section is equally liable to be punished, although the intention which he had of saving any person from legal punishment was founded on a mistaken belief to that person's liability to punishment; *Emp.* v. *Amirudeen*, *I. L. R.* 3 *Cal.* 412. "Legal punishment" does not apply to a fine inflicted on a *chaukidar* by his superior in the police; *Reg.* v. *Jungle Lall*, *W. R. Cr.* 40.

A police officer negligently or improperly submitting an incorrect report of a local investigation may be punished under Sect. 29 of Act V. of 1861, where the proof is insufficient to bring the case within Sect. 218; *Reg.* v. *Baroda Kant*, 15 *W. R. Cr.* 17. A *Kulkarni* who makes a false report with reference to an offence committed at his village, with any of the intents mentioned in Sect. 218, is punishable under that section; *Reg.* v. *Malhar Ramchandra*, 7 *Bom. H. C. Rep. C. C.* 64, where a public servant in charge as such of certain documents was required to produce them, and being unable so to do, fabricated and pro-

duced similar documents with the intention solely of screening *himself* from punishment, it was held that he could not be convicted under Sect. 218; *Emp.* v. *Mazhar Hussein*, *I. L. R.* 5 *All.* 553. "Any person" means some person other than the public servant himself; *Emp.* v. *Gauri Shunker*, *I. L. R.* 6 *All.* 42.

Section 220. Proof of an unlawful commitment will not of itself warrant the legal inference of malice. This section contemplates a *wilful* excess of authority, *i.e.*, a guilty intention superadded to an illegal act. Whether or not such intention exists is a question of fact, and not of law, and a finding thereon in a case of acquittal, whether right or wrong, is conclusive; *Reg.* v. *Narayen Babajee*, 9 *Bom. H. C. Rep.* 346; but it is only where there has been an excess by an officer of his legal powers that it becomes necessary to consider whether he has acted corruptly or maliciously; if the act is entirely legal, there can be no *mens rea*, *Emp.* v. *Amarsang*, *I. L. R.* 10 *Bom.* 506.

OMISSION TO APPREHEND, AND NEGLIGENT ESCAPE.

Sect. 221. *Omission to apprehend a Person charged with an Offence.* **Whoever, being a public servant, legally bound as such public servant to apprehend or keep in confinement any 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:—**

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 with 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 appre-

hended 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.

Sect. 222. *Intentional Omission to apprehend a Person under Sentence of a Court of Justice.* 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, or lawfully committed to custody, intentionally omits to apprehend such person, or, if the person was lawfully committed to custody, 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:—

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 extending to ten years, or if the person was lawfully committed to custody.

Sect. 223. *Negligently suffering an Escape from Confinement.*— **Whoever, being a public servant, legally bound as such public servant to keep in confinement any person charged with, or convicted of, any offence, or lawfully committed to custody, 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.**

Offences under Sect. 221 *are triable by the Court of Session, if the original offence was capital; by the Court of Session, a Presidency Magistrate, or Magistrate of the first class, if such offence was not capital, but punishable with transportation for life, or ten years' imprisonment; and if the original offence be punishable with imprisonment for less than ten years, then by a Presidency Magistrate, or a Magistrate of the first or second class; those under Sect.* 222 *by the Court of Session, unless the original offender be under a sentence of less than ten years' imprisonment, or have been lawfully committed to custody, then by the Court of Session, a Presidency Magistrate, or Magistrate of the first class; those under Sect.* 223, *by a Presidency Magistrate, or a Magistrate of the first or second class. A warrant should issue in the first instance, except under Sect.* 228, *and then a summons. Police officers may not arrest without a warrant. Defendants are bailable, except under the first two clauses of Sect.* 222. *Not compoundable. Sanction required under certain circumstances by Sect.* 197, *Cr. P. C.*, 1882.

Charge.

That on or about the day of , one C D was charged with (*or* liable to be apprehended for, *or* under sentence of a Court of Justice, to wit, the Court of Session of), for an offence punishable with death, to wit, the offence of murder, and that you, the said A B, being a public servant, to wit, an inspector of police (*or* keeper of the jail at), and being as such public servant legally bound to apprehend (*or* keep in

confinement) the said C D, did intentionally omit to apprehend (*or* negligently suffer to escape, *or* aid in escaping, *or* aid in attempting to escape, from such confinement) the said C D; and that you, the said A B, have thereby committed an offence punishable under Sect. 221 (222) of the Indian Penal Code, and within, &c.

Evidence.

Prove that C D was charged with the principal offence, or that he was convicted of and sentenced for it. In these sections the word "offence" denotes a thing punishable under the Penal Code, or under any special or local law; Sect. 40, *ante*, p. 38. Prove that the defendant was a public servant, whose duty it was to apprehend or keep in confinement such offender. This will generally be by producing the warrant for arrest or of commitment, or, after proving the service of a notice upon the defendant to produce it, by parol or other secondary evidence of its contents. The warrant must be shewn to have been delivered to the defendant. If the charge be one of escape, it must be proved that the defendant actually had the prisoner in custody under the warrant. Lastly, prove the omission to apprehend, or the suffering of an escape or the aiding in escaping or attempting to escape. In England, under an indictment for a negligent escape, the negligence need not be proved, as the law will imply it; 1 *Hale*, 600; so under these sections the law will imply that the allowing to escape was intentional, and that need not, therefore, be proved.

If, in fact, the escape was not negligent, if the original defendant by force rescued himself, or was rescued by others, and the defendant under this charge made fresh pursuit after him, but without effect; all this must be shewn on the part of the defendant.

It is immaterial whether the principal defendant was guilty of the offence imputed to him or not.

In charges under these sections, the nature of the office held by the defendant should be stated, so that it may appear on the face of the charge whether he was under any legal obligation to apprehend or keep in confinement; 1 *R. C. C. Circ.* 19. The

name of the person suffered to escape should also be stated; *ib.* *A chaukidar* or village watchman is not legally bound as a public servant to apprehend a person accused of having committed a murder outside the village of which he is the *chaukidar*, such person not being a proclaimed offender, and not having been found by him in the act of committing such murder: consequently, such *chaukidar*, if he refuses to arrest such person at the instance of a private individual, is not punishable under Sect. 221; *Emp.* v. *Kallu*, *I. L. R.* 3 *All.* 60.

Section 223 applies only to cases where the person allowed to escape is in custody for an offence, or has been committed to custody, and not to cases where such person has merely been *arrested* under civil process; *Emp.* v. *Tafaullah*, *I. L. R.* 12 *Cal.* 190; but this case is now provided for by Sect. 225A, *post*, p. 291, as enacted in Act X. of 1886. A police officer who is in charge of a prisoner by order of a Magistrate, in order that he should investigate the charge and report, is not justified in allowing the prisoner to go at large, although he may allege that after investigation he considered there was no case against him, but ought to keep him in custody until discharged by the Magistrate; *Emp.* v. *Ashraf Ali*, *I. L. R.* 6 *All.* 129.

Section 225A, *post*, p. 291, introduced by Act X. of 1886, Sect. 24, applies to cases of negligent and intentional misconduct of public servants in respect of persons committed to their custody, and not otherwise provided for. It ought rightly to have been numbered 223A and not 225A.

RESISTANCE TO APPREHENSION—ESCAPE.

Sect. 224. *Resistance to Apprehension—Escape.*—**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 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.

Sect. 225. *Resistance to Apprehension of another—Rescue.*—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;

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 sentence, to transportation for 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.

Sect. 225A. *Omission to apprehend, or sufferance of escape on part of Public Servant in cases not otherwise provided for.*—Whoever, being a public servant legally bound as such public servant to apprehend, or to keep in confinement any person in any case not provided for in Sect. 221, Sect. 222, or Sect. 223, or in any other law for the time being in force, omits to apprehend that person or suffers him to escape from confinement, shall be punished—

(*a*) if he does so intentionally, with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and

(*b*) if he does so negligently, with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Sect. 225B. *Resistance, obstruction, escape or rescue in cases not otherwise provided for.*—Whoever, in any case not provided for in Sect. 224 or Sect. 225 or in any other law for the time being in force, intentionally offers any resistance or illegal obstruction to the lawful apprehension of himself or of any other person, or escapes or attempts to escape from any custody in which he is lawfully detained, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

2. Section 651 of the Code of Civil Procedure is hereby repealed.

Offences under Sect. 224, *the first clause of Sect.* 225, *Sect.* 225A, *cl.* (*b*), *and Sect.* 225B, *are triable by a Presidency Magistrate, or a Magistrate of the first or second class; those under the second clause of Sect.* 225 *and Sect.* 225A, *cl.* (*a*), *by the Court of Session, a Presidency*

Magistrate, or a Magistrate of the first class; and those under the other clauses, by the Court of Session. A warrant should issue in the first instance, except under Sect. 225A, cl. (b). Police officers may arrest without a warrant, except under Sect. 225A. Defendants are bailable under Sect. 224, the first clause of Sect. 225, and Sects. 225A and 225B, but not in other cases. Not compoundable.

Evidence.

Prove the fact that the prisoner was charged with, or convicted of, an offence in due form of law, and that he resisted his apprehension or that having been apprehended he escaped from the custody in which he was. If he were lawfully in custody, it matters not whether he was guilty of the offence charged or not; or whether a competent court subsequently determines that he has been guilty of an offence different from that with which he was charged; *Reg.* v. *Ram Saran*, 24 *W. R. Cr.* 45; this offence depends upon the power to arrest or commit to custody, and if an officer has power to arrest on suspicion and does so arrest, the arrest is good, although the suspicion may not be well founded, and a person resisting arrest or afterwards escaping from custody has committed this offence. Where a warrant was issued for the arrest of one A B, and under it another person of the same name was arrested who escaped from custody, but was recaptured and afterwards acquitted; it was held that he had committed no offence under Sect. 224; *Ganga Charan* v. *Emp.*, *I. L. R.* 21 *Calc.* 337.

If the charge be against a person for assisting another in resisting or escaping, the case must be proved as against that other person, and the accused must be shewn to have assisted him in his unlawful acts.

Under Sect. 225, it is not necessary that the custody from which the person is rescued should be that of a police officer; it is enough that it should be custody which is recognized by law: therefore, the rescue from the custody of a private person who had arrested a thief in the act of stealing is an offence under Sect. 225; *Emp.* v. *Kutti*, *I. L. R.* 11 *Mad.* 441. Where a private person arrested a thief in the act of stealing, and took him

to the village magistrate who sent him under charge of two village servants to the nearest police station, but the prisoner escaped on the road, it was held that this was an escape from legal custody; *Emp.* v. *Potalu*, *I. L. R.* 11 *Mad.* 480; it is not necessary that a person who lawfully arrests an offender should himself take him to the nearest police station; *ib.*; see also *Emp.* v. *Fakira*, *I. L. R.* 17 *Mad.* 103. A prisoner was legally arrested, but subsequently for a short time was left unguarded, when he escaped; it was held that he had escaped from legal custody; *Emp.* v. *Muppan*, *I. L. R.* 18 *Mad.* 401.

Where a police officer duly appointed under Act V. of 1861 is engaged in the discharge of any part of his duty as such police officer, when an unlawful assembly takes place, he is competent to apprehend any of the members of such assembly, and any one who rescues the party apprehended is rightly convicted under Sect. 225; *Reg.* v. *Assan Shurreef*, 13 *W. R. Cr.* 75. Escape from the custody of a village watchman by a person wanted by the police and arrested on suspicion of having committed a theft by the watchman is not an offence under Sect. 224; *Reg.* v. *Bojjigan*, *I. L. R.* 5 *Mad.* 22. A prisoner, sentenced to transportation, and escaping from custody while on the way to undergo his sentence, is punishable under Sect. 224; *Reg.* v. *Ramasamy*, 4 *Mad. H. C. Rep.* 152. A police officer who apprehends a person charged with a non-cognizable offence, does not have him in legal custody if he has no warrant for his arrest; *Reg.* v. *Ram Saran*, 24 *W. R. Cr.* 45.

Punishment *must* be awarded for escape in addition to the punishment for any other offence; *Reg.* v. *Dhoonda Bhooya*, 5 *R. C. C. Cr.* 7. A person escaping from custody in which he has been legally detained for the purpose of giving security for good behaviour does not commit an offence under Sect. 224, as he was not lawfully detained in custody for an offence; 7 *Mad. H. C. R. App.* 41. He will be punishable under Sect. 225B which has now been substituted by Act X. of 1886 for the old Sect. 225A.

In a case under the repealed Sect. 225A, it must have been shewn that the accused had been ordered to furnish security for good behaviour, that he had failed in doing so, that on his default he had been committed to custody, from which he had escaped or attempted to escape. An escape from custody while being taken before a magistrate for the purpose of being bound over to be of good behaviour does not fall under any of these three sections; *Emp.* v. *Shasti Churn, I. L. R.* 8 *Cal.* 331, followed in *Emp.* v. *Kandhaia, I. L. R.* 7 *All.* 67. Sect. 225B will, however, provide for such cases as are referred to in the last two authorities, and to all cases of resistance to lawful arrest, or escape from lawful custody, which are not specially provided for.

Sections 224 *and* 225.—In these sections the word "offence" denotes anything punishable under the Penal Code or under any special or local law; Sect. 40, *ante*, p. 38.

Under the Fugitive Offenders' Act, 1881 (44 and 45 Vict. c. 69), Sect. 28, where a person arrested under a warrant issued or endorsed in pursuance of that Act, escapes or attempts to escape, or if any person aids or attempts to aid the prisoner in escaping, the offence can be tried in the place from or to which the prisoner is being removed, or the place where he escapes or is found; and Sect. 23 provides that the trial and punishment is to be as if the offence had been committed within the jurisdiction where he can be tried.

UNLAWFUL RETURN FROM TRANSPORTATION.

Sect. 226. *Unlawful Return from Transportation.*—**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.**

Sect. 227. *Violation of Condition of Remission of Punishment.*—**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.

Offences under Sect. 226 *are triable by the Court of Session; those under Sect.* 227 *by the Court by which the original offence was triable. A warrant should issue in the first instance under Sect.*226, *but not under Sect.* 227. *Police officers may arrest without a warrant under Sect.* 226, *but not under Sect.* 227. *Defendants are not bailable. Not compoundable.*

Charge under Sect. 226.

That you, the said A B, on or about the day of , were sentenced to transportation by the Court of Session of , to wit, for the term of your natural life, and that on the day of , at , the term of such transportation not having expired, and such punishment not having been remitted, you, the said A B, did return from such transportation; and that you have thereby committed an offence punishable under Sect. 226 of the Indian Penal Code, and within, &c.

Evidence.

Prove the sentence or order of transportation by producing certificate under the hand of the Clerk of the Crown or other officer having the custody of the records of the court in which the sentence was passed, which must contain the effect and substance of the charge and conviction of such offender, and of the sentence or order for transportation. Merely stating that the prisoner was convicted of felony, without stating the nature of the felony, is insufficient; *R.* v. *Watson, R. and R.* 468. The prisoner's identity must also be proved.

It must also be shewn that the defendant has actually been sent to a penal settlement, and returned or been at large before the expiration of the time for which he was ordered to be transported; *Reg.* v. *Ramaswamy*, 4 *Mad. H. C. Rep.* 152; and it is for the defendant to shew that he was justified in being at large,

by having had his punishment remitted. The fact of the sentence being in force when the defendant is found at large is sufficiently proved by the certificate of the conviction and sentence, the judgment remaining unreversed, although it appear on the face of the certificate that the sentence was one which could not legally have been inflicted on the defendant for the offence of which, according to the certificate, he had been convicted; *Reg.* v. *Finney*, 2 *C. and K.* 774.

If the charge be under the latter of these two sections, then the prosecution must shew that the first punishment has been remitted or commuted, and the conditions under which it was so remitted or commuted, and that the defendant has broken the conditions on which it was so remitted or commuted.

The words "the court by which the original offence was triable" must be taken to mean any court empowered by law to try any such offence as that for which the convict was under sentence; *Reg.* v. *Ahone Akony*, 9 *Bom. H. C. Rep.* 356.

INTERRUPTIONS TO JUDICIAL PROCEEDINGS.

Sect. 228. *Intentional Insult, &c., to a Public Servant sitting in a Judicial Proceeding.*—**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.**

Triable by the Court in which the offence is committed, subject to the provisions of Chap. XXXV of the Criminal Procedure Code, 1882. *A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect.* 195, *Cr. P. C.*, 1882.

Evidence.

Prove that the person insulted or interrupted was acting as a public servant, and shew in what capacity he was acting; this will

be sufficient evidence that he held a certain office. Shew, also, what he was doing in order that it may be seen that he was acting within the limits of the jurisdiction conferred upon him by virtue of his holding that office, otherwise he would not be sitting in a stage of a judicial proceeding. In the charge and conviction it ought to be clearly stated that the person insulted was sitting in a stage of a judicial proceeding, the nature of which ought also to appear; *In re Prokash Chunder*, 12 *W. R. Cr.* 64. Then prove that the accused by some act insulted or interrupted such public servant. It must also be shewn that the accused had the intention of insulting the public servant by the act alleged to have been committed by him; *Reg.* v. *Hurri Kishen Doss*, 15 *W. R. Cr.* 62.

It has been held that prevaricating while giving evidence is not invariably proof of intentionally causing interruption to a public servant in a stage of a judicial proceeding; *Reg.* v. *Auba*, 4 *Bom. H. C. Rep. C. C.* 6; nor is refusing or neglecting to give a direct answer to questions; *Reg.* v. *Pandu*, 4 *Bom. H. C. Rep. C. C.* 7; nor can a conviction be had under this section simply because witnesses in a case give inconsistent evidence, or give their evidence reluctantly, and so take up the time of the court unnecessarily; *Reg.* v. *Chota Hurry*, 15 *W. R. Cr.* 5. But prevarication and refusal to answer on the part of a witness may amount to intentional interruption under this section; *Reg.* v. *Jaimal Shravan*, 10 *Bom. H. C. R.* 69; *Emp.* v. *Dewji Asa*, *B. R.* 4*th July* 1889. A person who bids for an estate at a sale in execution of a decree, knowing that he is not able to deposit the earnest-money, obstructs the business of the court, and is punishable under this section; *In re Mohesh Chunder*, *W. R.* 1864, *Misc.* 3. A sub-registrar is a public servant, and proceedings before him are judicial proceedings within this section; *In re Sardhari Lall*, 13 *B. L. R. App.* 40.

PERSONATION OF A JUROR.

Sect. 229. *Personation of a Juror or Assessor.*—**Whoever, by personation or otherwise, shall intentionally cause or knowingly suffer himself to be returned, empanelled, or sworn as a juryman 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.

Triable by a Presidency Magistrate, or a Magistrate of the first class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

CHAPTER XII.

OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS.

I.—OFFENCES RELATING TO COIN.

COUNTERFEITING COIN.

Sect. 230. *Coin—Queen's Coin.*—**Coin is metal used for the time being as money stamped and issued by the authority of some State or sovereign power in order to be so used.**

Queen's coin is metal stamped and issued by the authority of the Queen, or by authority of the Government of India, or of the Government of any Presidency, or of any Government in the Queen's dominions, in order to be used as money; and metal which has been so stamped and issued shall continue to be the Queen's coin for the purposes of this chapter, notwithstanding that it may have ceased to be used as money.

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 Rupee is the Queen's coin.**

(*e*) **The "Farukhabad Rupee," which was formerly used as money under the authority of the Government of India, is Queen's coin, although it is no longer so used.**

Sect. 231. *Counterfeiting Coin.*—**Whoever counterfeits or knowingly performs any part of the process of counter-**

feiting 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.

Explanation.—**A person commits this offence who, intending to practise deception, or knowing it likely that deception will be thereby practised, causes a genuine coin to appear like a different coin.**

Sect. 232. *Counterfeiting Queen's Coin.*—**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.**

Sects. 233-235. See *post*, p. 302.

Sect. 236. *Abetting in India coining out of India.*—**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.**

Note.

Section 75 provides for increased punishment for a second offence.

Triable by the Court of Session. Accused persons are not bailable, and may be arrested without a warrant. A warrant for the apprehension of a defendant should be issued in the first instance. Not compoundable.

Charge.

That you, on or about the day of , at , did counterfeit a piece of the Queen's coin known as a Rupee; and that you have thereby committed an offence punishable under Sect. 232 of the Indian Penal Code, and within, &c.

Evidence.

The actual counterfeiting can rarely be directly proved by positive evidence. It is usually made out by circumstantial evidence, such as the finding of coining tools in the defendant's

house, together with pieces of counterfeit money, some in a finished, and some in an unfinished state, or such other evidence as is sufficient to cause the jury to draw the inference that the defendant has been engaged in counterfeiting coin.

The definition of counterfeiting given above is exactly the same in substance as that given in Sect. 28 of the general definitions, p. 33, but there it is further stated that "it is not essential to counterfeiting that the imitation should be exact," which is the law in England, where a trifling variance from the real coin in the inscription, effigies, or arms, does not take the case out of the statute; 1 *Hale*, 215; and although the counterfeit coin was made of a different metal from the real coin, as lead, tin, copper, &c., gilt or silvered over, yet it amounted to a counterfeit within the statute; *ib.* Also, where the counterfeit coin was made to resemble the smooth-worn shillings then in circulation, without any impression upon them, the case was held to be within the statute; *R.* v. *Wilson*, 1 *Leach*, 285; *R.* v. *Welsh*, *ib.* 364. A genuine sovereign had been filed at the edges to such an extent as to reduce its weight by $\frac{1}{2}\frac{1}{4}$ and to remove the milling almost entirely, and a new milling was consequently added,—it was held that such a sovereign was false and counterfeit; *Reg.* v. *Hermann*, 4 *Q. B. D.* 284. If the coins are not finished, then the case will come within the latter portion of these sections, as where the defendant was apprehended in the act of making counterfeit shillings, by steeping round blanks, composed of brass and silver, in *aqua fortis*, none of which were finished, but exhibited the appearance of lead, though by rubbing they readily acquired the appearance of silver, and would pass current; *R.* v. *Case*, 1 *Leach*, 154*n.*; *R.* v. *Lacey*, *ib.* 153.

The counterfeit coin must be proved to resemble some coin used as money, that is, some coin in actual circulation, or which has not been withdrawn from circulation, at the time the offence is committed. An imitation of an ancient coin quite gone out of circulation, and kept only for the purpose of curiosity, would not be a counterfeit coin, because it is not used as money; though, if the counterfeiter attempted to sell it as a real coin of the class of which it was an imitation, he might be charged with obtaining

money by cheating. To counterfeit a coin of the Emperor Abkar is no offence under these sections; *Reg.* v. *Bapu Yadav*, 11 *Bom. H. C. Rep.* 172. Gold mohurs may be coin, as they have a current though not an absolutely fixed value; *Reg.* v. *Kunj Beharee*, 5 *N. W.* 187.

It is not necessary to prove that the counterfeit coin was uttered, or attempted to be uttered, as the offence is the counterfeiting; 1 *Hale*, 215, 229; 3 *Inst.* 16; 1 *East, P. C.* 165.

Section 236 provides for what would not otherwise be an offence under the Code, for the general provisions on abetment provide only for the abetment of acts made punishable by the Code, and as the counterfeiting of coin out of British India is not so punishable, the abetting in India of such coining would not be there punishable.

MAKING, &c., COINING TOOLS.

Sect. 233. *Making, &c., Instrument for counterfeiting Coin.*—**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.**

Sect. 234. *Making, &c., Instrument for counterfeiting Queen's Coin.*—**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 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.**

Sect. 235. *Possession of Instrument, &c., for counterfeiting Coin.*—**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 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.

Sect. 236. See *ante*, p. 300.

Note.

Section 75 provides for increased punishment for a second offence.

Offences under Sect. 234 *and the latter clause of Sect.* 235 *are triable by the Court of Session; those under Sect.* 233 *and the first clause of Sect.* 235, *by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may arrest without a warrant, and accused persons are not bailable. Not compoundable.*

Charge under Sect. 234.

That you, on or about the day of , did make a certain die, for the purpose of being used for counterfeiting a piece of the Queen's coin, to wit, a rupee; and that you have thereby committed an offence punishable under Sect. 234 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the defendant made, &c., a die as stated in the charge, or that the die being already made, he bought, sold, or disposed of it. If the evidence only goes to the die, &c., being in the defendant's possession, then the charge must be framed on Sect. 235, and not on either of the two preceding ones. According to the interpretation clauses in Sect. 27, *ante*, p. 33, an instrument of this kind will be in the possession of the defendant, if it be in the possession of his wife, clerk, or servant, provided it be on his account, which involves his having actual or constructive knowledge of it being in their possession.

Under Sects. 233 and 234 it will be sufficient if the accused only makes a part of a die, because making a part of a die, is evidently a performing of a part of the process of making a die but a question may arise whether a person in bare possession of a part-made die will come under the provision of Sect. 235, for nothing is said there about anything else than an instrument. The English statutes not only include an instrument for completely counterfeiting coin, but also those which are adapted only to counterfeit "any part or parts of both or either of such sides" of the coin.

Although the making or possessing of tools, &c., must be for the purpose of coining, it will not be necessary formally to prove the intent of the defendant, as that may be inferred; nor is it necessary to show that coin has actually been made with the instrument in question; *R.* v. *Ridgeley*, 1 *East, P. C.* 171. If the possession or act of manufacture be innocent, it is very easy for the defendant to prove that fact, as he alone knows all the circumstances of the possession or manufacture.

Where the defendant employed a die-sinker to make, for a pretended innocent purpose, a die calculated to make shillings, and the die-sinker, suspecting fraud, informed the authorities at the Mint, and under their directions made the die for the purpose of detecting the prisoner,—it was held that the die-sinker was an innocent agent, and that the defendant was rightly convicted as a principal; *Reg.* v. *Bannen*, 2 *Mood. C. C.* 309.

A galvanic battery has been held to be a machine, and, therefore, an instrument for counterfeiting; *Reg.* v. *Grover*, 9 *Cox's Crim. Cases*, 282. The following having also been held to be instruments for coining: A press for coinage; *Reg.* v. *Bell*, 1 *East, P. C.* 169; a puncheon for coining, though that alone without the counter-puncheon would not make the figure; *Rex* v. *Ridgeley*, *ubi sup.*; a collar of iron for graining the edges of counterfeit money; *Rex* v. *Moore*, 2 *C. and P.* 235; mould of lead, having the stamp of one side of a shilling; *Rex* v. *Lennard*, 1 *Leach's C. C.* 90, and 1 *East, P. C.* 170.

IMPORTING, &c., COUNTERFEIT COIN.

Sect. 237. *Importation, &c., of Counterfeit Coin.*—**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.**

Sect. 238. *Importation, &c., of Counterfeit Queen's Coin.*—**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 which may extend to ten years, and shall also be liable to fine.**

Sects. 239 to 241. See *post*, p. 312.

Sects. 242 and 243. See *post*, pp. 309-310.

Note.

Section 75 provides for increased punishment for a second offence.

Offences under Sect. 237 are triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class; those under Sect. 238, by the Court of Session. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That you, on or about the day of , at , did import into British India, to wit, into the port of Bombay, certain pieces of counterfeit Queen's coin, to wit, ten thousand counterfeit Company's rupees, you, the said , well knowing that the same were counterfeit; and that you have thereby committed an offence punishable under Sect. 238 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the defendant imported the counterfeit coin. Prove also the defendant's guilty knowledge; for unless that be averred

in the charge and proved, it is no offence; 1 *Hale*, 128. It matters not under these sections whence the coin is imported, or whither it is exported. The mere importation or exportation of counterfeit coin constitutes the offence.

MAKING COIN OF WRONG WEIGHT, &c.

Sect. 244. *Employé at Mint making Coin of Wrong Weight, &c.*—**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.**

Note.

Section 75 provides for increased punishment on a second conviction.

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable

CONVEYING COINING TOOL OUT OF MINT.

Sect. 245. *Taking Coining Instrument from Mint.*- **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.**

Note.

Section 75 provides for increased punishment on a second conviction.

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That you, on or about the day of , at , without lawful authority, did take out of a mint lawfully established in British India, to wit, the mint at , a certain coining tool, to wit, a die; and that you have thereby committed an offence punishable under Sect. 245 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the defendant conveyed the tool or instrument charged in the charge out of some mint in British India. The article must be shewn to be a tool or instrument used in coining. It must also be proved that the defendant had no lawful authority to take it out, as the Code does not, as is the case with the English statutes on the same subject, throw the burden of proof on the defendant.

IMPAIRING COIN.

Sect. 246. *Altering Weight, &c., of Coin.*—**Whoever fraudulently or dishonestly performs 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 any thing else into the cavity, alters the composition of the coin.**

Sect. 247. *Altering Weight, &c., of Queen's Coin.*—**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.**

Note.

Section 75 provides for increased punishment on a second conviction.

Triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That you, on or about the day of , fraudulently and dishonestly did diminish the weight of ten pieces of Queen's coin, called Company's rupees; and that you have thereby committed an offence punishable under Sect. 246 of the Indian Penal Code, and within, &c.

Evidence.

Prove the diminishing, &c., either by direct or circumstantial evidence; as that the defendant was in possession of filings of impaired coin, or of files or other instruments for impairing. The meaning of the words fraudulently and dishonestly is doubtless that the defendant did the acts charged with the intent that the impaired coins should pass as good ones. This intent may be proved by shewing that the defendant attempted to pass the coin, or had passed other coin so impaired, or that while in his possession he had it mixed with other money, or from any other facts of a similar nature from which the fraudulent intention may be inferred.

ALTERING APPEARANCE OF COIN.

Sect. 248. *Altering Appearance of Coin.*—**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.**

Sect. 249. *Altering Appearance of Queen's Coin.*—**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 for a term which may extend to seven years, and shall also be liable to fine.

Sects. 250, 251. See *post*, p. 313.

Note.

Section 75 provides increased punishment on a second conviction.

Triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That you, on or about the day of , did perform a certain operation on one piece of the Queen's coin, called a sixpence, to wit, did wash the same with a certain wash, capable of producing the colour and appearance of gold, with the intent that the said coin should pass as a coin of a different description, to wit, as a half sovereign, and that you have thereby committed an offence punishable under Sect. 249 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the defendant gilded or coloured genuine coin as stated in the charge. Where a wash or material is alleged to have been used by the defendant, it must be shown, either from the application by the defendant, or from an examination of its properties, that it is capable of producing the colour of gold or silver; but such a charge will be supported by a proof of colouring with gold itself; *Reg.* v. *Turner*, 2 *Mood. C. C.* 42.

This section also meets the case of filing one coin so as to cause it to resemble any other.

POSSESSION OF COUNTERFEIT, &c., COIN.

Sect. 242. *Possession of Counterfeit Coin.*—**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.

Sect. 243. *Possession of Counterfeit Queen's Coin.*—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.

Sect. 244. See *ante*, p. 306.

Sect. 252. *Possession of Altered Coin.*—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 Sects. 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.

Sect. 253. *Possession of Altered Queen's Coin.*—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 Sects. 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 imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

Sect. 254. See *post*, p. 313.

Note.

Section 75 provides for increased punishment on a second conviction.

Triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That you, on or about the day of , fraudulently (*or* with intent that fraud might be committed) were in possession of twenty pieces of counterfeit Queen's coin, called rupees, knowing at the time you became possessed of the said coin that the said coin was counterfeit; and that you have thereby committed an offence punishable under Sect. 243 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the defendant had in his custody, or in the custody of his wife, clerk, or servant, the coins stated in the charge. If they were in the custody of the wife, clerk, or servant, knowledge of that fact ought to be brought home to the defendant. If pieces of counterfeit coin are found upon one of two persons acting in guilty concert, and both knowing of the possession, both will be guilty under these sections; *Reg.* v. *Rogers*, 2 *Mood. C. C.* 85; *Reg.* v. *Williams*, *C. and Mar.* 259. Prove also that the possession of the defendant was fraudulent, or with intent to defraud, and that he knew when he became possessed of the coin that it was counterfeit. These, of course, can only be proved by the surrounding circumstances of the case; such as, for example, by evidence of former utterings of counterfeit or altered coin, or by the facts of the defendant having in his possession a large quantity of counterfeit coin of like date, and made in the same mould, wrapped up in separate papers, and distributed in different pockets of his dress; *Reg.* v. *Jarvis*, *Dears. C. C.* 552; *Reg.* v. *Fuller*, *R. and R.* 308. Possession of one piece of counterfeit or altered coin will be sufficient to support a conviction under these sections; but, of course, in the event of only one such piece being found in any person's possession, the proof of guilty knowledge and intents must be very strong before a conviction can take place.

PASSING COUNTERFEIT COIN.

Sect. 239. *Passing Counterfeit Coin.*—**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.**

Sect. 240. *Passing Counterfeit Queen's Coin.*—**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.**

Sect. 241. *Passing Counterfeit Coin, which, when first possessed, Passer did not know to be Counterfeit.*—**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.**

Illustration.

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 Sect. 239 or 240, as the case may be.

Sect. 242. See *ante*, p. 309.

Sect. 250. *Passing Altered Coin.*—Whoever, having coin in his possession with respect to which the offence defined in Sect. 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.

Sect. 251. *Passing Altered Queen's Coin.*—Whoever, having coin in his possession with respect to which the offence defined in Sect. 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.

Sects. 252 and 253. See *ante*, p. 310.

Sect 254. *Delivery of Altered Coin to another, which, when first possessed, the Deliverer did not know to be altered.*—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

Sects. 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.

Note.

Section 75 provides for increased punishment on a second conviction, except under Sects. 241 and 254.

Offences under Sects. 241 and 254 are triable by a Presidency Magistrate, or a Magistrate of the first or second class; those under Sects. 239, 240, 250 and 251 by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class. Police officers may arrest without a warrant. A warrant should issue in the first instance. Defendants are not bailable. Not compoundable.

Charge under Sect. 240.

That you, the said A B, on or about the day of , having in your possession a counterfeit Queen's coin, called a rupee, and knowing at the time you became possessed of the said coin that it was counterfeit, fraudulently, and with intent to defraud (*or* fraudulently, and with intent that fraud might be committed), did deliver the same to C D (*or* did attempt to induce C D to receive the same), and that you, the said A B, have thereby committed an offence punishable under Sect. 240 of the Indian Penal Code, and within, &c.

Charge under Sect. 241.

That you, the said A B, on or about the day of , having in your possession a counterfeit Queen's coin, called a rupee, well knowing at the time of the commission of the hereinaftermentioned offence that the said coin was counterfeit, but not knowing at the time you received the said coin into your possession that the said coin was counterfeit, did deliver the said counterfeit coin to C D as genuine (*or* did attempt to induce C D

to receive the said counterfeit coin as genuine); and that you, the said A B, have thereby committed an offence punishable under Sect. 241 of the Indian Penal Code, and within, &c.

Evidence.

Prove the delivery of the coin, or an attempt to induce some person to receive the coin charged; and prove that it is counterfeit.

A shilling was given to a Jew boy for fruit, and he put it into his mouth under pretence of trying whether it were good, and then taking a bad shilling out of his mouth instead of it, returned it to the prosecutor, saying that it was not good; this (which is called ringing the changes) was holden to be an uttering within the old English statute, and would be an attempt to induce another person to receive the coin under the Code; *R.* v. *Franks*, 2 *Leach*, 644. It has been held to be an "uttering and putting off" as well as a "tendering" if the counterfeit coin be offered in payment, though it be refused by the person to whom it is offered, and such an act would certainly be a "delivery"; *Reg.* v. *Welsh*, 2 *Den. C. C.* 78. There must be intention to defraud, or that some fraud should be committed by some one as the consequence of the delivery. Upon an indictment on 2 W. IV. c. 34, s. 7, against husband and wife for uttering a counterfeit half-crown, it appeared that a woman asked the female prisoner to give her something, as her children were without food, and the male prisoner gave her twopence, and told her that his wife would give her something more, on which she gave the woman the bad half-crown in question, telling her to get what she could for her children; it was held by *Lord Abinger*, C. B., that although in the statute there were no words with respect to defrauding, yet in the proof it is necessary to go beyond the mere words of the statute, and to shew an intention to defraud some person; *Reg.* v. *Page*, 8 *C. and P.* 122. But as every person is taken to intend the probable consequence of his acts, and as the probable consequence of giving a piece of bad money to a beggar is that the beggar will pass it to some one else, and thereby defraud that person, it is a question whether this case rests upon satisfactory grounds. In fact, its correctness

has been incidentally doubted by *Lord Denman*, C. J., in *Reg.* v. *Anon*, 1 *Cox's Crim. Cases*, 250, where the point ruled was that the giving a counterfeit coin to a woman as the price of connection with her was an uttering, as, without doubt, there was an intention to defraud. In any case a party may not be defrauded by taking base coin, as he may pass it again, but the probability is that he will be defrauded which is sufficient. And in the case of giving bad money away in charity, even if it were held that there was no intention to defraud the person to whom the money was given, yet there is clearly an intention that a fraud should be committed upon some one.

It is not necessary that the uttering should be actually by the hand of the defendant. Where two persons went to a shop, and one of them went in and uttered a bad piece of money, having no more in her possession, and the other stayed outside the shop having other bad money, it was held that both might be convicted, as the possession and uttering were both joint; *R.* v. *Skerret*, 2 *C. and P.* 427.

It must also be proved that the defendant knew the coin was counterfeit when he uttered it. This, of course, must be done by circumstantial evidence. If, for example, it be proved that he passed off, or attempted to pass off, either on the same day, or at other times, whether before or after the passing charged, counterfeit coin, either of the same or different denomination, to the same or a different person, or had other pieces of bad money about him when he uttered the counterfeit coin in question, these facts will be evidence from which his guilty knowledge may be inferred. *R.* v. *Whiley*, 2 *Leach*, 983; *Reg.* v. *Forster*, *Dears. C. C.* 456.

In charges of offences under Sects. 241 and 254 it is necessary to allege that the defendant did not know the coin was counterfeit when he received it into possession, otherwise the case must be sent to the Court of Session or Magistrate of the first class, and not be tried before the Magistrate. It would seem as if the prosecution ought to prove this fact as part of their case, but nevertheless it is so entirely within the knowledge of the defendant

alone, that if alleged in the charge, it should be assumed to be true without further proof, especially as the law gives the accused the benefit of any doubt in respect to his guilt. But it has been held that attempted delivery of counterfeit coin by a *sonar*, with false statements as to how such coin was obtained, is *primâ facie* proof that the *sonar* knew the coin was counterfeit at the time it came into his possession, so that the offence would come under Sect. 240 and not 241; *Ram Ruttun Saha* v. *Bawool Whindub*, 23 *W. R. Cr.* 4. In fact, the most scientific way of arranging the sections would have been to place these last two as provisoes to those prohibiting the passing of bad or altered coin, reducing the punishment in such cases.

The mere possession of bad coin taken innocently is no offence, as a person may well keep it by him to prevent it being circulated and so hinder the commission of fraud. There must be some delivery or attempted delivery of it as genuine before criminal liability attaches, or proof that the person had the intention and knowledge stated in Sect. 243.

METAL TOKENS ACT, 1889.

Sect. 1. *Title, extent and commencement.*—(1) *This Act may be called the Metal Tokens Act*, 1889.

(2) *It extends to the whole of British India; and*

(3) *It shall come into force at once.*

Sect. 2. *Definition of issue.*—*In this Act "issue" means to put a piece of metal into circulation for the first time for use as money in British India, such piece having been made in contravention of this Act or brought into British India by sea or by land in contravention of any notification for the time being in force under section* 19 *of the Sea Customs Act*, 1878.

Sect. 3. *Prohibition of making by private persons of pieces of metal to be used as money.*—*No piece of copper or bronze or of any other metal or mixed metal, which, whether stamped or unstamped, is intended to be used as money shall be made except by the authority of the Governor-General in Council.*

Sect. 4. (1) *In either of the following cases, namely:—*

(*a*) *if any person makes in contravention of the last foregoing section, or issues or attempts to issue, any such piece as is mentioned in that section,*

(*b*) *if, after the expiration of three months from the commencement of this Act, any person has in his possession, custody or control any such piece as is mentioned in the last foregoing section, with intent to issue the piece,*

the person shall be punished,—

(*i*) *if he has not been previously convicted under this section, with imprisonment which may extend to one year, or with fine, or with both; or,*

(*ii*) *if he has been previously convicted under this section, with imprisonment which may extend to three years, or with fine, or with both.*

(2) *If any person is convicted of an offence under sub-section* (1), *he shall, in addition to any other punishment to which he may be sentenced, forfeit all such pieces as aforesaid, and all instruments and materials for the making of such pieces, which may have been found in his possession, custody or control.*

(3) *If in the trial of any such offence, the question arises whether any piece of metal or mixed metal was intended to be used or to be issued for use as money, the burden of proving that the piece was not intended to be so used or issued shall lie on the accused person.*

Sect. 5. *Cognizance of offences under the last foregoing section.*— (1) *The offence of making, in contravention of section* 8, *any such piece as is mentioned in that section shall be a cognizable offence.*

(2) *Notwithstanding anything in the Code of Criminal Procedure,* 1882, *no other offence punishable under section* 4 *shall be a cognizable offence, or, beyond the limits of a Presidency-town, be taken cognizance of by any Magistrate, except a District Magistrate or Subdivisional Magistrate, without the previous sanction of the District Magistrate or Subdivisional Magistrate.*

Sect. 6. *Importation of pieces of metal for use as money.*—*If at any time the Governor General in Council sees fit, by notification under section* 19 *of the Sea Customs Act,* 1878, *to prohibit or restrict the bringing by sea or by land into British India of any such pieces of metal as are mentioned in section* 3, *he may by notification direct that any person contravening the prohibition or restriction shall be liable to the punishment to which he would be liable if he were convicted under this Act of making such pieces in British India, instead of to the penalty mentioned in section* 167 *of the Sea Customs Act,* 1878, *and that the provisions of sub-section* (3) *of section* 4 *and sub-section* (1) *of section* 5, *or of either sub-section, in relation to the offence of making such pieces, shall, notwithstanding anything in the Sea Customs Act,* 1878, *apply, so far as they can be made applicable, to the offence of contravening the prohibition or restriction notified under section* 19 *of the Act.*

Sect. 7. *Addition to section* 98, *Act X.,* 1882.—*To section* 98 *of the Code of Criminal Procedure,* 1882, *the following shall be added, namely:*—

"*The provisions of this section with respect to*—

(*a*) *counterfeit coin,*

(*b*) *coin suspected to be counterfeit, and*

(*c*) *instruments or materials for counterfeiting coin,*

shall, so far as they can be made applicable, apply, respectively, to—

(*a*) *pieces of metal made in contravention of the Metal Tokens Act,* 1889, *or brought into British India in contravention of any notification for the time being in force under section* 19 *of the Sea Customs Act,* 1878.

(*b*) *pieces of metal suspected to have been so made or to have been so brought into British India or to be intended to be issued in contravention of the former of those Acts, and*

(*c*) *instruments or materials for making pieces of metal in contravention of that Act.*"

Sect. 8. *Prohibition of receipt as money of metal which is not coin.*—(1) *No piece of metal which is not coin as defined in the Indian Penal Code shall be received as money by, or on behalf of any, railway-administration or local authority.*

(2) *If any person on behalf of a railway-administration, or on behalf of a local authority, or on behalf of the lessee of the collection of any toll or other impost leviable by a railway-administration or local authority, receives as money any piece of metal which is not such coin as aforesaid, he shall be punished with fine which may extend to ten rupees.*

OFFENCES RELATING TO GOVERNMENT STAMPS.

Sect. 255. *Counterfeiting a Government Stamp.*—**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.**

Sect. 256. *Having Possession of an Instrument, &c., for counterfeiting a Government Stamp.*—**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 imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.**

Sect. 257. *Making, &c., Instrument for 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.**

Sect. 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.**

Sect. 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.**

Sect. 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.**

Sect. 261. *Effacing any Writing from a substance bearing a Government Stamp, &c., with intent to cause loss to Government.*—**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.**

Sect. 262. *Using a Government Stamp known to have been before used.*—**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.

Sect. 263. *Erasure of Mark denoting that Stamp has been used.*—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 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.

263A. *Prohibition of fictitious stamps for postal purposes.*—(1) Whoever—

(*a*) makes, knowingly utters, deals in or sells any fictitious stamp, or knowingly uses for any postal purpose any fictitious stamp, or

(*b*) has in his possession, without lawful excuse, any fictitious stamp, or

(*c*) makes or, without lawful excuse, has in his possession any die, plate, instrument or materials for making any fictitious stamp,

shall be punished with fine which may extend to two hundred rupees.

(2) Any such stamp, die, plate, instrument or materials in the possession of any person for making any fictitious stamp may be seized and shall be forfeited.

(3) In this section 'fictitious stamp' means any stamp falsely purporting to be issued by Government

for the purpose of denoting a rate of postage, or any facsimile or imitation or representation, whether on paper or otherwise, of any stamp issued by Government for that purpose.

(4) In this section and also in sections 255 to 263, both inclusive, the word 'Government,' when used in connection with, or in reference to, any stamp issued for the purpose of denoting a rate of postage, shall, notwithstanding anything in section 17, be deemed to include the person or persons authorised by law to administer executive government in any part of India, and also in any part of Her Majesty's dominions or in any foreign country.

Note.

Sect. 75 provides for increased punishment for a second offence, except under Sects. 262 and 263A.

Offences under Sect. 262 *are triable by a Presidency Magistrate, or a Magistrate of the first or second class; those under Sects.* 259, 260, 261, *and* 263, *by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class; and those under Sects.* 255, 256, 257, *and* 258, *by the Court of Session. In all cases a warrant should issue in the first instance. Police officers may arrest without a warrant. Accused persons are bailable. Not compoundable.*

Evidence.

All the remarks in respect to counterfeit coin apply *mutatis mutandis* to the offences described in the ten preceding sections, and need not, therefore, be repeated.

CHAPTER XIII.

OFFENCES RELATING TO WEIGHTS AND MEASURES.

Sect. 264. *Use of False Weighing Machine.*—**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.**

Sect. 265. *Use of False Weights or Measures.*—**Whoever fraudulently uses any false weight or measure of length or capacity, or fraudulently uses any weight or 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.**

Sect. 266. *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.**

Sect. 267. *Making, &c., False Weights and 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.**

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

Prove the use of the false weights, &c. If a man use false weights, it will, under ordinary circumstances, be presumed that he knew they were false, and that he used them fraudulently, especially if the advantage gained by their use is in his own favour. So, if a man makes false weights or measures, the presumption will be that he does it knowingly, and so, fraudulently. But the mere possession of such measures, &c., will not in itself raise any strong presumption of fraud, as they may have been put away so as not to be used. The fraudulent intent will be shown greatly by the place where they are found. Suppose a false balance was found fixed to a tradesman's counter where he was accustomed to sell his goods, and there was no other in the place,—there would be, in this case, the strongest possible presumption that the possession was not innocent. On the other hand, suppose he had true balances in his shop, but an untrue one stowed away in an attic with a lot of lumber, here the presumption would be against fraud. A farmer had in his house a balance or portable weighing-machine and two iron weights which were found by the inspector to be light. The inspector saw no produce about the premises, and could not prove that the farmer exposed or kept for sale, or weighed for conveyance or carriage, any goods or produce, and it was held that the conviction of the farmer was wrong; *Griffiths* v. *Place*, 20 *L. T. N. S.* 484.

In conformity with this doctrine, the High Court of Bombay has decided that the mere possession of weights in excess of the authorised standard will not support a conviction under the 266th Section; a fraudulent intent must be laid and proved; *Reg.* v. *Damodhar Daljee*, 1 *Bom. H. C. Rep.* 181. In the case of *Reg.* v. *Kangali Muduk*, 18 *W. R. Cr.* 7, where there was no evidence of intention on the part of the accused to fraudulently use false weights, the conviction was quashed, and the fine levied directed to be returned, *Kemp*, J., remarking that in the Mofussil scales are generally so rudely constructed that a stone is commonly used in one scale to create a balance.

A post master, who is also a trader, who has in his possession scales and weights belonging to the Post Office, for his use as

post master, cannot under the English Acts be proceeded against for having false weights and scales; *Queen* v. *Justices of Kent*, 24 *Q. B. D.* 181.

In England the decisions on the subject of weights and measures have been principally on the meaning of the words "incorrect or otherwise unjust." In the first case the defendants used a machine called a weigh-bridge for the purpose of weighing trucks. The weigh-bridge was liable to get out of order through trucks passing over it, and to have the correctness of its balance disturbed by a variety of other circumstances to which it was exposed, such as the falling of a heavy shower of rain. To compensate for any such derangement of the machine, an adjusting ball was fixed, which, by passing backwards and forwards along the thread of the screw on which it worked, caused the end of the steelyard to which it was attached to become heavier or lighter, and thus produced a compensation for any variation in the weight of the platform. The necessary adjustment was made before each time of the machine being used. On the district inspector of weights and measures calling at the station in the course of his duties, he found the machine in gear, and he proceeded to test it without making use of the adjusting ball, and found it 21 lbs. out of balance. It was held by the Court of Queen's Bench that, under the circumstances, the weigh-bridge was not "incorrect or otherwise unjust" within the meaning of 5 & 6 Will. IV, c. 63, s. 28, and that it ought to have been properly adjusted before it was examined by the inspector; *Reg.* v. *London and North-Western Railway*, 5 *L. T. N. S.* 792. In this case, *Crompton*, J., said: "I do not think it (the weigh-bridge) was incorrect at all. It requires to be set before it is used, and the adjusting apparatus is made for the purpose of giving peculiar correctness, and the whole thing cannot be called incorrect because at a particular time when it was examined it was not set. I doubt if a proper examination was made; it ought to be examined when it was in a proper state to be used." But if the machine be out of order, and requires adjustment before it will weigh correctly, such adjustment not being part of the original design of the machine, an information against a company for

having an incorrect machine in their possession may be sustained; *The Great Western Railway Company* v. *Baillie*, 34 *L. J. N. S. M. C.* 31. A pair of scales had a hollow brass ball hanging upon the weight end of the beam; the ball was constructed with a neck which could be unscrewed so as to allow shot to be placed inside, and, being hung by a hook upon the beam, was easily removable. The scales were correct in that state, but if the shot inside the ball was removed, the scales were unjust, and against the purchaser; and it was held that Justices were right in finding that the ball loaded with shot was no part of the scales, and that, consequently, they were unjust; *Cart* v. *Stringer*, 9 *B. and S.* 238, and *L. R.* 3 *Q. B.* 433.

The Ceylon Penal Code omits from the sections corresponding to Sects. 264-266, the word "fraudulently." This would seem to make but very little difference in the effect of the sections, except so far as the use of a false weight is concerned. A man may use a false weight, not knowing it to be false, and that would not be a fraudulent use, unless, perhaps, he had been grossly careless in not ascertaining whether it were correct or not. If, however, a man uses a false balance knowing it to be false, or uses one weight as a different weight, or is in possession of a false balance, &c., intending it to be used while false, the use or possession under these circumstances would be fraudulent.

CHAPTER XIV.

OF OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY, CONVENIENCE, DECENCY, AND MORALS.

PUBLIC NUISANCE.

Sect. 268. *Public Nuisance.*—**A person is guilty of a public nuisance who 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.

Sects. 269 to 271. See *post*, p. 335.

Sects. 272 to 276. See *post*, pp. 337 and 338.

Sects. 277, 278. See *post*, pp. 340, 341.

Sects. 279, 280. See *post*, pp. 341, 342.

Sect. 281. See *post*, p 343.

Sect. 282. See *post*, p. 346.

Sect. 283. See *post*, p. 344.

Sects. 284 to 289. See *post*, pp. 346-348.

Sect. 290. *Punishment for Public Nuisance.*—**Whoever commits a public nuisance in any case not otherwise punishable by this Code, shall be punished by fine which may extend to two hundred Rupees.**

Triable by any Magistrate. A summons shall issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

The whole of this chapter deals with public nuisances under various classifications. Section 268 defines generally what a public nuisance is; the following sections provide punishments for different kinds of public nuisances, and Sect. 290 provides a

punishment for any one committing a public nuisance not specially punished by the other sections of this chapter.

In order to constitute a nuisance there must be not merely a nominal but such a sensible and real damage as a sensible person, if subjected to it, would find injurious, regard being had to the situation and mode of occupation of the property injured; *Scott* v. *Firth*, 4 *F. and F.* 349. The mere placing of cow-dung cakes by the side of the road to dry does not constitute a nuisance, unless material annoyance is caused to the public; *Emp.* v. *Bapu Jaga*, *B. R. 8th July* 1886; and the nuisance must be to the public, or to people in general, or to a portion of the public, or to a particular class of people in the exercise of a public right; *Onooram* v. *Lamessor*, 9 *W. R. Cr.* 70; bare solicitation of chastity is not a public nuisance, as it proves or suggests no fact relating to any *common* injury, danger or annoyance; *Emp.* v. *Raji Tima*, *B. R. 15th July* 1895.

This section was not intended to apply to acts or omissions calculated merely to offend the sentiments of a class: thus, where certain Mahomedans inhabiting a village erected during the Mohurrum a temporary shed on waste land of the village, and placed a religious symbol therein, it was held that such act did not amount to a public nuisance, merely because it might cause annoyance to the Hindoo inhabitants of the village whose temples were in the vicinity; *Muttumeira* v. *Emp.*, *I. L. R.* 7 *Mad.* 590; followed in *Emp.* v. *Zakiuddeen*, *I. L. R.* 10 *All.* 44, in which it was held that, where certain Mahomedans, for a religious purpose, killed and cut up two cows before sunrise in a private compound, partly visible from a public road, and the killing of one cow only was witnessed by one Hindoo, the circumstances proved did not show the commission of a public nuisance. The cutting up of meat in a place by which Jains pass, by which their private feelings might be hurt, is not a public nuisance; *Emp.* v. *Byramjee Eduljee*, *I. L. R.* 12 *Bom.* 437. On an indictment for a nuisance by erecting and continuing piles and planking in a harbour, and thereby obstructing it, and rendering it insecure, a special verdict found that by the defendant's works the harbour was, in some extreme cases, rendered less secure; and it was held that the defendant was not responsible

criminally for consequences so slight, uncertain, and rare, and that a verdict of not guilty must be entered; *Reg.* v. *Tindall*, 6 *A. and E.* 143; see also *Reg.* v. *Russell*, 3 *El. and Bl.* 942, and 23 *L. J. N. S. M. C.* 173. The obstruction of a navigable river by a bamboo dam in which there was a small opening through which boats with difficulty would pass, is a public nuisance: *In re Umesh Chandra*, *I. L. R.* 14 *Cal.* 656; but there is no rule of law that any encroachment, however slight, on a tidal navigable river necessarily amounts to a public nuisance, and the question in such cases must always be whether the encroachment has caused an obstruction or not; *Jugal Das* v. *Imp. I. L. R.* 20 *Cal.* 666, where it was held that the erection of a jag, 45 cubits long and 25 cubits broad, on the silted side of a tidal navigable river 300 cubits broad, did not constitute an offence either under Section 283 or Section 290.

It may be well here to mention a few cases which have been held to be public nuisances. Using a shop in a public market as a slaughter-house; *C. C. C.* 301. Erecting a manufactory for harts-horn; *C. C. C.* 311. Erecting a privy near the highway; 3 *Went.* 225. Placing putrid carrion near the highway; 4 *Went.* 213. Keeping a corpse unburied; *Reg.* v. *Vann*, 2 *Den. C. C.* 331. Keeping hogs near a public street, and feeding them with offal; *C. C C.* 305; and see 2 *Ld. Raym.* 1163. Keeping a fierce and unruly bull in a field through which there was a footway; *C. C. C.* 310. Keeping a ferocious dog unmuzzled; *C. C. C.* 311. These last two cases would be met by Sect. 289, *post*, p. 348. Baiting a bull in the king's highway; 4 *Went.* 213. Bringing a horse deceased with glanders into a public place to the danger of infecting the Queen's subjects; *Reg.* v. *Henson*, *Dears. C. C.* 24. Keeping wood naptha in a populous place in such large quantities as to cause terror and danger; *Reg.* v. *Lister*, 1 *Dears. and B. C. C.* 209. Exposing in the public streets a child infected with small-pox; *R.* v. *Vantandillo*, 4 *M. and Sel.* 73. This last would be met either by Sect. 269 or by Sect. 270, *post*, p. 335. Boiling tripe and other entrails and offal of beasts; *Reg.* v. *White*, 1 *Burr.* 333. Stage plays, unlicensed booths, and stages for rope-dancers, mountebanks, or the like, are public nuisances; 4 *Bl. Com.* 167, 168. Making great noise in the night with a speaking-trumpet (*R.* v. *Smith*, 1 *Str.* 704),

and keeping dogs which make noises in the night (2 *Chit. Crim. Law*, 647; 1 *Russ. on Crimes*, 5 Edit. 438), are public nuisances. A common scold is a public nuisance; 4 *Bl. Com.* 169. An obstruction of a highway is a public nuisance. A common gaming-house, *i. e.*, one which is kept for gain or profit, may constitute a nuisance; but it cannot be held, in the absence of any actual annoyance to the public, that every person who admits gamblers into his house, and all persons who game therein, are guilty of a public nuisance under Sect. 268; *Reg.* v. *Hau Nagji*, 7 *Bom. H.C. Rep. C. C.* 74; but if a person permits his house to be used by disorderly people for gambling, and annoyance is thereby caused to the public, he is guilty of causing a nuisance; *Emp.* v. *Thandavarayudu*, *I. L. R.* 11 *Mad.* 364. As between the defendant and the public, the occupier of a ruinous house, although only a tenant-at-will, is bound to repair it, so that it becomes not dangerous to the public; *R.* v. *Watts*, 1 *Salk.* 357. The occupier of a house is bound to keep the soil in his privy from trespassing; *Tenent* v. *Goldwin*, 1 *Salk.* 360. A person kept a ground for shooting at pigeons, some of which, when fired at, escaped, and a crowd of idlers collected outside his grounds to fire at the escaped birds. *Lord Tenterden*, C. J., said:—"If a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable. And this is an old principle. Here the defendant invites persons on his own ground to shoot pigeons. The effect of that is, that idle people collect near the spot: they tread down the grass of the neighbouring fields, destroy the fences, and create alarm and disturbance. It is not found that the defendant has attempted to prevent their so collecting. He has, indeed, had them driven off his own ground, but that is all." *Littledale*, *J.*, also said:—"It has been contended that to render the defendant liable, it must be his object to create a nuisance, or else that that must be a necessary and inevitable result of his act. No doubt it was not his object; but I do not agree with the other position, because if it be the *probable* consequence of his act, he is answerable as if it were his actual object. If the experience of mankind must lead any one to expect the result, he will be answerable for it." And so in that case a verdict of guilty was upheld;

R. v. *Moore*, 3 *B. and Ad.*, p. 188. But although the immediate occupier is in most cases the party liable, yet if the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being continued during the term; *R.* v. *Pedly*, 1 *A. and E.* 822. So he is, if he let a building which requires particular care to prevent the occupation in the course of nature becoming a nuisance, or doing damage; *R.* v. *Pedly supra*; *Todd* v. *Flight*, 30 *L. J. N. C. P.* 21. The owner of a market allowed sheep to be penned there, and he found the hurdles for the pens, and derived a profit in addition to the toll on the sheep. The sheep-droppings created a nuisance on the part where they where penned. It was held that the owner of the market was the person by whose default, permission, or sufferance the nuisance arose; *Draper* v. *Sperring*, 30 *L. J. N. S. M. C.* 225. Omission to fence a well on private ground within eight yards of a highway, and open to it, is not punishable as a public nuisance; *Reg.* v. *Anthony*, *I. L. R.* 6 *Mad.* 280; nor is the omission of a person to keep his ponies from straying; *Jognath* v. *Jamul*, 6 *W. R. Cr.* 71.

To constitute the production of offensive smells a common nuisance, it is not necessary that the smells should be injurious to health as required by Sect. 278, *post*, p. 341; it is sufficient for them to be so offensive as sensibly to detract from the enjoyment of life and property in the neighbourhood; *R.* v. *White*, 1 *Burr.* 333; *R.* v. *Neill*, 2 *C. and P.* 485. It is necessary that the nuisance should be in a populous neighbourhood, or near a highway; *R.* v. *Papineau*, 1 *Str.* 686; and it must affect the health or enjoyment of the neighbourhood; *Rex* v. *Darey*, 5 *Esp.* 217; for its being a public nuisance depends in a great measure upon the number of houses and the concourse of people in the vicinity; *R.* v. *White*, *supra*. Therefore, when 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 anything, a private nuisance; *Rex* v. *Lloyd*, 4 *Esp.* 200, and 1 *Russ. on Crimes*, 5th Edit. 419. So, too, the High Court at Calcutta has ruled that in the case of a public nuisance under Sect. 290, it must be proved that injury, danger or annoyance has been caused either in regard to the enjoyment of property, or the exercise of a public right on the part of a portion of the community, or of any particular class of people; *Onooram* v. *Lamessor*, 9 *W. R. Cr.* 70.

The fact that a nuisance has been in existence a number of years in the same place, and has not been materially increased just before the time of prosecution, will not legalize it; *Municipal Commissioner* v. *Mahomed Ali*, 7 *Ben L. R.* 499; *R.* v. *Cross*, 3 *Camp*, p. 227; but in a neighbourhood where there were already established other trades, &c., emitting extremely offensive or insalubrious smells, which smells were not perceptibly increased by the alleged nuisance in question, it has been held that a long acquiescence by the neighbourhood will prevent an indictment for the continuance of that particular nuisance; *R.* v. *Neville, Peake*, 91; *R.* v. *Watts, Moo. and M.* 281. But the mere fact that there are other nuisances in the neighbourhood will not be a defence; *R.* v. *Neville*, *supra*, and see *Welch* v. *Hornby*, 7 *East*, p. 199; *Bliss* v. *Hall*, 4 *Bing. N. C.* 183. In *R.* v. *Russell*, 6 *B. and C.* 566, it was held that, in judging of a public nuisance, the public good it does might, in some cases, where the public health was not concerned, be taken into consideration, to see if the public benefit outweighed the public annoyance; but in *R.* v. *Ward*, 4 *A. and E.*, p. 404, that was explained in the following words:—"The advantage gained ought to be closely connected with the inconvenience resulting, or rather with that which would have been an inconvenience if it were not absorbed in the superior advantage."

Another class of nuisance, not specifically mentioned in any section of the Penal Code, is that of indecent exposure of the person, although it might in some cases be reached under Sect. 509, if there is the intention to insult the modesty of a woman; but under this section it may be punished irrespective of such

intent. Under the present section it will be necessary to prove that the defendant wilfully and indecently exposed his person in a public place, so as to cause annoyance to people dwelling in sight of the place, or passing by it. An indecent exposure, though in a place of public resort, if visible by one person only, is not a public nuisance; *Reg.* v. *Webb*, 1 *Den. C. C.* 338; *Reg.* v. *Watson*, *cit. id.*, *secus*, if, though actually seen by one person only, there are other persons in such a situation as that they may be witnesses of the exposure; *Reg.* v. *Farrell*, 9 *Cox's C. C.* 446. An omnibus is a public place; *Reg.* v. *Holmes*, *Dears. C. C.* 207. An exposure at the back of a house in London, so as to be visible to persons in the back premises of many other houses, is an exposure in a public place; *Reg.* v. *Thallman*, 33 *L. J. N. S. M. C.* 58; 1 *L. and C.* 326. An indictment charged two persons with indecent exposure of their persons in a public place, and it was held that an urinal with boxes or divisions for the convenience of the public, situated in an open market, was not a public place, within the meaning of the allegation; *Reg.* v. *Orchard*, 4 *Cox's C. C.* 248; but this case was commented on in *Reg.* v. *Harris*, *L. R.* 1 *C. C.* 282, in which it was held that a jury might well find that an urinal on a public footpath was a public place. *Quære*, whether two persons, having committed fornication in open day on a public common in the sight of one person only, but where others might have seen them, though there was no proof that any persons were passing over or along the common at that time, are guilty of an indecent exposure; *Reg.* v. *Elliot*, 1 *L. and C.* 103. But it is an indecent exposure to bathe in the sea on the beach, near inhabited houses, from which the person may be seen, even although the houses may have been recently erected, and till then it may have been usual for men to bathe in great numbers at the place in question; *Rex* v. *Crunden*, 2 *Camp.* 89.

Imprisonment in default of payment of a fine, under Sect. 290, should be simple, not rigorous; *Reg.* v. *Santu bin Lakhappa*, 5 *Bom. H. C. Rep. C. C.* 45; *secus*, *Reg.* v. *Yellamandu*, *I. L. R.* 5 *Mad.* 157.

Nuisances punishable under the Penal Code may still be made the subject of civil action, before or without prosecution; *Jina Runchod* v. *Jodha Ghella*, 1 *Bom. H. C. Rep.* 2.

INFECTION.

Sect. 269. *Negligent Act likely to spread Infection.*—**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.**

Sect. 270. *Malignant Act likely to spread Infection.*—**Whoever malignantly 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 two years, or with fine, or with both.**

Sect. 271. *Disobedience to a Quarantine Rule.*—**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.**

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance, and defendants are bailable. Police officers may arrest without a warrant under Sects. 269 and 270, *but not under Sect.* 271. *Not compoundable.*

Evidence.

Inoculation in itself is not an illegal or negligent act, and unless it is proved that the act was done negligently, with the knowledge or belief that it was likely to spread the infection of a disease dangerous to life, or that there was negligent dealing with the

patient after inoculation with the knowledge or belief as aforesaid, there can be no conviction in respect of such an act under Sect. 269; *Mad. H. C.* 10*th July* 1867, 2 *Mad. Jur.* 324; see, also, as to the latter part of this ruling, the case of *Rex* v. *Vantandillo*, 4 *M. and S.* 73. In England it has been ruled that it is an offence for an Apothecary unlawfully and injuriously to inoculate children with the small-pox, and while they are sick of it to cause them to be carried through the public streets; *Rex* v. *Burnett*, *ib.* 272. So, too, it is an offence to bring a horse infected with glanders into a public place; *Reg.* v. *Henson*, *Dears. C. C.* 24. K, knowing that he was infected with cholera, entered a railway carriage as a passenger without informing the Railway Company's servant of his condition, and M, knowing K's condition, purchased his railway ticket and travelled with him; it was held that K was properly convicted under Sect. 269 of negligently doing an act which was, and which he had reason to believe was, likely to spread infection of a disease dangerous to life, and M, of abetment of K's offence; *Emp.* v. *Krishnappa*, *I. L. R.* 7 *Mad.* 276. A prostitute, who, while suffering from syphilis, encourages and permits a man to have sexual intercourse with her, and thus communicates the disease to him, is not guilty under Sect. 269; *Emp.* v. *Rahma*, *I. L. R.* 11 *Bom.* 59.

Where a number of pilgrims were brought from Singapore to Bombay for transhipment to Jeddah and during the voyage there had been a number of cases of small-pox, and those who had arrived in Bombay suffering from that disease had been sent to hospital, it was held that it was not a negligent act likely to spread infection to tranship the remainder at once on board the steamer which was to take them to Jeddah; *Bombay and Persia S. N. Co.* v. *Rubattino Co.*, *I. L. R.* 14 *Bom.* 147.

As to the meaning of the word "malignantly," see *ante*, p. 174. The Ceylon Code in the section corresponding to Sect. 270 uses the word "maliciously" instead of "malignantly" and probably the substituted word really represents the intention of the framers of the Indian Code.

Act I. of 1870 expressly empowers the Governor-General in Council to make rules relating to quarantine, which, on publica-

tion in the *Government Gazette*, are to be deemed to be rules made under Sect. 271.

ADULTERATION.

Sect. 272. *Adulteration of Food.*—**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.**

Sect. 273. *Sale of Noxious Food, &c.*—**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.**

Sect. 274. *Adulteration of Drugs.*—**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.**

Sect. 275. *Sale of Adulterated Drugs.*—**Whoever, knowing any drug or medical 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.

Sect. 276. *Sale of any Drug as a different Drug or Preparation.* **—Whoever knowingly sells, 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.**

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

Under Sect. 272, it will be necessary to prove that the food or drink was mixed with some foreign substance of such a nature as to make the food or drink noxious to those who use it; mere adulteration with harmless substance for the purpose of getting an extra profit is not punishable under this section, and it must also be shown that the adulteration was made with the intention to sell the adulterated article as food or drink, or with the knowledge that it was likely so to be sold. Under Sect. 273, the food so sold must have been made or have become noxious, or be in a state unfit for food or drink; it must be sold *as food or drink*, and the seller must know or have reason to believe that the same is noxious. A sale of such food or drink for other purposes than use as food or drink will not come within this section, although the substance sold may eventually be used for food or drink.

Under Sects. 274 and 275, it must be shown that the drug or medical preparation has been mixed with some foreign subtance so as to lessen its efficacy, *or* to change its operations, *or* to make

it noxious. These words are wider than those used in the last two sections, and will include cases where a drug of known strength is only diluted with water, but will not include cases in which the drug has deteriorated by being kept, nor where there are different qualities of the same drug and an inferior quality is supplied instead of a superior one. In other respects the proof required is the same as under the two prior sections.

Under Sect. 276, all that is required is that one drug should *knowingly* be sold, or exposed or offered for sale, for another. The English Food and Drugs Act, 1875, enacts that no person shall sell to the prejudice of the purchaser any article of food, or any drug which is not of the nature, substance and quality of the article demanded by such purchaser. It was held that, in order to constitute an offence under this Act, the representation of the nature, &c., must be made at the time of sale; and that a prior false representation was no offence, if a true one be made at the time of sale; *Kirk* v. *Coates*, 16 *Q. B. D.* 49. Sect. 276 goes further than the Act in question, and seems to cover the case of offering for sale, even though the would-be purchaser never bought anything, or, if he bought anything, was eventually informed before his purchase of the true state of the case. Where a druggist in England sold to a customer who asked for tincture of opium, a tincture which contained opium and spirit, but did not contain the same quantity of opium to spirit as the standard prescribed by the British Pharmacopœia, it was held that the vendor was liable under the above Act, although the purchaser had not asked for tincture of opium prepared according to the B. P., as the purchaser must be held to have asked for the tincture of opium known to commerce, which is that of the strength prescribed by the B. P., *White* v. *Bywater*, 19 *Q. B. D.* 582.

A servant who actually sells the article is liable to punishment under these sections if he otherwise comes under their provisions; *Hotchin* v. *Hindmarsh* [1891], 2. *Q. B.* 181.

The fact, that the buyer has a contract with the seller that, if the article supplied be inferior to the contract quality, a certain deduction in price shall be made, is immaterial in determining

whether an offence has been committed under these sections; *Fecitt* v. *Walsh* [1891], 2 *Q. B.* 304.

Exposure for Sale.—There must be a sale or exposure or offering for sale; therefore, where a salesman, who had received bad meat for sale from a customer who knew it was bad, noticed on examination that it was in an unsound condition, and put it aside, and then called the inspector's attention to it before it had been exposed for sale; it was held that the owner of the meat could not be convicted; *Barlow* v. *Terrett* [1891], 2 *Q. B.* 107. It is not necessary that there should be such an exposure as will enable the purchaser to see the article itself, but the article may be exposed for sale, even if wrapped up in paper so as to be invisible; *Wheat* v. *Brown* [1892], 1 *Q. B.* 418. Articles that are merely stored in a back room or a cellar are not exposed for sale; *Crane* v. *Lawrence*, 25 *Q. B. D.* 152. The respondents kept a refreshment room in which were posted notices that "Nothing but a mixture of the best Danish butter and margarine is sold at this Establishment." Slices of bread, spread with a mixture of Danish butter and margarine, were sold for consumption on the premises, and also haddocks on which was put margarine cut from a lump kept on a shelf. There were no labels either on the slices or the lump of margarine. It was held that the margarine had not been exposed for sale by retail within the meaning of 50 and 51 Vict. c. 29, s. 6, and therefore no offence had been committed; *Moore* v. *Pearce's Dining and Refreshment Rooms*, *Weekly Notes*, 1895, p. 136.

On a conviction under Sects. 272 to 275, the food, drink, drug, or medical preparation in respect of which the conviction was had may be ordered to be destroyed; Act X. of 1882, Sect. 521.

FOULING WATER AND ATMOSPHERE.

Sect. 277. *Fouling Spring, &c.*—**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.**

Sect. 278. *Vitiating Atmosphere.*—**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.**

Triable by any Magistrate. A summons should issue in the first instance. Defendants are bailable. Under Sect. 277, *police officers may arrest without a warrant, but not under Sect.* 278. *Not compoundable.*

Evidence.

Prove the commission by the defendant of the act which fouls the water or vitiates the atmosphere. In the case of fouling water, the use to which the water is ordinarily put must be averred in the charge, and proved; and it must also be proved that the act of the defendant rendered it less fit for such purpose. In the case of vitiating the atmosphere, it will not be sufficient to prove that the vitiation was simply in respect of bad smells, as under Sect. 290; but it must be shown that the atmosphere is actually rendered less healthy. The term "public spring" does not include a continuous stream of water running along the bed of a river; *Reg.* v. *Patha, B. R. 2nd July* 1869; *Reg.* v. *Vitti Chokkan, I. L. R.* 4 *Mad.* 229; and *Emp.* v. *Halodhur Poroe, I. L. R.* 2 *Cal.* 383, where it was held that strewing branches in a public river was no offence under Sect. 277: the water of a rivulet, even though standing in pools from which water is drawn for drinking purposes, is not a public spring; *Emp.* v. *Hari Bapu, B. R. 1st October* 1885.

The act of performing the offices of nature in a public street is not an offence under Sect. 278; *In re Mahadshet Appashet, B. R. 29th May* 1884.

RASH DRIVING, &c.

Sect. 279. *Rash Driving.*—**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.

Sect. 280. *Rash Navigation.*—**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 for a term which may extend to six months, or with fine which may extend to one thousand Rupees, or with both.**

Offences under Sect. 280 *are triable by a Presidency Magistrate, or a Magistrate of the first or second class; those under Sect.* 279 *by any Magistrate. A summons should issue in the first instance. Defendants are bailable. Police officers may arrest without a warrant. Not compoundable.*

Evidence.

Prove that the defendent drove, or rode, or navigated in a rash or negligent manner. *Negligence* is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which a prudent and reasonable man would not do, *per Alderson*, B., *in Blyth* v. *Birmingham Waterworks Co.*, 11 *Ex.*, p. 784, adopted by *Brett*, J., in *Smith* v. *L. and S. W. Railway Co.*, *L.R.* 5 *C.P.*, p. 102; provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care; *Le Lievre* v. *Gould* [1893], 1 *Q. B.*, p. 497. *Culpable rashness* is acting with the consciousness that mischievous and illegal consequence may ensue, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The culpability arises from acting despite of the consciousness. *Culpable negligence* is acting without the consciousness that illegal or mischievous effects may follow, but in circumstances which show that the actor has not exercised the caution incumbent on him; and that, if he had, he would have had also the consciousness. The culpability arises from the neglect of the civil duty of circumspection; *In re Nidamarti Nagabhushanam*, 7 *Mad. H. C. Rep.* 119, approved of in

Emp. v. *Ketabdi Mundul*, *I. L. R.* 4 *Cal.* 764. Simply driving a cart, the bullocks of which have no nose-strings, does not necessarily constitute the offence of rash driving; *Reg.* v. *Ganpati Saluke*, *B. R.* 12*th August* 1869.

Besides the proof of the rash driving, it must also be proved that there was some other person whose life was or might have been endangered, or to whom hurt or injury was likely to have been caused. For it is manifest that in a road across country where there is no person whose life could be endangered, a person driving or riding might safely go at a much greater speed than in a crowded thoroughfare. Therefore, it will not be sufficient to prove merely that the defendant was driving so rashly or negligently as to endanger any other person, if such person were in his way, but it must be shewn that some person was actually there in a position of danger, or where he was likely to be in danger, or that the accused was driving in a place where there was a likelihood of persons being in danger; *Le Lievre* v. *Gould* [1893], 1 *Q. B.*, p. 497; *The Satanita* [1895] *P. D.*, p. 256. Where the accused was riding up a narrow path, the principal road to a hill-station, it was held that the probability of there being persons on the road, and of their being placed in danger by the act of the accused, might be taken into account; *Emp.* v. *Hormusji Nowroji*, *I. R.* 19 *Bomb.* 715. See, also, *ante*, pp. 71 and 72.

The actual driver, and not the owner of the carriage, is liable under Section 279, in case of a collision and injury arising out of rash driving; *Larrymore* v. *Pernendoo Deo Rai*, 14 *W. R. Cr.* 32.

FALSE LIGHTS, &c.

Sect. 281. *Exhibiting False Lights, &c.*—**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.**

Sect. 282. See *post*, p. 346.

Triable by the Court of Session. A warrant should issue in the first instance. Defendants are bailable. Police officers may arrest without a warrant. Not compoundable.

Charge.

That you, on or about the day of , at , [well knowing that a certain ship called the (*or* whose name is unknown) was sailing on the high seas (*or* in a certain river called the) near unto , whilst the said ship was so sailing as aforesaid] did exhibit a false light, with intent to mislead the captain or other chief officer and the crew of the said ship; and that you have thereby committed an offence punishable under Sect. 281 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the defendant exhibited the false light, mark, or buoy. The intent with which he exhibited it must be proved by circumstances which fairly and naturally lead to that conclusion; as by the fact that he was watching near the place, and that a ship was in sight, and by her movements appeared to take note of the light and follow it, although she may have found out the error and rectified her course.

OBSTRUCTING PUBLIC WAY, &c.

Sect. 283. *Obstructing a Public Way.*—**Whoever, by doing any act, or by omitting to take order with any property in his possession or under his charge, causes danger, obstruction, or injury to any person in any public way or public line of navigation, shall be punished with fine which may extend to two hundred Rupees.**

Sect. 284. See. *post*, p. 346.

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Defendants are bailable. Police officers may arrest without a warrant. Not compoundable.

Charge.

That you, on or about the , day of , at , by doing a certain act, to wit, by leaving a buggy for a long space

of time, to wit, five hours, in a public way, to wit, street, did cause obstruction to divers persons in the said public way; and that you have thereby committed an offence punishable under Sect. 283 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the way in question is a public way or a public line of navigation. Prove the act or omission, and shew that by the act or omission, obstruction, danger, or injury arises to any of the passengers. The expression "take order with," it would appear, means to make such a disposition of the property as would prevent the obstruction, &c. Prove that the defendant was in possession or in charge of the thing causing the obstruction. Where a waggoner occupied one side of a public street in a city, before his warehouses, in loading and unloading his waggons, for several hours at a time, both day and night, and having one waggon at least usually standing before his warehouses so that no carriage could pass on that side of the way, and sometimes even foot-passengers were incommoded by cumbrous goods lying upon the ground ready for loading,—this was holden to be an obstruction, although it appeared that there was room for two carriages to pass on the opposite side of the street; *R.* v. *Russell*, 6 *East*, 427. In the case of an ordinary highway, although it be of a varying and unequal width, running between fences one on each side, the right of passage or way, *primâ facie*, and unless there be evidence to the contrary, extends to the whole space between the fences; and the public are entitled to the use of the entire width of it as the highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot-passengers. Therefore, the unauthorised placing of telegraph posts and wires along a road, although not on the metalled part, is an obstruction; *Reg.* v. *The United Kingdom Electric Telegraph Company*, 31 *L. J. N. S. M. C.* 166; see, also, *R.* v. *Wright*, 3 *B. and Ad.* 681. The same right exists with respect to water; *Williams* v. *Wilcox*, 7 *L. J. N. S. Q. B.* 229. Digging trenches to lay down pipes for the supply of gas from mains to private houses may be an obstruction; *Reg.* v. *The*

Longton Gas Company, 29 *L. J. N. S. M. C.* 118; also the laying down a tramway along a public street; *Reg.* v. *Train*, 31 *L. J. N. S. M. C.* 169; and exhibiting effigies at a window and thereby attracting a crowd; *R.* v. *Carlile*, 6 *C. and P.* 636. The building of a wall or embankment, partly in the bed of a navigable river, does not *necessarily* constitute a nuisance; the question whether it is so or not is one of fact, and if the finding negatives any actual obstruction, that is in effect an acquittal; *Reg.* v. *Betts*, 16 *Q. B.* 1022; *I. L. R.* 20 *Cal.* 665. As to compensatory benefit to the public, see *R.* v. *Ward*, *ante*, p. 333. It has, however, been held in Calcutta that a finding that a lane has been made narrow and less commodious than before to the public in consequence of a fence erected alongside of it by the accused is not sufficient to support a conviction under this section; *Emp.* v. *Ram Sing*, 11 *C. L. R.* 462; and, both in Madras and Calcutta, it has been held that obstruction to the public will not bring an act under this section, but that there must be proof of obstruction to some particular person or class of persons; *Reg.* v. *Khader Moidin*, *I. L. R.* 4 *Mad.* 235; *In re Umesh Chandra*, *I. L. R.* 14 *Cal.* 656.

The property must be either in possession or charge of the defendant; but it must be so in his possession that he must necessarily be aware of its condition, and have control over it. The owner of a wrecked and abandoned ship is not answerable for injury done by it; *Brown* v. *Mallett*, 5 *C. B.* 599.

NEGLIGENCE.

Sect. 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.**

Sect. 283. See *ante*, p. 344.

Sect. 284. *Negligent Conduct with respect to any Poisonous Substance.*—**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.

Sect. 285. *Negligent Conduct with respect to any Fire.*—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.

Sect. 286. *Negligent Conduct with respect to any Explosive Substance.*—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.

Sect. 287. *Negligent Conduct with respect to Machinery.*—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.

Sect. 288. *Negligence in pulling down or repairing Buildings.*—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.

Sect. 289. *Negligence with respect to any Animal.*—Whoever knowingly or negligently omits to 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.

Sect. 290. See *ante*, p. 328.

Offences under Sects. 282, 284, 287, *and* 288 *are triable by a Presidency Magistrate, or a Magistrate of the first or second class; those under Sects.* 285, 286, *and* 289, *by any Magistrate. A summons should issue in the first instance. Police officers, except under Sects.* 284, 287, *and* 288, *may arrest without a warrant. Defendants are bailable. Not compoundable.*

Evidence.

As in the case of rash driving, &c., it will be necessary to prove that there was some one in the way to be injured by the negligence of the defendant.

The negligence, rashness, or knowledge must be positively made out. If "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"; *per Williams*, J., in *Cotton* v. *Wood*, 29 *L. J. N. S. C. P.*, p. 335. In a case of a horse running away and injuring the plaintiff. *Erle*, C. J., said:—"The plaintiff is not entitled to have his case submitted to the jury, unless he gives some affirmative evidence of negligence in the defendant. The negligence imputed here is either the unskilful management of the horse, or imprudence in taking a vicious horse into the public street. The evidence is, that the defendant was riding the horse, at a walk, when the animal became restive, and, though the defendant did all he could, he was overpowered, and the horse ran on to the pavement and killed the husband of the plaintiff. I can see here no affirmative evidence whatever of any want of skill on the part of the defendant. Then, is there any evidence of a culpable want of prudence in the defendant in bringing the horse into a public street? I can see none. The horse was brought the day before, and the defendant was out trying his new purchase himself. It is said that this itself is negligence, and that he ought to have ascertained the temper of the horse before he tried it. But I do not think so. There is not the slightest evidence that the defendant had any knowledge whatever of the vicious character of the horse, and he must be presumed, therefore, to have been entirely ignorant of it. And I do not think that riding a horse of which a man himself has no experience in a public street is sufficient evidence on which to rest an action for negligence"; *Hammack* v. *White*, 31 *L. J. N. S. C. P.*, p. 180. In another case, in which a man was indicted for manslaughter, in consequence of a death caused through a rocket having exploded in his shop, and set fire to the place where the deceased was, *Cockburn*, C. J., said:—"The prisoner kept a quantity of fireworks in his house, but that did not alone cause the fire by which the death was occasioned. It was the superadded negligence of some one else that caused it. Had the death proceeded from the natural consequence of this unlawful keeping of the fireworks, as,

for instance, if from the prisoner's negligent keeping of them a rocket had gone off by spontaneous combustion, and so caused the death, the conviction might, I think, 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*, 28 *L. J. N. S. M. C.*, p. 28; see, also, pp. 71-72.

With respect to negligent keeping of animals, the rules which govern the right to recover for damage done by them, as far as they concern the present set of sections, are as follow:—The owner of a wild animal, as a lion or a bear, which escapes and does damage, is liable for it without any proof of notice of the animal's ferocity; but where the damage is done by a domestic animal, as an ox, a dog, &c., the plaintiff must shew that the defendant knew the animal was accustomed to do mischief; *R.* v. *Huggins*, 2 *Ld. Raym.* 1583. The gist of the action is not merely the negligent keeping, but the keeping with the knowledge of the mischievous propensity; *Jackson* v. *Smithson*, 15 *M. and W.* 563; *May* v. *Burdett*, 9 *Q. B.* 101; consequently, if a defendant be charged with negligence in keeping a wild animal, by which there is probable danger to any person, the fact of the animal being *feræ naturæ* will go far towards rendering less necessary strict proof of negligence, if danger have arisen from it. Section 289, however, does not refer to savage animals alone, but to any animal, and it is quite possible that a good-tempered pony negligently allowed to get loose and run through a crowded bazaar would create a considerable amount of danger to the passers-by; *In re Chand Manal*, 19 *W. R. Cr.* 1; but it must be shewn that there is probable danger to life, or of grievous hurt; 3 *Mad. H. C. Rep. App.* 33. An elephant does not belong to a class which, according to the experience of mankind, is not dangerous to man; therefore, the owner of one keeps it at his own risk; *Filburn* v. *The People's Palace Co.*, 25 *Q. B. D.* 258.

If a dog, accustomed to bite, be let loose at night for the protection of the defendant's yard, and the injury arise from the plaintiff incautiously going into the yard after it has been shut up, no action will lie; *Brock* v. *Copeland*, 1 *Esp.* 203; *Deane* v. *Clayton*, 1 *B. Moo.* 225, 245. But though a person has

a right to keep a fierce dog to protect his property, he must not place it in the open approaches to his house, so as to injure persons lawfully coming to the house; *per Tindal*, C. J., in *Sarch* v. *Blackburn, M. and M.* 505; see, also, *Blackman* v. *Simmons*, 3 *C. and P.* 138.

Plying for hire a boat which is out of order, and unfit to carry passengers, and taking therein a hundred passengers, should be charged under Sect. 282, and not under Sect. 336; *Reg.* v. *Khoda Jacla*, 1 *Bom. H. C. Rep.* 137.

C having returned to his house after dawn from watching his crops at night with a loaded gun, and finding his house door locked, placed the gun, loaded with the hammer down on the cap, on a cot outside his house, and went for a short time to a neighbouring house. In his absence the child of a neighbour came to the cot and began playing with the gun, which went off and killed the child; it was held that he could not be convicted under Sect. 286; *Emp.* v. *Chenchugadu*, *I. L. R.* 8 *Mad.* 421.

The accused, a horse-keeper, harnessed his master's horse, put it into his carriage, and then went away, leaving the horse and carriage standing in the road of the compound of his master's house without any justification. It was held that the accused had committed an offence under Sect. 289. The horse was not the less in the actual possession of the servant, because it was for some purposes in the constructive possession of his master; *Emp.* v. *Nathia Reva*, *B. R.* 21*st April* 1881; see, also, *In re Chand Manal*, 19 *W. R. Cr.* 1.

Omits to take such order with.—A man in order to omit, &c., must know of the circumstances that render it necessary to take the order. Consequently, one man cannot be held liable for the acts of another serving under him, unless it be shewn that he ordered the act to be done, or knew of circumtances which rendered it dangerous; *Hardcastle* v. *Bielby* [1892], 1 *Q. B.* 709.

The word "injury" includes any harm illegally caused to the property of any person, and is not confined to injury to the person only; *Reg.* v. *Natha Lalla*, 5 *Bom. H. C. Rep. C. C.* 67.

REPETITION OF NUISANCES.

Sect. 291. *Continuance of nuisance.*—**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.**

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

It must be shewn that the person charged under this section had, on some previous occasion, committed the particular nuisance and had been personally enjoined not to repeat or continue it, and had repeated or continued it; *Emp.* v. *Jokhu, I. L. R. R.* 8 *All.* 99; the injunction should appear in evidence, and be recorded in the case; a proclamation to the public, or a portion of the public, is not sufficient; *Emp.* v. *Gunga Sonha, B. R. 24th June* 1886.

By Act X. of 1882, Sect. 143, a Magistrate of the district, or a Magistrate of a division of a district, or any Magistrate specially empowered, may enjoin any person not to repeat or continue a public nuisance, as defined in the Indian Penal Code, or under any local or special law.

Sections 133, 142, and 144 of the same Act also provide for a summary suppression of nuisances.

OBSCENITY.

Sect. 292. *Sale of Obscene Books.*—**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.**

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.**

Sect. 293. *Possession of Obscene Books for Sale.*—**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.**

Sect. 294. *Obscene Acts and Songs.*—**Whoever, to the annoyance of others,**

(*a*) does any obscene act in any public place, or

(*b*) sings, recites or utters any obscene song, ballad or words, in or near any public place,

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

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A warrant should issue in the first instance. Police officer may arrest without a warrant. Defendants are bailable. Not compoundable.

Note.

The exception in Sect. 292 *must be also negatived in a charge under Sect.* 293, *for having an obscene representation in possession.*

Evidence.

The sale, distribution, or exhibition of the obscene print, &c., or the singing, reciting, or uttering of obscene words must be proved. If the charge be for importing, printing, or having in possession obscene works, it must be shewn that the act charged was for the purpose of sale, distribution, or public exhibition. The mere having in possession for the purpose of gratifying the possessor's prurient feelings is not an offence. The sale of an

obscene print to a person in private, he having, in the first instance, requested that such prints should be shewn to him, his object being to prosecute the seller, is sufficient to support a charge under these sections; *Reg.* v. *Carlile*, 1 *Cox's C. C.* 229.

It is not easy to define "obscene" legally. Webster defines it as "offensive to chastity and delicacy; expressing or presenting to the mind or view something which delicacy, purity, and decency forbid to be exposed." *Cockburn*, C. J., in *Reg.* v. *Hicklin*, *L. R.* 3 *Q. B.*, at p. 371, thus defines it in respect to a printed publication: "The test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." In order to determine what is legally obscene, all the surrounding circumstances must be looked at. The detailed delineation of the private parts in a medical book would not be legally obscene; nor would, in most cases, an *artistic* representation on canvas of a nude female be so, but a photograph of a naked woman, if exposed for sale, would be obscene. The first is necessary for the education of those who have to practise medicine or surgery; the second would have those points removed from it or modified, which would excite obscene ideas; but the third would be immodest in its mode of production, and could be intended for no purpose which decency would permit.

The case of *Reg.* v. *Hicklin* was approved of in *Steele* v. *Brannan*, *L. R.* 7 *C. P.* 261; and followed in *Emp.* v. *Indarman*, *I. L. R.* 3 *All.* 837; and *Emp.* v. *Parashram Eshwant*, *I. L. R.* 20 *Bom.*, 193.

A book may be obscene although there is only one obscene passage in it; *Emp.* v. *Indarman*, *I. L. R.* 3 *All.* 837; and it is no defence that the book is sold and distributed in good faith in prosecution of a religious controversy; *ib.*; see, also, *Reg.* v. *Hicklin*, *L. R.* 3 *Q. B.* 367; or that it is the report of a trial which contains matter of an obscene and demoralising nature; *Steele* v. *Brannan*, *L. R.* 7 *P. C.* 261. The question of obscenity is one of fact, and it is open to the accused to shew by evidence and argument that the effect of the publication is not necessarily

to deprave or debauch, or, if pictures, that they are artistic or conventional or otherwise not polluting to the morals of the public ; *Emp.* v. *Parashram Eshwant*, *I. L. R.* 20 *Bom.*, 193.

The provisions of Sect. 294, as now altered by Act III. of 1895, prevent the *mere* recitation, &c., of obscene words in a public place being punishable; to constitute an offence, there must be persons present who hear them, and they must further be annoyed by the recitation. This is in accordance with English law ; *Strickland* v. *Hayes*, (1896) 1 *Q. B.*, 290.

A *lávni* is not necessarily an obscene song. It may be, and often it is so, but it must be proved that the words of it were actually obscene before a conviction can take place under Sect. 294 ; *Reg.* v. *Ganu bin Krishna*, 4 *Bom. H. C. Rep. C. C.* 25.

In charges under Sects. 292 and 294, specific allegations ought to be made as to the representations and words alleged to have been exhibited and uttered and charged to be obscene, and the Court trying the case should distinctly find what was exhibited or uttered, and what it adjudges obscene ; *Reg.* v. *Upendronath Doss*, *I. L. R.* 1 *Cal.* 356.

On a conviction under Sect. 292 or Sect. 293 all copies of the thing in respect of which the conviction is had may be ordered to be destroyed ; Act X. of 1882, Sect. 521. A conviction under the Dramatic Performances Act is no bar to a conviction under Sect. 294 ; Act XIX. of 1876, Sect. 9.

The Ceylon Penal Code omits the exception to Sect. 292.

LOTTERIES.

Sect. 294A. *Keeping Lottery Office.*—**Whoever keeps any office or place for the purpose of drawing any lottery not authorised by Government, 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 publishes any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person, on any event or contingency relative or applicable to the drawing of any ticket,

lot, number or figure in any such lottery, shall be punished with fine which may extend to one thousand Rupees.

Triable by any Magistrate. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable. Sanction required under Sect. 196, *Cr. P. C.*, 1882.

Evidence.

Prove that the accused kept an office or place for the purpose of drawing a lottery not authorised by Government, or that he published a proposal for the purpose set out in the second clause of the section.

The words "any such lottery" in the second paragraph of this section refer to any lottery "not authorised by Government," whether the lottery is to be drawn within British India or out of it; *Emp.* v. *Mancharji Kawasjee*, *I. L. R.* 10 *Bom.* 97. The editor of a newspaper who in Bombay inserts in his newspaper any advertisement relating to a foreign lottery "publishes" the proposals contained in such advertisement within the meaning of this section; *ib.* See, also, *Rex* v. *Smith*, 4 *T. R.* 414.

The Ceylon Penal Code omits the words "not authorised by Government."

CHAPTER XV.

OFFENCES RELATING TO RELIGION.

Sect. 295. *Injuring Place of Worship.*—**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 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.**

Sect. 296. *Disturbing a Religious Assembly.*—**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.**

Sect. 297. *Trespassing on Burial Places, &c.*—**Whoever, with the 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 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.**

Sect. 298. *Uttering Words, &c., with Intent to wound Religious Feelings.*—**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.**

Triable by a Presidency Magistrate or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may arrest without a warrant under Sect. 295, 296, *and* 297, *but not under Sect.* 298. *Defendants are bailable. Offences under Sects.* 295 *to* 297 *are not compoundable, those under Sect.* 298 *are compoundable.*

Evidence.

Prove the destruction, damage, defilement, disturbance, trespass, indignity offered, or uttering of words. Prove also that the place is a place of worship, or an object held sacred by a class of persons. An "object" in Sect. 295 does not include an animate object; *Emp.* v. *Imam Ali, I. L. R.* 10 *All.* 150, followed in *Romesh Chunder* v. *Hiru Mondal, I. L. R.* 17 *Cal.* 852.

In the case of a person defiling a place of worship, or offering an indignity to a human corpse, the intention with which the act was done, or the knowledge of what was likely to be the effect of the act, may *almost* be assumed from the nature of the act, but there are some cases in which it would be required to be formally proved. A Hindu who has sexual intercourse with a woman in the enclosure surrounding the tomb of a Mahomedan Fakir which is not shewn to be used for worship, is not guilty of an offence under Sect. 295, but he may be convicted under Sect. 297; *In re Ratna Mudali, I. L. R.* 10 *Mad.* 126.

A, B, C and D were co-owners of a plot of land in which they were accustomed to bury their dead. A and B opened a saw-pit close to the grave of D's relations, but did not disturb

any of their graves; it was held that A and B could not be convicted under Sect. 297: *In re Khaja Mahomed*, *I. L. R.* 3 *Mad.* 178.

In the cases of destruction, damage, or trespass, the intention or knowledge must always be proved directly, if it is not sufficiently shewn by the surrounding facts.

In the case of disturbance of religious worship, the section does not in so many words require proof of intention, but a person does not do a thing "voluntarily" unless he uses means whereby he intended to cause it or means which he knew or had reason to believe to be likely to cause it. It is necessary, however, to prove that there was an assembly lawfully engaged in public worship, or in religious ceremonies; that the assembly was in fact disturbed, and that the defendant did the act causing the disturbance, with the intention of causing disturbance, or knowing or believing that such act was likely to cause a distubance; *per Mahmood*, J., in *Emp.* v. *Ramzan*, *I. L. R.* 7 *All.* 461; see, also, *Ata Ullah* v. *Azim Ullah*, *I. L. R.* 12 *All.* 494 (*F. B.*), a civil case arising out of the dispute which gave rise to the foregoing case, and in which the judgment of *Mahmood*, J., in that case was discussed and approved of. See further, *Jangu* v. *Ahmad*, *I. L. R.* 13 *All.* 419 (*F. B.*); and *Jaipál Gir* v. *Dharmapála*, *I. L. R.* 23 *Cal.* 60. The worship referred to must be real worship, and not a cloak for doing something else. If the worship or ceremony is commenced by an act which is not lawful, it cannot be said that the persons were engaged in it from the mere fact of their falling into a posture of worship, although such worship be real; *ib.*

In the case of uttering words, the *intention* with which the words were uttered must be *strictly* proved; and it is not sufficient to shew that the utterer *knew* that his act was *likely* to wound the religious feelings of any person. Many of the great Hindoo festivals at Juggurnauth, Allahabad, Hurdwar, and other places, where thousands of Hindoos are gathered together for the performance of religious ceremonies, are likewise attended by other persons whose object it is to engage the worshippers in friendly discussion on religious subjects. Persons thus engaged

commit no offence within any of the foregoing provisions of the Code. If their orderly proceedings are interrupted by other persons who seek to produce angry discussion, to create a disturbance, and to break up the congregation, a disturbance thus created, though it may be said to be indirectly occasioned by the original discussion, cannot properly be deemed to be voluntarily caused by the promoters of such discussion. So, if in the heat of an argument, words are used which do wound the religious feelings of any person, they do not constitute an offence, because they would not be uttered with the deliberate intention of wounding the religious feelings of any person. Some people have thought that these sections are very dangerous ones; but if the matter be calmly considered, it will be seen that no missionary can come within the provisions of Sect. 298, unless he grossly misconducts himself, because, in order to offend against that section, he must utter words with the deliberate intention of wounding the religious feelings of some person, which, if he is at all keeping within the limits of his office, cannot be the case, as his intention is not to insult, but to convince. The Ceylon Legislature have apparently considered Sect. 298 as likely to be misconstrued and have omitted it from the Ceylon Penal Code.

It has been decided in the High Court of Madras that the interpolation of a forbidden chant in an authorized ritual is an offence under the Indian Penal Code; but as the report makes no mention of the sections under which the defendants were charged, it is only possible to assume that the Court must have meant under some one or all of Sects. 296, 297, and 298; *Narasimah* v. *Stree Krishna*, 2 *Mad. Jur.* 236.

CHAPTER XVI.

OFFENCES AFFECTING THE HUMAN BODY.

OFFENCES AFFECTING LIFE.

CULPABLE HOMICIDE AND MURDER.

Sect. 299. *Culpable Homicide.*—**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 knowledge 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.**

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.

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.

Sect. 300. *Murder.*—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or

Secondly, if it is done with the intention of causing such bodily injury as the offender knows is likely to cause the death of the person to whom the harm is caused, or

Thirdly, 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

Fourthly, 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 did 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.

Exception 1.—When Culpable Homicide is not Murder.—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.

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 provocation, 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.

(*t*) Z strikes B. B is by this provocation excited to violent rage. A, a bystander, 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 culpable homicide, but A is guilty of murder.

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 horsewhip 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 horsewhipped, 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.

Sect. 301. *Culpable Homicide by causing the Death of the Wrong Person.*—**If a person, by doing anything 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**

Sect 302. *Punishment for Murder.*—**Whoever commits murder shall be punished with death, or transportation for life, and shall also be liable to fine.**

Sect. 303. *Punishment for Murder by a Life-Convict.*—**Whoever, being under sentence of transportation for life, commits murder, shall be punished with death.**

Sect. 304. *Punishment for Culpable Homicide not amounting to Murder.*—**Whoever commits culpable homicide not amounting to murder shall be punished with transporta-**

tion 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.

Sect. 304A. *Death through Rashness or Negligence.*—**Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.**

Offences under Sects. 302, 303, *and* 304 *are triable by the Court of Session; those under Sect.* 304A *by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable, except under Sect.* 304A. *Not compoundable. Sentence of death passed by the Court of Session must be confirmed by the High Court.*

Charge.

That you, the said A B, on or about the day of at , did commit murder by causing the death of one C D, and that you have thereby committed an offence punishable under Sect. 302 of the Indian Penal Code, and within, &c.

Evidence.

Culpable homicide is the causing of death; *first*, by doing any act with the *intention* of causing death; *secondly*, by doing any act with the *intention* of causing such bodily injury as is likely to cause death; *thirdly*, by doing any act with the *knowledge* that by doing such act death is likely to be caused; *fourthly*, by any illegal omission, with the *intention* that such omission should cause death; *fifthly*, by an illegal omission, with the *intention* that such

omission should cause such bodily injury as is likely to cause death; *sixthly*, by any illegal omission, it being *known* that death is likely to be the result of such omission. These last three cases are under Sect. 32, which provides that "words which refer to acts done, extend also to illegal omissions."

To constitute culpable homicide there must be *intention* in doing the act, or in the omission, or else *knowledge* of the probable result of the act or omission, and the prosecution must establish the intention or knowledge which the law requires to make up the offence; 1 *R. C. C. Cr.* 5. Where these are not established, or where they are negatived, the prosecution must fail, in respect to a charge of murder or culpable homicide not amounting to murder; 5 *R. J. and P.* 217; and the offence is reduced to grievous hurt, *per Loch* in *Reg.* v. *Madar Jolaha*, 8 *W. R. Cr.* 28; and *Reg.* v. *Megha Meeah*, 2 *W. R. Cr.* 39; or, in a case where certain persons whom the accused, a ferryman, was carrying across a river in a boat, which sank, were drowned, to the offence of negligently conveying persons by water for hire in a vessel overloaded or unsafe; *In re Mugnee Behara*, 11 *W. R. Cr.* 3. These two decisions, however, are modified, if not actually overruled, by Sect. 304A, introduced into the Penal Code by Act XXVII. of 1870, which provides an express punishment for the case of any person committing the offence of "causing the death of any person by doing any rash or negligent act not amounting to culpable homicide," but the act done must not amount in itself to an offence. In the cases of express intention to kill, the homicide is usually committed in secret, consequently, it is rarely practicable to substantiate it by direct and positive testimony, but it must ordinarily be shown by circumstantial evidence. This may be lying in wait, antecedent menaces, former grudges, and concerted schemes, to do the deceased some bodily harm; 1 *Hale*, 451. The law further provides that a man must be held to have intended that which is the natural consequence of his acts; 1 *R. C. C. Cr.* 91; and if, by any deliberate act, any one is killed, it is culpable homicide, at the least; thus, going deliberately with a horse used to strike, or discharging a gun among a number of people; 1 *Hawk.* c. 11, s. 12; and he is ordinarily held to know the probable

consequence of his act: thus, where a person takes up a heavy log of wood and strikes another with it on a vital part with such force as to cause his death almost instantaneously, the act must be held to have been done with the knowledge that it was likely to cause death; *Reg.* v. *Rajoo Ghose*, 7 W. R. Cr. 106.

Explanation 1 to Sect. 299 is in accordance with English law, *i.e.*, so far as it renders a man responsible for a homicide committed under the circumstances therein set forth, but it must be read with Illustration (*b*) to Sect. 300, *ante*, p. 363, which alters that law as laid down in 1 *Hale*, 428, that if a man have a disease, which in all likelihood would terminate his life in a short time, and another give him a blow or a wound, or hurt, which hastens his death, this is such a killing as would amount to murder. And the alteration is this, that, in order to amount to murder, the slayer must *know* of the disease which renders the blow or wound fatal, and must also know that under the circumstances, such blow, &c., as he gave was likely to prove fatal; 1 *R. C. C. C.* 77. The *second explanation* affirms the decision in the case of *Reg.* v. *Holland*, 2 *M. and Rob.* 351; see, also, 3 *Mod. Dig.* 127, *s.* 174, that if a man be wounded, and the wound turn to a gangrene or fever for *want* of proper application, or from neglect, and the man die of the gangrene or the fever, or, if it become fatal from the refusal of the party to submit to a surgical operation, this is also such a killing as would constitute culpable homicide; 1 *Hale*, 428; or if the wound render necessary a surgical operation, such as an amputation; *R.* v. *Saxton*, 3 *M. Dig.* 127, *s.* 174; for when a wound is given, which, in the opinion of competent medical advisers, is dangerous, and the treatment which they *bona fide* adopt is the immediate cause of death, the party who inflicted the wound is criminally responsible; *Reg.* v. *Pym*, 1 *Cox's C. C.* 339. *Secus*, if the death of the party were caused by improper applications to the wound, and not by the wound itself; 1 *Hale*, 428. If the death happened through improper applications, or culpable negligence in the attendants, if they were hired for the purpose of taking care of the patient, it would be culpable homicide in them.

The *third explanation* of Sect. 299 alters the English law, doubtless to do away with the great difficulty there has always

been to prove that the child killed had an existence independent of that of its mother. The words, however, of the section are ambiguous. They simply say that the causing of death *may* amount to culpable homicide, but then no provision is made for the circumstances under which it is homicide. A part of the child must have been brought forth, which must mean exposed beyond the external portion of the *vagina*; therefore, the operation of *craniotomy*, which would ordinarily be performed before any part of the child had been expelled, would not be culpable homicide. But suppose a foot or a leg had been exposed and drawn up again, as is recorded to have been the case when Rachel brought forth Esau and Jacob, and then from some circumstance or another, *craniotomy*, or a similar operation resulting in the death of the child should become necessary? Under the strict words of this clause such an act would constitute culpable homicide, and would not come under any of the general exceptions contained in Sects. 87-92, *ante*, pp. 90 to 101, but for the provisions of Sect. 315.

We next have to consider how culpable homicide may be committed by *omission*. The omission must be illegal, *i. e.*, it must be an omission which is punishable under the Penal Code, or an omission which is prohibited by law, or an omission which furnishes ground for a civil action, Sect. 43, *ante*, pp. 39-40, or the wilful omission of a duty cast upon a person by the law; *Reg.* v. *Shepherd*, 31 *L. J. N. S. M. C.* 102. If the omission be with the intention to cause death, there is not the slightest doubt that if death be caused by the omission, the offence will be culpable homicide amounting to murder. If the omission be not with the deliberate intention of causing death, then the defendant must know that he is likely to cause death by such omission. There is no authoritative definition of what constitutes knowledge, but in Sect. 26, *ante*, p. 33, it is thus enacted: "A person is said to have 'reason to believe' a thing if he has sufficient cause to believe that thing, but not otherwise"; so a man may be said to know if he has sufficient grounds from which a person of ordinary intelligence and skill might draw an inference which would constitute knowledge. Thus, an engine-driver on a railway seeing a danger-signal must be held to know that there is danger, and to take the risk of *any* danger there may

be if he disregards it. So, if it be the duty of an engine-driver to look out for a signal which will warn him of danger, if there be any, he must be held responsible for all the consequences of his omission if he neglects to look out for the signal. But the omission must be one of an absolute duty, as in the case of *Reg.* v. *Hughes*, 26 *L. J. N. S. M. C.* 202, where it was the duty of a banksman to place a stage on the mouth of the shaft of a coal-pit to receive a loaded truck run down to it on a tramway: but he neglected to place the stage, whereby the truck fell down the shaft and killed a workman who was at the bottom. In this case, *Lord Campbell*, C. J., said:—"The death of the deceased was the direct consequence of the omission of the prisoner to perform his duty. If the prisoner, of malice aforethought, and with the premeditated design of causing the death of the deceased, had ommitted to place the stage on the mouth of the shaft, and the death of the deceasd had thereby been caused, the prisoner would have been guilty of murder. According to the common-law form of an indictment for murder by reason of the omission of a duty, it was necessary that the indictment should allege that it was the duty of the prisoner to do the act, or to state facts from which the jury might infer that it was his duty. But it has never been doubted that if death is the direct consequence of the malicious omission of the performance of a duty (as of a mother to nourish her infant), this is a case of murder. If the omission was not malicious, and arose from negligence only, it is a case of manslaughter." *Lord Coleridge*, C. J., in *Reg.* v. *Downes*, 1 *Q. B. D.*, p. 30, says:—"To cause death by culpable neglect is manslaughter." A, B, and C went into a field in proximity to roads and houses, taking with them a rifle, which would be deadly at a mile, for the purpose of practising firing with it. B placed a board which was handed to him by A, in the presence of C, in a tree in the field as a target. All three fired shots at the target so placed from a distance of 100 yards, but no precautions were taken to prevent danger from such firing. A shot fired by one of the three, but by which was not proved, killed a boy in a garden 393 yards from the firing point. It was held that all had been guilty of a breach of duty in

firing at the spot in question without taking proper precautions to prevent injury to others, and were rightly convicted of manslaughter; *Reg.* v. *Salman*, 6 *Q. B. D.* 79. This last case would, in India, have probably been held to fall under Sect. 304A, and so would many other cases of negligent omission. If the charge be of culpable homicide through neglect to provide food to a child, the prosecution must shew that it was the defendant's duty to supply food, and also that the child was of such tender years that it could not provide food for itself; *R.* v. *Friend*, *R. and R.* 20; *Reg.* v. *Marriott*, 8 *C. and P.* 425; and also that the defendant was in the possession of means to provide the food; *Reg.* v. *Chandler*, *Dears. C. C.* 453. The same principles apply in the case of a charge against a woman arising from the death of her daughter in consequence of her not having provided a midwife for her in childbirth: *Reg.* v. *Shepherd*, 31 *L. J. N. S. M. C.* 102.

Where the prisoner, a woman of mature age and without any means of her own, lived with and was supported by the deceased, her aunt, a woman of 75, and no one else lived with them, it was held that there was a duty imposed upon the prisoner to see that the deceased was supplied with food necessary to sustain life, and it being proved that food was supplied at the house on account of the deceased, and that the death of the deceased was accelerated by the prisoner's neglect of such duty, it was further held that she was properly convicted of manslaughter. *Reg.* v. *Instan*, [1893], 1 *Q. B.* 450.

It must also be shewn that the neglect or omission had the effect of shortening life; *per Lord Coleridge*, C. J., in *Reg.* v. *Murby*, 8 *Q. B. D.*, p. 574.

To sum up, in cases of *omission* or *non-feasance*, it is necessary to prove the duty lying on the accused, his neglect to perform it, and that such neglect was the direct cause of death or of shortening life.

Killing when doing some other Act.—Under the English law, the quality of this act differs under different circumstances. If a man shoot at another's poultry, with intent to steal them, and by accident kill a man, it is murder; if without such an intent, it is

manslaughter; the act of shooting at the poultry being unlawful but not felonious; *Fost.* 258. If a man fired at his own poultry, and killed a man, it would be misadventure only, unless it were in a place where persons were likely to pass, when it would be manslaughter; *R.* v. *Burton*, 1 *Str.* 481. The illustration (e), appended to Sect. 299, *ante*, p. 361, however, does away with this distinction, and provides that in such cases the slayer has committed no offence in respect of the homicide. Of course, if the fowwere in a place where the act of firing at it was likely to cause death, from the number of persons living or passing in the neighbourhood, that fact would render the slayer guilty of culpable homicide, or of an offence under Sect. 304A.

To constitute culpable homicide, the killing must further be by a person of sound memory and discretion. It cannot be done by a child under seven years of age; Sect. 82, *ante*, p. 79; nor is it an offence if done by a child above seven years of age and under twelve, unless he has attained sufficient maturity of understanding to judge of the nature and consequences of his act; Sect. 83, *ante*, p. 79; nor by Sect. 84, *ante*, p. 81, if the person committing the homicide is insane. As to the effect of drunkenness, see Sects. 85 and 86, *ante*, pp. 87 and 88.

Murder.—Under the English law murder is killing with malice aforethought. Malice is either expressed or implied. Express malice is the positive possession of the intention referred to in the first three clauses of Sects. 300, *ante*, p. 362; implied malice is either the possession of a general intention of such a nature implied from the acts of the accused, or the wanton running of the risk mentioned in the fourth clause of the same section. Express malice is shewn by lying in wait, antecedent menaces, former grudges, and concerted schemes, to do the deceased some bodily harm; 1 *Hale*, 451. So, if a man resolve to kill the next person he meets, and do kill him, it is murder, although he knew him not, for it is universal malice; 4 *Bl. Com.* 200. If a man wilfully poison another, in such a deliberate act, the law presumes malice, although no particular enmity be proved; 1 *Hale*, 455.

Under the Penal Code the acts which constitute murder are more particularly described as—(1) doing an act with the *intention*

thereby of causing death; (2) doing an act with the intention of causing such bodily injury as the offender *knows is likely to cause* the death of the person to whom the harm is caused, *i. e.*, if the offender *knows* that the *particular person injured* is likely, either from peculiarity of constitution, or immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death; *Reg.* v. *Govinda*, *I. L. R.* 1 *Bom.* 342, *per Melvill*, J.; (3) doing an act with the intention of causing some bodily injury, which injury is *sufficient*, *in the ordinary course of nature*, to cause death; between these cases the distinction is fine, but appreciable, and is a question of the degree of probability, which will generally resolve itself into a consideration of the nature of the weapon used; a blow from the fist or a stick on a vital part may be *likely* to cause death, but a wound from a sword in a vital part is *sufficient* in the ordinary course of nature to cause death; *Reg.* v. *Govinda*, *ubi supra*; (4) doing an act *without sufficient excuse*, *knowing* that the act was so eminently *dangerous*, that it must in all probability cause death, or such bodily injury as was likely to cause death. This last cause applies to cases where there is no intention to cause bodily injury or death, but is not necessarily limited to these; *Reg.* v. *Govinda*, *ubi supra*. Under it will fall such acts, as going deliberately with a horse used to strike, or discharging a gun among a multitude of people, 1 *Hawk.* c. 11, s. 12. To bring a case under this clause, it must be shewn distinctly that the accused at the time of committing the act charged knew that, *in all probability*, it would be likely to cause death, or that it would bring about such bodily injury as would be likely to cause death. Therefore, where a poisonous drug was administered to a woman to procure miscarriage, and there was no evidence that the accused had any knowledge of the properties of the drug beyond the immediate purpose for which they employed it, or that it was likely to cause death, or such injury as was likely to result in death, it was held that they were not guilty of murder, but of causing death by an act done with the intention of causing miscarriage, under Sect 314; *Reg.* v. *Kalachand Gope*, 10 *W. R. Cr.* 59; see, also, the judgment of *Peacock*, C.J., in *Reg.* v. *Gora Chand*, 5 *W. R. Cr.* 45, quoted in full. *post*, p. 389. If the accused,

believing a man to be dead, and, in order to conceal a murder which he supposes he has committed, sets fire to a hut in which the man is, and so actually causes his death, the accused is not guilty of murder; *Emp.* v. *Khandu*, *I. L. R.* 15 *Bom.* 194. This is a case, however, which must be followed with a great caution, as the decision depended entirely upon the particular facts disclosed in the evidence, and the inferences to be drawn from them.

Killing under Provocation, *Sect.* 300, *Exception* 1. No *provocation* whatever can render homicide justifiable. If a man kill another on slight provocation only, it is murder; but if on grave provocation, the offence is only reduced to manslaughter, or culpable homicide not amounting to murder. The provocation must, however, be grave and sudden, and must also be sufficient to deprive the offender of the power of self-control, and it is essential that it should be proved that the homicide was committed while the accused was smarting under a provocation so recent and so strong that he cannot be considered at the moment the master of his own understanding, and before there has been time for the blood to cool, and reason to resume its influence; *Reg.* v. *Nokul Nushyo*, 7 *W. R. Cr.* 27; *Reg.* v. *Bechoo Sahoot*, 19 *W. R. Cr.* 35; *Reg.* v. *Somiruddin*, 24 *W. R. Cr.* 18; *Emp.* v. *Devji Govindji*, *I. L. R.* 20 *Bom.* 215, this is, of course, a question of fact, and the High Court will not interfere with the finding of a jury on that point; *Reg.* v. *Sokrau*, 13 *W. R. Cr.* 33; but there must be some proportion between the provocation and the resentment; *Reg.* v. *Hari Giri*, 1 *Ben. L. R. A. Cr.* 11; and in determining whether the provocation be so grave and sudden as to deprive the offender of the power of self-control, it is admissible to take into account the condition of mind in which the offender was when the provocation was given; *Emp.* v. *Khogayi*, *I. L. R.* 2 *Mad.* 122, where the accused had been justly enraged at the conduct of deceased's son and been even foully abused by the deceased himself; but the use of rather disrespectful words, not amounting to abuse, by a wife to a drunken husband is not sufficient to excuse the fury of the husband; *Emp.* v. *Sakharam*, *I. L. R.* 14 *Bom.* 561. In another case, M, a common workman, saw N committing adultery with his wife, and on the

following morning, while labouring under the excitement provoked by their misconduct, came upon them eating food together in his (M's) house, while his wife had neglected to prepare food for him. M took up a bill-hook which was at hand and killed N. It was held that if M connected the subsequent conduct of N and his wife with their misconduct of the previous evening, and regarded it as an open avowal of their criminal relations, which, under the circumstances, he might have done, the provocation was sufficiently grave and sudden to deprive him of self-control, and to reduce the offence from murder to culpable homicide not amounting to murder; *Boya Munigadu* v. *Reg.*, *I. L. R.* 3 *Mad.* 33. 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 pommel 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 that it drew a great deal of blood, it was holden to be manslaughter only; *R.* v. *Steadman*, *Fost.* 292. An unwarrantable imprisonment of a man's person has been holden sufficient provocation to make a killing, even with a sword, manslaughter only; *R.* v. *Buckner*, *Stg.* 467; *R.* v. *Withers*, 1 *East*, *P. C.* 233. Therefore, where a constable took a man without a warrant, upon a charge which gave him no authority to do so, and the prisoner ran away, and J S, who was with the constable all the time, ran after the prisoner, who, to prevent his being retaken, killed J S, it was holden to be manslaughter only, although, whilst under the charge of the constable, the prisoner struck the man who gave the charge, because a blow under the provocation of the illegal arrest would not justify the constable in detaining him, unless the blow were likely to be followed by dangerous consequences, and formed a new and distinct ground of detainer; *R.* v. *Curran*, 1 *Mood. C. C.* 132; see, also, *R.* v. *Thompson*, *ib.* 80. If a man pull another's nose, or offer him any other great personal indignity, and the other thereupon kill him, it is manslaughter only; *Kel.* 135; 4 *Bl. Com.* 191. Or, if a man take another in adultery with his wife, and kill him directly on the spot, it is manslaughter only; 1 *Hale*, 486; *R.* v. *Manning*, *T.*

Raym. 212; 1 *Ventr.* 158; *Reg.* v. *Kelly*, 2 *C. and K.* 814. So, if a father see another person committing an unnatural crime with his son and instantly kill him, it is manslaughter only; but if he hear of it, and go in quest of him, and kill him, it is murder; *Reg.* v. *Fisher*, 8 *C. and P.* 182. Under Sect. 100 of the Penal Code, the killing by a man of a person attempting to have connection with his wife might not even be culpable homicide if the killing of the assailant were in good faith, *i. e.*, in the belief that the killing of the assailant would prevent the commission of the act. The wife of the prisoner had been forcibly taken to the house of the deceased, a native physician, who alleged that her presence was necessary to the due performance of certain incantations. The prisoner, being suspicious of what was going to happen, was armed with a sword and watching from the roof of a house near. While so watching, he saw the deceased actually attempting to violate his wife. He then jumped down from the roof, and while the deceased, having risen from off the prisoner's wife, was escaping through a door, struck him with a sword in several places, from the effects of which he died. On appeal the High Court held that a conviction for murder could not be sustained, as the act was done under the influence of grave and sudden provocation which deprived the prisoner of the power of self-control; *Reg.* v. *Ramtahal Kahar*, 3 *Ben. L. R. A. Cr. J.* 33. If the deceased had been actually attempting to *ravish* the prisoner's wife, and had not ceased his attempt when the blows were struck, the homicide would have been justifiable under clause 3 of Sect. 100. Where two prisoners confessed that having caught the deceased in the act of committing adultery with the wife of one of them, they then and there killed him, the offence was held not to be murder; *Reg.* v. *Gour Chund Polie*, 1 *W. R. Cr.* 17; *Reg.* v. *Boodhoo*, 8 *W. R. Cr.* 38. Where the prisoners found the deceased lying in bed with their sister, and forthwith ill-treated him, and from the effects of the ill-treatment he died, it was held that the provocation was sufficient to reduce the offence to culpable homicide not amounting to murder; *Reg.* v. *Kasseemuddin*, 4 *W. R. Cr.* 38; *Reg.* v. *Maithya Gazee*, 6 *W. R. Cr.* 42. But where, under similar circumstances, the prisoner not only beat the deceased, but carried him for some distance to the

bank of a river, and there cut off his head, it was holden to be murder; *Reg.* v. *Yasin Sheikh*, 12 *W. R. Cr.* 68. So, too, where a man suspecting his wife, and seeing her leave the house, took up a hatchet, and following her found her sitting down and talking to her paramour, and there and then killed her, it was held to be murder, as he himself sought the provocation and prepared for it; consequently, it could not be said to be sudden; *Emp.* v. *Mohan*, *I. L. R.* 8 *All* 622. So, too, where the accused was the cousin of the woman's deceased husband, and after making preparation, as in the last case, followed her, and finding her actually having connection with her paramour, killed her, it was held to be murder; *Emp.* v. *Lochan*, *ib.* 635.

To take away the life of a wife because she is suspected, however strongly, of having committed adultery, is murder; *Reg.* v. *Kelly*, 2 *C. & K.* 814. A wife's resistance to an act of sexual intercourse by her husband is not grave and sudden provocation; *Emp.* v. *Dadabhai*, *B. R.* 19*th July* 1895; nor is her denial of a charge of adultery made by her husband, although he may have good reason to suppose the denial is false; *ib.*

Where a boy, after fighting with another, ran home bleeding to his father, and his father immediately took a small cudgel, and ran three-quarters of a mile to the place where the other boy was and struck him a single blow with the stick, of which blow the boy afterwards died, it was holden to be manslaughter only; 12 *Cox*, 87. Under somewhat similar circumstances to those of *Reg* v. *Rowley*, two judges of the High Court at Calcutta against one upheld a ruling of the Sessions Judge that this was murder, and not manslaughter, *Reg.* v. *Dasser Bhooyan*, 8 *W. R. Cr.* 71. Where a mob threw a pickpocket into a pond for the purpose of ducking him, but he was unfortunately drowned, this was holden to be manslaughter, *R.* v. *Thay*, 1 *East*, *P. C.* 236. So, too, doubtless, if a man were to pull aside the curtains of a palanquin, in which was a woman who was accustomed always to go abroad veiled, and put his head in, and the husband or near relation of the woman were to kill the intruder, this would probably be holden to be culpable homicide not amounting to murder. In charging a jury on the point of provocation, a judge should tell them that,

to bring the case within the first exception to Sect. 300, the prisoner must have been deprived of the power of self-control by grave and sudden provocation, that the feeling which took away the power of self-control must have had an adequate cause, and that the provocation must not have been sought by the prisoner as an excuse for doing harm; *Reg.* v. *Gunesh Inshkur*, 9 *W. R. Cr.* 72; *Reg.* v. *Hari Giri*, 1 *Ben. L. R A. Cr. J.* 11, *and* 10 *W. R. Cr.* 26.

No provocation, however great, will justify or extenuate a homicide, where there is evidence of express malice; *R.* v. *Mason*, *Fost.* 132. So, where A and B, having fallen out, A said he would not strike, but would give B a pot of ale to strike him, whereupon B did strike, and A thereupon killed him, this was holden to be murder; 1 *Hawk. c.* 13, *s.* 24. These two cases would come within the first proviso to Exception 1 to Sect. 300, because the provocation would have been sought, or voluntarily provoked, by the slayer as an excuse for killing or doing harm to his opponent. If two persons fight upon a sudden quarrel, and be separated, and one of them afterwards, having provided himself with a deadly weapon, lies in wait for the other, to have an opportunity, thus armed, to renew the quarrel, and they accordingly meet, quarrel, and fight, and the man who is armed kills the other, this is murder; see *R.* v. *Snow*, 1 *Leach*, 151; 1 *East*, *P. C.* 245.

Proviso 2, *Excep.* 1, *Sect.* 300, *Provocation by acts of Public Servants—Arrest by Officers of Justice.*—A man is by law supposed to bow before its authority; therefore, no action of any officer in obedience to the law will be a sufficient ground of provocation so as to excuse in any way the killing of the officer. Three things are to be attended to in matters of this kind: the legality of the deceased's authority, the legality of the mode in which he exercised it, and the defendant's knowledge of that authority; for, if an officer be killed in attempting to execute a writ or warrant invalid on the face of it, or against the wrong person, or out of the district where alone it could be legally executed; or if a private person interfere, and act in a case where he has no authority by law to do so; or if the defendant had no knowledge of the officer's business, or of the intention with which a private person interferes,

and the officer or private person be killed, it would be manslaughter, or culpable homicide not amounting to murder, only. By the law of England the officer, and persons acting in aid of him, enjoy this protection *eundo, morando, et redeundo*; therefore, if an officer, on his way to do his duty, be opposed and killed, or if he arrive at the place, and in consequence of opposition retreat, and on his retreat be killed, it is murder; *Fost.* 308, 309; 9 *Co.* 67*b*; 1 *Hale*, 462, *Reg.* v. *Phelps*, *C. and Mar.* 180. (1) *Legality of the Authority.*—If an officer having a warrant from a proper magistrate to apprehend B for felony, or if B be indicted for felony, or if the hue-and-cry be levied against B, in these cases if B, or any of his accomplices, kill the officer, or any person joining in the hue-and-cry, it is murder, whether B be guilty or innocent of the felony charged against him; *Fost.* 318. But if the warrant were illegal, and void upon the face of it; see 1 *Hale*, 459; 1 *East*, *P. C.* 310; or issued with a blank on it, and the blank was afterwards filled up; *R.* v. *Stockley*, 1 *East*, *P. C.* 310; *Housin* v. *Barrow*, 6 *T. R.* 122. *R.* v. *Winnick*, 8 *T. R.* 454; *R.* v. *Hood*, 1 *Mood. C. C.* 281; or issued with an insufficient description of the defendant, as, for instance, if it were to take the son of J S, *id.*, or if it be attempted to be executed against C instead of B; the killing would be manslaughter only. If a writ of execution in civil cases be correct upon the face of it, although the judgment be erroneous, or the proceedings irregular, if the officer endeavouring to execute it be resisted, and killed, it is murder; 1 *Hale*, 497; *Fost* 411, 412. (2) *Legality of the Mode of executing Warrant.*—The warrant must be executed within the proper jurisdiction and by the person authorised by law to execute it. If the constable of the village of A attempt without a warrant to suppress a tumult in the village of B, and be resisted, and killed, it is manslaughter only, for he had authority in such a case within the village of A only; 1 *Hale*, 459. So if a sheriff's officer attempt to execute a writ out of the proper county, and be resisted, and killed, it is manslaughter only; 1 *Hale*, 457, *et seq.* A constable who had a warrant to apprehend A, gave it to his son, who, in attempting to apprehend A, was stabbed with a knife which he had in his hand, the constable being in sight

but a quarter of a mile off, it was held that the son had no authority to apprehend A; *R.* v. *Patience*, 7 *C. and P.* 775. (3) *Defendant's Knowledge of the Deceased's Authority or Intention.* —If the slayer knew the officer's business, either expressly from the deceased, or impliedly from the surrounding circumstances, the killing is murder; *R.* v. *Howarth*, 1 *Mood. C. C.* 207; but if he was ignorant in this respect, it is manslaughter only; 1 *Hawk. c.* 13, *ss.* 49, 50; *Fost.* 310; 1 *Hale*, 458. Where a bailiff rushed into a gentleman's bedchamber early in the morning, without giving the slightest intimation of his business, and the gentleman, not knowing him, wounded him with his sword and killed him, this was held to be manslaughter; 1 *Hale*, 470. Where, however, a constable shews a warrant; 1 *Hale*, 461; or where it appears that the defendant knew him to be an officer, and said, "Stand off! I know you well enough; come at your peril!"; *R.* v. *Pew*, *Cro. Car.* 183; if the officer be killed by the defendant, it will be murder. If a constable interfere to prevent an affray within his own village and he be killed by one of the inhabitants, or other person who knows him to be a constable, it will be murder; but if by a stranger, it will be manslaughter only. So if one of several know him to be a constable, it will be murder in him and manslaughter in the rest; 1 *Hale*, 438. If a constable command the peace; 1 *Hale*, 461; or shew his staff of office; *Fost.* 311; this, it would seem, is a sufficient intimation of his authority. *Foster*, on this point, says:—"With regard to those ministers of justice who, in right of their office, are conservators of the peace, and in that right alone interpose in the case of riots or affrays, it is necessary, in order to make the offence of killing them amount to murder, that the parties concerned should have some notice with what intent they interpose; otherwise, the persons engaged may, in the heat and bustle of an affray, imagine that they come to take a part in it. But, in these cases, a small matter will amount to a due notification. It is sufficient if the peace be commanded, or the officer, in any other manner, declare with what intent he interposeth, or if the officer be within his proper district, and known or generally acknowledged to bear the office he assumeth, the law will presume that the party killing had

due notice of his intent, specially if it be in the day-time. In the night-time some further notification is necessary, and commanding the peace, or using words of the like import, notifying his business, will be sufficient. I remember a saying of a very learned judge, that a constable's staff will not make a constable. This is very true. But if a minister of justice be present at a riot or affray within his district, and in order to keep the peace, produce his staff of office, or any other known ensign of authority. this, I conceive, will be a sufficient notification with what intent he interposeth." Private persons, however, when they interfere, must expressly intimate the intention with which they interpose, otherwise the killing of them will be manslaughter only; *Fost.* 310, 311.

If, however, express malice be shewn on the part of the person killing, even the cases which have been stated to be manslaughter only will be murder; *R.* v. *Stockley*, 1 *East*, *P. C.* 310; *R.* v. *Curtis*, *Fost.* 135.

Cases arising out of the right of private defence will be found at pp. 108-113, *ante*. *Exception* 2 provides for the case of a person who unintentionally has exceeded the right of private defence, in which case the slayer is not guilty of murder but of culpable homicide not amounting to murder. If, however, the excess is not unintentional, the offence is murder. Thus, where the prisoner found deceased in the act of housebreaking by night in his house, and killed him with a *dahali*, which he had called for, as he admitted, for that purpose, the High Court held that he was rightly convicted of murder, as he had *intentionally* done more harm to the deceased than was necessary for the purpose of self-defence, and that, not whilst deprived of the power of self-control; *Reg.* v. *Duruan Giri*, 5 *W. R. Cr.* 73. The right of private defence only continues as long as the offence continues, and a slaying after the offence has ceased is not covered by this exception; *Reg.* v. *Bolakee Jolahel*, 10 *W. R. Cr.* 9.

Exception 3. *Killing by Officers.*—An officer of justice, resisted in the execution of his legal duty, may repel force by force, and if, in so doing, he kill the person resisting, it is justifiable homicide; and this in civil as well as criminal cases; 1 *Hale*, 494; 2 *Hal.* 118. The same as to persons acting in aid of the

officer; *Fost.* 318. A party, whether acting as a *chaukidar* or a private person, is protected by law in using that amount of violence necessary to secure a fugitive house-breaker; *Reg.* v. *Protab*, 2 *W. R. Cr.* 9. Still there must be an apparent necessity for the killing; for, if the officer were to kill after the resisting had ceased (1 *East, P. C.* 297), or if there were no reasonable necessity for the violence used upon the part of the officer (*R.* v. *Goffe*, 1 *Vent.* 216), the killing would be manslaughter at the least. Also, in order to justify an officer killing a person, it is necessary that he should be legally authorized to take and keep him, and be executing his duties legally, so that the killing of the officer would be murder. If the officer unintentionally exceed his duties, and thus kill the person he has to arrest or keep in custody, the Code specially provides that that is culpable homicide not amounting to murder.

If the prisoners in a jail, or going to a jail, assault the jailor or officer, and he, in his defence, kill any of them, it is justifiable for the sake of preventing an escape; 1 *Hale*, 496.

The prisoners, fearful of being punished if they allowed an outlaw, for whose apprehension a reward had been offered, to escape, and thinking they were acting lawfully, killed him while he was attempting to escape; it was held they were guilty of culpable homicide not amounting to murder; *Reg.* v. *Aman*, 5 *N. W.* 130.

Death in a sudden fight. Exception 4. This exception does not apply to a case of a fight arranged beforehand; *Emp.* v. *Rahmuddin*, *I. L. R.* 5 *Cal.* 31; *Reg.* v. *Zalim*, 1 *W. R. Cr.* 33, and to obtain the benefit of this exception the accused must bring himself strictly within all its terms; *Reg.* v. *Ahal*, 3 *W. R. Cr.* 18.

Culpable Homicide by Consent. Exception 5.—This is a provision peculiar to the Indian Penal Code, and doubtless was introduced for the purpose of putting a stop to certain practices which prevail in India, amounting under the English Law to murder; but which were nevertheless, in some measure, sanctioned by the religious belief prevalent in that country. The Indian Law Commissioners say:—"It appears to us that this description of

homicide ought to be punished, but that it ought not to be punished so severely as murder. Our reasons for not punishing it so severely as murder are these: In the first place, the motives which prompt men to the commission of this offence are generally more respectable than those which prompt men to the commission of a murder. Sometimes it is the effect of a strong sense of religious duty, sometimes of a strong sense of honour, not unfrequently of humanity. The soldier who, at the entreaty of a wounded comrade, puts that comrade out of pain; the friend who supplies laudanum to a person suffering the torment of lingering disease; the freed-man who, in ancient times, held out the sword that his master might fall on it; the high-born native of India, who stabs the females of his family at their own entreaty, in order to save them from the licentiousness of a band of marauders, would, except in Christian societies, scarcely be thought culpable; and even in Christian societies, would not be regarded by the public, and ought not to be treated by the law, as assassins." Also the crime of culpable homicide by consent does not produce any sense of general insecurity to society.

This exception must be considered in applying it, first, with reference to the act consented to or authorized; and next, with regard to the person or persons authorized; and as to each of these some degree of particularity at least should appear upon the facts proved before the exception can be said to apply. It does not refer to anything short of suffering the infliction of death, or running the risk of having death inflicted, under some definite circumstances, not merely of time, but of the mode of inflicting it, specifically consented to, as in the cases of *suttee* or duelling which seem to have been chiefly in the minds of the framers of the Code. It would not appear to contemplate a consent to the acts of persons not known or ascertained at the time of the consent being given. The consent may be inferred from circumstances, and need not be established by actual proof of express consent. There is great difficulty, however, in holding that a general consent to take the risk of the lethal acts of such and all of the members of an opposing mob can be imputed to each member of each mob from the mere fact that both mobs go out armed in

order to have a fight; and if there were such a general consent, it cannot be supposed that it would be a consent within the meaning of this exception, and would involve the proposition that the Legislature intended by it to confer a species of privilege upon the murderous acts of riotous assemblies, provided their members should add to their offence the further quality of deliberate premeditation in the commission of it; *Emp.* v. *Nayamuddin, I. L. R.* 18 *Cal.* 484 (*F. B.*).

The case of a *suttee* is a noted example of this exception; *Emp.* v. *Rohimuddin, I. L. R.* 5 *Cal.* 31. Z, a Hindoo woman, consents to be burned with the corpse of her husband. A kindles the pile. Here, if Z be above the age of eighteen years, A has committed culpable homicide not amounting to murder; but if Z be under eighteen, no amount of consent on her part can reduce the crime below that of murder. In a case of *suttee*, some of the prisoners actually set fire to the pile, while one who did not co-operate, in the first instance, in causing the death of the widow, took an active part in causing her to return to the pile when she had left it, after having been partially burnt. The Bengal High Court held that the former prisoners were guilty of culpable homicide, and the latter one of abetment of suicide; 1 *R. J. and P.* 174.

Where death supervened upon emasculation, voluntarily submitted to by an adult, the operator was held not to be guilty of murder, but of culpable homicide; *Reg.* v. *Boboolun Hijrah*, 5 *W. R. Cr.* 7. Certain snake-charmers, by professing to be able to cure snake-bites, induced several persons to allow themselves to be bitten by poisonous snakes, and from the effects of the bite three persons so bitten died. The High Court laid down that clauses 2 and 3 of Sect. 300, explained by illustration (*c*), shewed that the act of the prisoners in wilfully and intentionally causing the deceased to be bitten on their naked bodies by a deadly snake, an injury sufficient in the ordinary course of nature to cause death, is not the less murder because they may have believed that they could remove, and intended to remove, by their incantations, the effect of the injury. If the offence be not murder, it is because it falls within the 5th exception to Sect. 300, *i. e.*, where the deceased takes the risk of death with his own consent; but

Sect. 90, *ante*, p. 97, provides that a consent is not such a consent as is intended by any section of this Code, if the consent is given 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 misconception. There was no doubt that the deceased in this case did give their consent under a misconception of fact, *viz.*, the belief that the prisoners, by incantations, could heal or protect them from the bite of venomous snakes; but if the prisoners believed, though erroneously, that they had the power of restoring to health persons who might have been bitten, in that case they did not know that the consent of the deceased was given in consequence of a misconception. In that case they must have acted in the belief that the deceased gave their consent with a full knowledge of the facts, and in the belief of the existence of powers which the prisoners asserted and believed themselves to possess; and, in this view of the case, the prisoners would be guilty of culpable homicide not amounting to murder, under Sect. 304: *Reg.* v. *Punai Fattama*, 3 *Ben. L. R. A. Cr. J.* 27; and 12 *W. R. Cr.* 7. A snake-charmer exhibited in public a venomous snake whose fangs he knew had not been extracted and to shew his own skill and dexterity, but without any intention to do any harm to any one, placed the snake on the head of one of the spectators; the spectator tried to push off the snake, was bitten, and died in consequence; it was held that the snake-charmer was guilty under Sect. 304 and not Sect. 304A; *Emp.* v. *Ganesh Dooley*, *I. L. R.* 5 *Cal.* 351.

Duelling would also seem to come within this exception, for each of the parties manifestly "takes the risk of death with his own consent." Each consents that the other shall fire at him with a pistol, or thrust at him with a sword, and the law might possibly imply that that was a consent; whatever might be the result of the firing or thrusting. There is, however, a difference between a duel with pistols and one with swords: in the former each person fires straight at the other, and there is no effort by way of defence by either, each takes the chance that the shot from his adversary's pistol which is aimed at him will kill him; in a duel with swords on the contrary each endeavours to parry his

adversary's thrusts and prevent himself being killed, it is in fact a premeditated fight; and in *Emp.* v. *Rohimuddin*, *I. L. R.* 5 *Cal.* 31, it was decided that this exception refers to cases where a man consents to submit to the doing of some particular act, either knowing that it will certainly cause death, or that death will be the likely result, but not to running the risk of death from something which a man intends to avert if he possibly can do so, even by causing the death of the person from whom the danger is to be anticipated. In a later case, however, when a fight between two bodies of men deliberately fighting together resulted in death, a greater proportion of the men being armed with deadly weapons, and it appearing that the deceased was an adult and that no unfair advantage was taken by the one side or the other, it was held that the offence committed was, under this exception, the offence of culpable homicide not amounting to murder; *Samshere Khan* v. *Emp.*, *I. L. R.* 6 *Cal.* 154. This last case was, however, dissented from by the majority of a *Full Bench* in *Emp.* v. *Nayamuddin*, *I. L. R.* 18 *Cal.* 484, in so far as it lays down as a rule of law that consent is to be inferred under the circumstances therein set forth.

Section 301. *Killing of Party other than the one intended.*—It has been decided by the English law that, if A, intending to kill B, kills C, in mistake, it is murder. The Penal Code provides that the offence of killing C shall be of the same nature as the killing of B would have been, had he been slain. Where the accused killed A, whom he had no intention of killing, having intended to kill B, with a highly lethal weapon, like a *dao*, he was held guilty of the murder of A; *Reg.* v. *Phamone Ahum*, 8 *W. R. Cr.* 78. Where a person, intending to kill the husband of a woman with whom he was carrying on an adulterous intrigue, waylaid him in the dark, but by mistake killed another man who came along the road, he was convicted of murder and hung; *Government* v. *Govinda*, 3 *M. Dig.* 125, §160.

Duties of Judge in charging Jury.—When a prisoner is on his trial by a jury upon a charge of murder, it is the duty of the judge to point out to the jury accurately the distinction between murder and culpable homicide not amounting to murder, and to direct their

attention to the evidence, and leave them to find the facts and to say (under his direction as to the law) of what offence the prisoner has been guilty; *Reg.* v. *Shamshere Beg*, 9 *R. W. Cr.* 51. In charging a jury in a case of culpable homicide not amounting to murder under Sect. 304, the judge should call upon the jury to state what kind of culpable homicide they consider the prisoner to have committed, as that section prescribes different punishments for different classes of that offence; and, in the absence of any such finding by the jury, the High Court will hold that the conviction was for the lighter description of that offence; *Reg.* v. *Ameer Khan*, 12 *W. R. Cr.* 35, and 6 *Ben. L. R. App.* 87, *n.*; *i. e.*, the judge should ask the jury, whether the prisoner had done the act causing death with the intention of causing death, or such bodily injury as was likely to cause death; or whether he had done it simply with the knowledge that it was likely to cause death, but without either of the foregoing intentions; *Reg.* v. *Kali Charn Das*, 6 *Ben. L. R. App.* 86, and 15 *W. R. Cr.* 17. The charge, in fact, should, in the first instance, be framed so as to charge the prisoner with that class of offence of which it is believed he will be found guilty, or if there be any doubt, then a separate charge should be framed under each portion of Sect. 304, and the jury should then be directed to find a verdict upon one or other of the charges according to their appreciation of the evidence.

The mere fact that the body of the murdered person has not been found, is not a ground for refusing to convict an accused person of murder; *Emp.* v. *Bagirath*, *I. L. R.* 3 *All.* 383; but a judge was held to have exercised a right discretion in not passing a sentence of death for murder where the dead body of the person murdered had not been found; *Reg.* v. *Budduroodeen*, 11 *W. R. Cr.* 20; and when that is the case, the strongest possible evidence as to the fact of the murder should be insisted on before an accused person is convicted; *Adu Shikdar* v. *Emp.*, *I. L. R.* 11 *Cal.* 635. In Bombay, in a case where the body of the deceased had not been found, and the main evidence against the accused was that of an accomplice who was not corroborated, the Advocate-General informed the Court, under Sect. 333, Cr. P.C., that he would not further prosecute the accused upon the charge then made against

him; thereupon the accused was discharged, but the presiding judge did not direct that such discharge should operate as an acquittal; *Emp.* v. *Vishnu Hurry*, 4th Sessions, 1887.

Section 304. *Culpable Homicide not amounting to Murder.*—The first part of this section applies only to cases which would be murder if not falling within one of the exceptions in Sect. 300; *Reg.* v. *Gora Chund*, 5 *W. R. Cr.* 45; in which this section is fully discussed by *Peacock*, C. J. (*Trevor* and *Norman*, JJ., concurring), and in the following words the distinctions which exist between murder and culpable homicide not amounting to murder are pointed out:—"An offence cannot amount to murder unless it falls within the definition of culpable homicide; for Sect. 300 merely points out the cases in which 'culpable homicide is murder.' But an offence may amount to culpable homicide without amounting to murder. Culpable homicide is not murder if the case falls within any of the exceptions mentioned in Sect. 300. The causing of death by doing an act with the intention of causing death is culpable homicide. It is also murder, unless the case falls within one of the exceptions in Sect. 300. Causing death with the intention of causing bodily injury to any person, if the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, in my opinion falls within the words of Sect. 299 'with the intention of causing such bodily injury as is likely to cause death,' and is culpable homicide. It is also murder unless the case falls within one of the exceptions in Sect. 300, clause 3. Causing death by doing an act with the knowledge that such act is likely to cause death is culpable homicide, but it is not murder even if it does not fall within any of the exceptions mentioned in Sect. 300, unless it falls within clauses 2, 3 or 4 of sect. 300, that is to say, unless the act by which the death is caused 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 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 unless 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. In speaking of acts, I, of course, include illegal omissions. There are many cases falling within the words of Sect. 299,' or with the knowledge that he is likely by such act to cause death,' that do not fall within the 2nd, 3rd or 4th clauses of Sect. 300, such, for instance, as the offences described in Sects. 279, 280, 281, 282, 284, 285, 286, 287, 288 and 289, *ante*, pp. 341 to 348, if the offender knows that his act or illegal omission is likely to cause death, and if in fact it does cause death. But although he may know that the act or illegal omission is so dangerous that it is likely to cause death, it is not murder, even if death is caused thereby, unless the offender knows that it must in all probability cause death, or such bodily injury as is likely to cause death, or unless he intends thereby to cause death or such bodily injury as is described in clauses 2 or 3, Sect. 300. As an illustration, suppose a gentleman should drive a buggy in a rash and negligent manner, or furiously along a narrow crowded street. He might know that he was likely to kill some person, but he might not intend to kill any one. In such a case, if he should cause death, I apprehend, he would be guilty of capable homicide not amounting to murder, unless it should be found as a fact that he knew that his act was so imminently dangerous that it must, in all probability, cause death or such bodily injury, &c., as to bring the case within the 4th clause of Sect. 300. In any ordinary case of furious driving, the fact would scarcely warrant such a finding. If found guilty of culpable homicide not amounting to murder, the offender might be punished to the extent of transportation for ten years, or imprisonment for ten years with fine (see Sects. 304 and 59); or if a European or American, he would be subject to penal servitude instead of transportation. It would not be right in such a case that the offender should be liable to capital punishment for murder. The first part of Sect. 304 would not apply to the case. That applies only to cases which would be murder if not falling within one of the exceptions in Sect. 300. If a man should drive a buggy furiously, not merely along a crowded street, but intentionally into the midst of a crowd of persons, it would probably be

found as a fact that he knew that his act was so imminently dangerous that it must, in all probability, cause death or such bodily injury, &c., as in clause 4, Sect. 300. From the fact of a man's doing an act with the knowledge that he is likely to cause death, it may be presumed that he did it with the intention of causing death, if all the circumstances of the case justify such a presumption; but I should never presume an intention to cause death merely from the fact of furious driving in a crowded street in which the driver might know that this act would be likely to cause death. Presumption of intention must depend upon the facts of each particular case. Suppose a gentleman should cause death by furiously driving up to a railway station. Suppose it should be proved he had business in a distant part of the country, say, at the opposite terminus; that he was intending to go by a particular train; and that he could not arrive at his destination in time for his business by any other train; that at the time of the furious driving it wanted only two minutes to the time of the train's starting; that the road was so crowded that he must have known that he was likely to run over some one and to cause death. Would any one, under the circumstances, presume that his intention was to cause death? Would it not be more reasonable to presume that his intention was to save the train? If the judge or jury should find that his intention was to save the train, but that he must have known that he was likely to cause death, he would be guilty of culpable homicide not amounting to murder, unless they should also find that the risk of causing of death was such that he must have known and did know that his act must, in all probability, cause death, &c., within the meaning of clause 4, Sect. 300." See, also, *Emp.* v. *Govinda*, *I. L. R.* 1 *Bom.* 342, *ante*, p. 374.

Section 304A. *Death through Rash or Negligent Act.*—This section does not apply to a case in which there has been the voluntary commission of an offence against the person. If a man intentionally commits such an offence, and consequences beyond his immediate purpose result, it is for the Court to determine how far he can be held to have the knowledge that he was likely by such act to cause the actual result; and, if such knowledge can be imputed, the result is not to be attributed to mere rashness;

if it cannot be imputed, still the wilful offence does not take the character of rashness, because its consequences have been unfortunate; *In re Nidamarti*, 7 *Mad. H. C. Rep.* 119; *Reg.* v. *Pemkoer*, 5 *N. W.* 38; *Emp.* v. *Idu Beg*, *I. L. R.* 3 *All.* 776; *Emp.* v. *Damodaran*, *I. L. R.* 12 *Mad.* 56; *Emp.* v. *Shivappa*, *B. R.* 14*th March* 1889; *Emp.* v. *Keegan*, *B. R.* 24*th August* 1893. Acts, probably or possibly, involving danger to others, but which, in themselves, are not offences, may be offences under Sects. 336, 337, 338, or 304A, if done without due care to guard against the dangerous consequences. Acts which are offences in themselves must be judged with regard to the knowledge, or means of knowledge, of the offender and placed in their appropriate place among offences; *Emp.* v. *Ketabdi Mundul*, *I. L. R.* 4 *Cal.* 764. In a subsequent case, however, the Court held that, where an accused was charged with culpable homicide, but convicted under Sect. 304A, and the evidence shewed that the deceased had an enlarged spleen, and that his death was caused by rupture thereof through blows given by the hands of the accused, but whether in anger or not does not appear, in order to find the accused guilty under this section, the jury must not only be satisfied of the prevalence of diseased spleen in the district in which the occurrence took place, but also that the accused was aware of such prevalence, and of the risk to life involved in striking a person afflicted with that disease; *Emp.* v. *Safatulla*, *ib.* 815. In this case, however, the judges do not, in any way, deal with the fact that the accused had committed an offence by the act which he did. Where a *kobiraj*, who had no knowledge of surgery, operated upon a man for internal piles by cutting them out with a clasp knife, an admittedly dangerous operation, and the patient died, it was held that he had committed an offence under this section; *Sukaroo* v. *Emp.*, *I. L. R.* 14 *Cal.* 566. A, a servant of a railway company, while moving some trucks by coolies on an incline, discharged this duty negligently, and lost control of the trucks. Under his orders one of the coolies attempted to stop the trucks and was killed in the attempt. It was held that A was guilty under this section; *Emp.* v. *Nawl Kishore*, *I. L. R.* 6 *All.* 248. The lessee of a ferry, who has the exclusive right of conveying passengers across a river at a particular spot, is

responsible for seeing that the boats he suffers to be used are in a fit state for use, and if loss of life is caused through the use of an unsound boat, he is liable under this section; *Emp.* v. *Bhutan*, *I. L. R.* 16 *All.* 472.

In the course of a trivial dispute the accused gave the deceased a severe push on his back, which caused him to fall a distance of two and a half cubits on to the road, and in such fall he broke his big toe. A few days afterwards the deceased died of tetanus. It was held that the accused was not guilty under this section; nor yet of culpable homicide not amounting to murder, because there was no likelihood of death following, and, *a fortiori*, no designed causing of it; *Reg.* v. *Acharjya*, *I. L. R.* 1 *Mad.* 224.

The question, whether intercourse with an immature wife by a full grown husband is dangerous and punishable, must depend upon the circumstances of each case, but if death be caused by such intercourse, and the act of cohabitation was in the particular case likely to lead to dangerous consequences, and indicated a reckless indifference to the welfare of the girl-wife, then the husband may be convicted of causing death by a rash and negligent act; *Emp.* v. *Hurree Mohun*, *I. L. R.* 18 *Cal.* 49.

For the definition of rashness and negligence see, *ante*, p. 342.

For other rulings in cases of homicide, see the notes to the sections on exposure of children, *post*, pp. 398 and 406; and on hurt, *post*, p. 413.

ATTEMPT TO MURDER, &c.

Sects. 305 and 306. *See post*, p. 399.

Sect. 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, 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 hurt is caused to any person by such act, the offender shall be liable either to transportation for life, or to such punishment as is hereinbefore mentioned.**

When any person offending under this section is under sentence of transportation for life, he may, if hurt is caused, be punished with death.

Illustrations.

(*a*) A shoots at Z with intention to kill him, under such circumstances that, if death ensued, A would be guilty of murder. A is liable to punishment under this section.

(*b*) A, with the intention of causing the death of a child of tender years, exposes it in a desert place. A has committed the offence defined in this section, though the death of the child does not ensue.

(*c*) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at B. He has committed the offence defined in this section; and, if by such firing he wounds Z, he is liable to the punishment provided by the latter part of this section.

(*d*) A, intending to murder Z by poison, purchases poison and mixes the same with food which remains in A's keeping; A has not yet committed the offence defined in this section. A places the food on Z's table, or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

Sect. 308. *Attempt to commit Culpable Homicide.*—Whoever does any act with such intention or knowledge and under such circumstances that if he by that act accused death he would be guilty of culpable homicide not amounting to murder, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and, if hurt is caused to any person by such act, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

Illustration.

A, on grave and sudden provocation, fires a pistol at Z, under such circumstances that if he thereby caused death he would be guilty of culpable homicide not amounting to murder. A has committed the offence defined in this section.

Sect. 309. See *post*, p. 399.

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may arrest without a warrant. Attempts to commit culpable homicide not amounting to murder are bailable, but not attempts to murder. Not compoundable.

Charge.

That you, the said A B, on or about the day of , at , did an act, to wit, , with such intention or knowledge, and under such circumstances, that if by that act you had caused the death of the said C D, you would have been guilty of murder (and that you by such act caused hurt to the said C D); and that you have thereby committed an offence punishable under Sect. 307 of the Indian Penal Code, and within, &c.

Evidence.

Prove some act done by the prisoner towards the accomplishment of his object, by which act he in any measure launches his purpose so as to have it no longer under his control, and be able to stop it if he wished; the illustrations (*c*) and (*d*) to Sect. 307 sufficiently explain this.

It has been held in Bombay that the act committed by the prisoner must be such as is capable of causing death in the natural course of events. Therefore, where the prisoner presented an uncapped gun at A B (believing the gun to be capped) with intent to murder him, but was prevented from pulling the trigger, it was held that he had committed no offence under Sect. 307; *Reg.* v. *Cassidy*, 4 *Bom. H. C. Rep. C. C.* 17. That case further rules that the contrary would, however, be the case if the charge were of an attempt to commit an offence under Sect. 511, and, therefore, it would be no

defence under the latter section to shew that, in consequence of something which intervened, the act of the accused could not have caused death, and that all that is necessary under that section is an intent and a consequent act under such circumstances that if the act were to cause death the slayer would be guilty of murder, or of culpable homicide not amounting to murder. Therefore, if a pistol was loaded with powder and shot, but the touch-hole was plugged that it could not possibly be fired, and the accused were wilfully to point the pistol at another and pull the trigger so as to fire the cap or ignite the priming, although in consequence of the stoppage the powder in the barrel was not ignited, the person presenting the pistol might be guilty of an attempt to murder under Sect. 511; because, if his act of pulling the trigger had caused the pistol to go off and the person at whom it was aimed had been killed, the killing would have amounted to murder; *Reg.* v. *Cassidy*, *ut i sup.* The whole of the principles laid down in this case have been dissented from by *Straight*, J., in *Emp.* v. *Niddha*, *I. L. R.* 14 *All.* p. 43. It is further doubtful, from the wording of Sect. 511, whether it applies to any case in which punishment has been elsewhere provided for an attempt to commit an offence; see the comments on Sect. 511. It would be well if the principles laid down in *Reg.* v. *Cassidy* could be reconsidered in a case in which the prisoner was charged in the form given above, because Sect. 307 says nothing about the *possibility* of death being caused by the act, but only requires the doing of an act with such intention or knowledge, and under such circumstances that, *if the act caused death*, the doer would be guilty of murder. If one man *intending* to kill another pulls the trigger of a gun and thus fires it and the other man dies, this is murder. If the same man with the same intention points a loaded gun at another and pulls the trigger, but from something wrong in the mechanism the hammer does not fall sufficiently low to hit the cap, and thus the gun is not fired, surely this is an act done with such intention and under such circumstances that, if death had been caused by the act, murder would have been committed. *Straight*, J., has held that if an accused did all he could do, and completed the only remaining proximate act in his power, he should not escape criminal

responsiblity, because, his own set volition and purpose having been given effect to to their full extent, a fact, unknown to him, and at variance with his own belief, intervened to prevent the expected consequence of that act; *Emp.* v. *Niddha, I. L. R.* 14 *All.*, p. 43.

Under the 24 & 25 Vict. s. 100 such an act would be an attempt to murder if the gun were loaded with powder and shot, even though the gun failed to be discharged from want of priming or any such cause, and it certainly seems strange that such an act cannot be brought within the much wider terms of Sect 307. In *Reg.* v. *Brown*, 10 *Q. B. D.* 381, the judges expressed an opinion as to what constituted an attempt to murder in much the same terms as those used by *Straight*, J., and would probably have ruled to that effect if the point had required decision on that occasion, although they would have had to overrule the case of *Reg.* v. *St. George*, 9 *C. and P.* 483; with regard to which *Lord Coleridge*, C. J., in *Reg.* v. *Duckworth* [1892], 2 *Q. B.*, p. 86, said he should have thought, with great deference, that that case ought to have been got rid of by this time. With regard to *Reg.* v. *Lewis*, 9 *C. and P.* 523, *Coleridge*, C. J., in the same case remarked that there was fair reason on the facts—not making it a question of law—to doubt whether there had, in that case, been an attempt to discharge a loaded fire-arm within the meaning of 7 Wm. IV and 1 Vict c. 85, s. 3.

Where an accused dealt two or three blows with a stick on the head of a man which stunned him, but which were not sufficient to cause his death, and then, believing the man to be dead, put him into a hut, and set fire to it with the intention of destroying the evidence of the supposed murder, in consequence of which the man died, he is not guilty of murder but of an attempt to murder; *Emp.* v. *Khandu, I. L. R.* 15 *Bom.* 194 (*Full Bench, dissentiente Parsons*, J.).

Exposing Children and other Persons.—The following cases have been held to be murder in England, and therefore any act done towards those ends would be an attempt to murder: an unnatural son who exposed his sick father to the air against his will, by reason whereof he died; 1 *Hawk. c.* 13, *s.* 5; a harlot who laid her

child in an orchard where a kite struck it and killed it; a mother who hid her child in a pig-sty where it was devoured; parish officers who moved a child from parish to parish till it died from want of care and sustenance: 1 *Hale*, 432; 4 *Bl. Com.* 197. So, where an indictment charged the death of a child to have been caused by its mother casting it on a heap of ashes and leaving it there in the open air, exposed to the cold, whereby it died; this was held to contain a sufficient charge of murder, inasmuch as it alleged a *misfeasance*; but if it had charged the death to have been caused by a mere *nonfeasance* in the neglect of the defendant's maternal duties, it would have been bad, unless it had also shewn that the child was of so tender an age, or was placed in such a situation as to be unable to take care of itself; *Reg.* v. *Waters*, 1 *Den. C. C.* 356; see, also, *Reg.* v. *Hogan*, 2 *Den. C. C.* 277; *Reg.* v. *Cooper*, 1 *Den. C. C.* 459; *Reg.* v. *Phillpot*, *Dears. C. C.* 179. So, where an apprentice died from harsh treatment on the part of his master, whilst he was labouring under disease; this was holden to be murder in the master; *R* v. *Squire*, 1 *Russ. on Crimes*, 5th edit., 653. If the charge, however, be one of *of nonfeasance*, as in neglecting to provide food the prosecution must shew not only a duty in the defendant to supply food, but also that the child was of such tender years as to be unable to provide food for itself; *R.* v. *Friend*, *R. and R.* 20; *Reg.* v. *Marriott*, 8 *C. and P.* 425; and also that the defendant was in the possession of means to provide for him, *Reg.* v. *Chandler*, *Dears. C. C.* 453. If a charge of murder or attempting to murder is to be made out, it must also be shown that the defendant *wilfully* withheld food, intending thereby to kill or commit one of the offences mentioned in Sect. 300, *ante*, p. 362, *Reg.* v. *Conde*, 10 *Cox's Crim. Cases*, 547. In the case of the exposure of an infant, much, too, will depend upon the place where it was exposed. A woman leaving her illegitimate child at its father's door can have no intention of killing it, and the act is really not a negligent one, for she may easily suppose that the door would shortly be opened and the child found, though the aspect of this case even may be altered if the child be left insufficiently clothed on a wet or cold night or in the blazing noon-day sun of a tropical climate. A very different case is where a woman leaves her child in the bush

or jungle, away from human ken, and where the wild beast may devour it, or where it must inevitably die from the exposure or starvation. Where a child was abandoned in a thicket close to a house and a footpath, wrapped in a quilt, and was found very shortly after its exposure, and died, not from the effect of its exposure, but from the ignorance of the people who found it and gave it no food, it was held that the prisoner could not be convicted of murder, or of an attempt to murder, as the exposure was not the cause of death, but that he was punishable under Sect. 317; *Reg.* v. *Khodabun Fakeer*, 10 *W. R. Crim.* 52; see also Sect. 317, *post*, p. 405, as to exposure of children.

SUICIDE.

Sect. 305. *Abetment of Suicide of Child, &c.*—**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.**

Sect. 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.**

Sects. 307 and 308. See *ante*, pp. 393 and 394.

Sect. 309. *Attempt to commit Suicide.*—**Whoever attempts to commit suicide, and does any act towards the comission of such offence, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.**

Abetment of suicide under Sects. 305 and 306 is triable by the Court of Session; attempts to commit suicide, by a Presidency Magistrate, or a Magistrate of the first or second class. The attempt is bailable, but not the abetment. A warrant should issue in the first instance. Police officers may arrest without a warrant. Not compoundable.

Charge.

That A B (being a person under the age of eighteen years at the time of his death) committed suicide, and that you, the said C D, abetted the said A B in the commission of the said suicide, and that you, the said C D, have thereby committed an offence punishable under Sect. 306 (305) of the Indian Penal Code, and within, &c.

Evidence.

The only point necessary to be discussed in these sections is the clause in Sect. 309, which subjects to punishment any one who "does any act towards the commission of" suicide, this must be such an act as would irresistibly manifest the intention of the would-be suicide, suchas taking poison, jumping into a well, firing a pistol at his own body. A man intending to commit suicide may take a long journey to hide it from his friends. The commencing of the journey, however, is not an act towards the commission of suicide, for the act is not one which, in any way, will enable him to put an end to his life, but simply one which will enable him to conceal the contemplated act of suicide from his friends. The mere running to a well, with the intention to commit suicide, is not an attempt to commit suicide; *Emp.* v. *Ramakka*, *I. L. R* 8 *Mad.* 5.

Fine alone was not a legal punishment for the offence constituted by Sect. 309; *Reg.* v. *Chantiora*, 1 *Bom. H. C. Rep.* 4, until Act VIII of 1882, Sect. 7, altered the words of the section.

Abetment of suicide is confined to the case of persons who aid and abet the commission of suicide by the hand of the person himself who commits the suicide. When a person, at the request or with the consent of another, kills that person, he is guilty of homicide by consent, which is one of the forms of culpable homicide, and not of abetment of suicide, 1 *R. J. and P.* 174. Evidence that a woman prepared to commit suicide in the presence of the accused, that they followed her to the pyre, and stood by her, her stepsons crying, "Ram, Ram," and one of the accused admitting that he told the woman to say, "Ram, Ram," and she would become *sutee*, proves active connivance, and unequivocal countenance

of the accused, and justifies the inference that they had engaged with her in a conspiracy for the commission of the *suttee*; *Reg.* v. *Mohit Pandy*, 3 *N.-W. P.* 316.

THUGS.

Sect. 310. *Thug.*—**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.**

Sect. 311 *Punishment.*—**Whoever is a thug shall be punished with transportation for life, and shall also be liable to fine.**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That you, on or about the day of , at , were a thug, and that you have thereby committed an offence punishable under Sect. 311 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the defendant was in the habit of associating with others for a common purpose, or in such a manner that he must have known of the doings of the others, and that the constant meetings could not be innocent. For instance, if he had been seen assisting in the initiation of a thug, or in the immediate neighbourhood of such ceremony, and in the company of those who had been assisting at the ceremony, and that before or afterwards he was in the habit of meeting the same men, whether secretly, by night or day, or openly. Having shewn this connection, acts of robbery or child-stealing by means of or accompanied by murder, committed by any of the persons he associates with, may be given in evidence to shew what the purpose of the association was. Or that he was in possession of property belonging to, and stolen from, a murdered man; or any other facts from which the purpose for which he met the others might be inferred.

OF THE CAUSING OF MISCARRIAGE, OF INJURIES TO UNBORN CHILDREN, OF THE EXPOSURE OF INFANTS, AND OF THE CONCEALMENT OF BIRTHS.

CAUSING MISCARRIAGE.

Sect. 312. *Causing Miscarriage.*—**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.**

Sect. 313. *Causing Miscarriage without Woman's Consent.*—**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.**

Sect. 314. *Death caused.*—**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 abovementioned.**

Explanation.—**It is not essential to this offence that the offender should know that the act is likely to cause death.**

Sect. 315. *Act done with intent to prevent a Child being born alive, or to cause it to die after birth.* 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.

Sect. 316. *Death of Unborn Child through act amounting to Culpable Homicide.*—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.

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.

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable, except for offences under Sect. 312. Not compoundable.

Charge.

That you, the said A B, on or about the day of , at , voluntarily did cause a certain woman, to wit, C D, then being (quick) with child (without the consent of the said

C D), to miscarry, such miscarriage not being caused by you, the said A B, in good faith, for the purpose of saving the life of the said C D; and that you, the said A B, have thereby committed an offence punishable under Sect. 312 (or 313) of the Indian Penal Code, and within, &c.

Evidence.

Under Sects. 312 and 313, evidence must be given that the defendant did some act, used some instrument, or administered some drug, in consequence of which the woman to whom the act was done miscarried. Under the 314th Section, there is no need to prove any miscarriage, but simply the act done, the intent with which it is done, which may be inferred from the nature of the act, and the subsequent death of the woman, the intent of the defendant may be proved, from the fact that he knew the woman was in the family way, either by him or by any one else whom he would wish to shield; that he had conversations with the deceased about the matter; and also from the nature of the drugs he administered, or other acts he did, or instruments he used. A woman who tries to cause herself to miscarry, she, in fact, not being pregnant, cannot be convicted of the offence described in Sect. 312, but another person who abets her act may be convicted of abetment of that offence; *Reg.* v. *Kabul Pattur*, 15 *W. R. Cr.* 4. *Quære*, however, whether the woman might not have been convicted under Sect. 511 of an attempt to commit this offence, in respect of which see *Reg.* v. *Whitchurch*, 24 *Q. B. D.* 420, *ante*, p. 122, in connection with *Reg.* v. *Brawn*, 1 *C. and K.* 144, *ante*, p. 123. Section 312 presupposes the expulsion of the child before the period of gestation is completed; therefore, in a case where the child was full-grown, it was held that there ought to be a conviction of an attempt under Sects. 312 and 511, and not one under Sect. 313; *Reg.* v. *Arunja Bewa*, 19 *W. R. Cr.* 32.

In England it has been held that, if a person procure or supply any poison or noxious thing for the purpose of procuring abortion, that is an offence, even though the woman for whom it was procured never intended to use it; *Reg.* v. *Hillman*, 1 *L. and C.* 343.

The term "with child" means "pregnant," and the stage to which pregnancy has advanced is immaterial under the first part of Sect. 312; *Emp.* v. *Ademma, I. L. R.* 9 *Mad.* 369.

The term "quick with child" is popularly applied to that time after conception when the mother first perceives the movements of the fœtus, under the erroneous belief that it is its first movement, and that it then becomes alive or quick. The fœtus is, however, alive from the moment of conception, and there is little doubt but that movements take place at a much earlier period, though unnoticed by the mother. In England, under the repealed statute of Geo. III. c. 58, s. 1, "quick with child" has been held to mean, when the woman first felt the child move within her; *Goldsmith's Case*, 3 *Camp.* 76; *Reg.* v. *Philips*, 3 *Camp.* 77; it has also been held to mean "having conceived"; *Reg.* v. *Wycherley*, 8 *C. and P.* 262. There can be no doubt but that the term "quick with child" in Sect. 312 refers to the time when the woman first feels the movements of the child within her, and not to any time after conception, previous thereto, otherwise effect could not be given to both the terms used therein, "with child" and "quick with child."

In the section in the Ceylon Penal Code, corresponding to Sect. 314, the provision for a higher punishment in the event of the act being done without the consent of the woman is omitted.

EXPOSURE OF CHILDREN.

Sect. 317. *Exposure of Children under Twelve.*—**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.**

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.**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.

Charge.

That you, being the father (*or* mother, *or* having the charge) of A B, a child under the age of twelve years, to wit, of the age of eight years, did expose and leave such child in a certain place, to wit, , with the intention of wholly abandoning such child; and that you have thereby committed an offence punishable under Sect. 317 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the defendant, being the father or mother of the child, exposed or left it in any place; prove, also, the intention wholly to abandon; for this section was intended to prevent the abandonment or desertion by a parent of his or her children of tender years, in such a manner that the children, not being able to take care of themselves, would run the risk of dying or being injured; *In re Felani Hariani*, 16 *W. R. Cr.* 12; this intention will be inferred from the way in which, and the place where, the child was left. A man, who, shortly after the birth of a child, left it in a thicket near a house and footpath, where it was found by some villagers, and taken care of, but died a few hours afterwards, not, however, from the effects of the exposure, was held to be guilty under this section, and not of the offence of murder; *Reg.* v. *Khodabux Fakeer*, 10 *W. R. Cr.* 52. In Bengal, among the lower classes of Mahomedans, it sometimes happens that parents, in fulfilment of a vow, take one of their male children to the Sunderbuns, and there apparently desert him. The place chosen is near some *durgah* or shrine erected by the Fakirs, to which the child has been dedicated. The intention, it is said, is not that the child should be abandoned, for the parent continues at hand; but that he should find his way to the neighbouring Fakir, and, after remaining some time, shall choose either to return to his family or to adopt the Fakir's mode of life. In such cases, there can be no intention of entirely abandoning so as to bring the act within this section. Again, according to a superstitious usage which prevails

in some parts of Eastern Bengal, an infant suffering from convulsions or which refuses sustenance, &c., is put into a basket and swung up to a tree, to all appearances abandoned. The belief is that, if the child is to be restored at all, it will be restored by the spirit by whom the child is possessed, if entirely delivered into its power. The parents of the child declare that they place the child there in the hope of preserving its life, and that they are not neglectful of its wants. In all these cases, it is a question for the jury to determine with what intention the child was exposed, as *Willes*, J., said in the case of *Reg.* v. *Wagstaffe*, at the Central Criminal Court, at the January Session, 1868:—"There may be a belief so utterly absurd, and devoid of foundation, that the person putting it forward must either be insane, or else to the crime which he has already committed be adding that of hypocrisy; but no person is absolutely to be bound by the opinion of another, so as to prevent him from honestly carrying out his own convictions as to how his children, or those dependent upon him, should be treated, whether in health or sickness."

The child, too, must be proved to be under the age of twelve years.

In England, where a woman sent off a child four weeks old by rail in a hamper to the address of the father, it being delivered there alive in about an hour from the time she sent it, it was held that this amounted to an abandonment and exposure whereby the life of the child was endangered; *Reg.* v. *Falkingham*, *L. R.* 1 *C. C.* 222. A woman who was living apart from her husband, and who had the actual custody of their child, under two years of age, brought the child, and left it at the father's door, telling him she had done so. The father knowingly allowed it to remain for about six hours outside his door, and subsequently in the roadway, where it was found by a constable cold and stiff. It was held that the father was guilty of an abandonment; *Reg.* v. *White*, *L. R.* 1 *C. C.* 311.

While an abandoned child is still alive the proper charge to be preferred against the accused is under this section, but if the child die, a charge should be added both under Sect. 302 and

Sect. 304, and if the accused should be convicted of the abandonment, and of either murder or culpable homicide not amounting to murder, separate punishments should not be awarded under the separate charges, but a sentence should be passed in respect of the most serious offence of which the prisoner is convicted; *Emp.* v. *Banni, I. L. R.* 2 *All.* 349.

CONCEALMENT OF BIRTH.

Sect. 318. *Concealment of Birth.*—**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.**

Triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first or second class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.

Charge.

That you, the said A B, on or about the day of , at , by secretly disposing of the dead body of a child, to wit, the male child of the said A B, then recently born, did intentionally endeavour to conceal the birth of such child; and that you have thereby committed an offence punishable under Sect. 318 of the Indian Penal Code, and within, &c.

Evidence.

Prove that a woman was delivered of a child, and that, at the time of the alleged concealment, the child was dead, and prove also some act of concealment of the dead body on the part of the accused. Where a woman, delivered of a seven months' child, threw it down a privy, and it appeared that another woman, charged as an accomplice, knew of the birth, the judges held that the act of throwing the child down the privy was evidence of the endeavour to conceal the birth; *R.* v. *Cornwall, R. and R.* 336. Where a woman was delivered of a child, the dead body of which

was found in a bed amongst the feathers, but there was no evidence to shew who put it there, and it appeared that the mother had sent for a surgeon at the time of her confinement, and had prepared child's clothing, the judge directed an acquittal on the charge for endeavouring to conceal the birth; *R.* v. *Higley*, 4 *C. and P.* 366. But where the mother caused the body of her child to be secretly buried, with a view to conceal the birth, it was held that she might be convicted of the concealment, though she previously allowed the birth to be known to some persons; *R.* v. *Douglas*, 1 *Mood. C. C.* 480. On the other hand, the mere denial of the birth is not sufficient to convict her; there must also be some act of disposing of the dead body; *Reg.* v. *Turner*, 8 *C. and P.* 755. The disposition need not be final; *Reg.* v. *Goldthorpe*, 2 *Mood. C. C.* 244; and *Reg.* v. *Perry*, *Dears. C. C.* 471. Where a woman put the dead body of her child over a wall into a field, through which there was no thoroughfare, and in such a place that persons ordinarily using the field could not have seen it, though persons looking over the wall at the spot where it was placed could have done so, it was held that there was evidence to go to the jury of a secret disposition; *Reg.* v. *Brown*, *L. R.* 1 *C. C.* 244 Where the mother of a bastard child induced her paramour to take away and bury the body, she remaining in bed, it was held that she might be convicted of concealing the dead body, and he of aiding and abetting; *Reg.* v. *Bird*, 2 *C. and K.* 817; *Reg.* v *Skelton*, 3 *C. and K.* 119.

In order to support a conviction under this section, the child must have arrived at such maturity that it might have been born alive; 4 *Mad. H. C. Rep. App.* 63; and it was so held in England in *Reg.* v. *Berriman*, 6 *Cox's Crim. Cases*, 388, in which *Erle*, J., said:—"There is no law which compels a woman to convict herself of want of chastity, and if she had miscarried at a time when the fœtus was but a few months old, and therefore could have no chance of life, you could not convict her"; but in another case it was held by *Martin*, B., that a fœtus, provided it has the parts and shape of a child, is a child; *Reg. v. Colmer*, 9 *Cox's Crim. Cases*, 506; in this case, however, the Judge stated that he would reserve the point, if necessary, but the accused was acquitted.

In a subsequent case, *Smith*, J., left it to the jury to say whether the offspring had so far matured as to be a child, or was only a fœtus, or the unformed subject of a premature miscarriage; *Reg.* v. *Hewitt*, 4 *F. and F.* 1101.

HURT.

Sect. 319. *Hurt.*—**Whoever causes bodily pain, disease or infirmity to any person, is said to cause hurt.**

Sect. 320. *Grievous Hurt.*—**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.**

Sect. 321. *Voluntarily causing hurt.*—**Whoever does any act with the intention of thereby causing hurt to any person, or with 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."**

Sect. 322. *Voluntarily causing Grievous Hurt.*—**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."**

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.

Sect. 323. *Punishment for Voluntarily causing Hurt.*—Whoever, except in the case provided for by Sect. 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.

Sect. 324. *Voluntarily causing Hurt by Dangerous Weapons or Means.*—Whoever, except in the case provided for by Sect. 334, voluntarily causes 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 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.

Sect. 325. *Punishment for Voluntarily causing Grievous Hurt.*—Whoever, except in the case provided by Sect. 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.

Sect. 326. *Voluntarily causing Grievous Hurt by Dangerous Weapons or Means.*—Whoever, except in the case provided by Sect. 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 an 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 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.

Sects. 327 and 329 to 333. See *post*, pp. 418-420.

Sect. 328. See *post*, p. 416.

Sect. 334. *Voluntarily causing Hurt on Provocation.*—**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.**

Sect. 335. *Causing Grievous Hurt on Provocation.*—**Whoever voluntarily 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.**

Explanation.—**The last two sections are subject to the same provisoes as Exception 1, Sect. 300.**

Offences under Sects. 323 *and* 334 *are triable by any Magistrate; those under Sects.* 324, 325, *and* 335, *by the Court of Session, a Presidency Magistrate, or a Magistrate of the first or second class; and those under Sect.* 326, *by the Court of Session a Presidency*

Magistrate, or a Magistrate of the first class. A summons should issue in the first instance. Police officers may arrest without a warrant under Sects. 324, 325, 326, *and* 335, *but not under Sects.* 323 *and* 334. *Defendants are bailable, unless charged under Sect.* 326.

Offences under Sects. 323 *and* 334 *are compoundable; those under Sects.* 325 *and* 326 *are not compoundable; and those under Sects.* 324 *and* 335 *are compoundable with the permission of the Court in which the prosecution is pending.*

Charge.

That you, on or about the day of , at , voluntarily did cause (grievous) hurt to A B, and that you have thereby committed an offence punishable under Sect. 323 (*or* 325) of the Indian Penal Code, and within, &c.

If the charge be framed on Sect. 324 *or Sect.* 326, *after* "A B" *insert* "by means of an instrument for shooting, to wit, a pistol," *or such other allegation contained in these sections as is warranted by the evidence.*

Evidence.

Prove the hurt, or grievous hurt, as the case may be, and, if so charged, that it was caused by any one of the aggravated means mentioned in Sects. 324 and 326; also that it was caused by the defendant. In the case of Sects. 334 and 335, the grave and sudden provocation must be such as not to furnish a defence under the sections relating to the right of private defence, as in the latter case there would be a complete answer to the charge. The fact that the defendant neither intended, nor knew himself to be likely to cause, hurt to any person other than the person who gave the provocation, must be proved from surrounding circumstances. The question of grave and sudden provocation is also one of fact for the jury, or magistrate sitting as a jury. The provocation must have been given by the person injured; *Reg.* v. *Bhala Chula*, 1 *Bom. H. C. Rep.* 17; and no amount of provocation will excuse, in any way, an assault upon a person other than the provoker. A person committing hurt or grievous hurt on grave and sudden provocation should be charged in the terms of Sect. 334 or Sect. 335; *Reg.* v. *Bhala Chula, ubi sup.*; but in

any other charge of hurt or grievous hurt it is not necessary to insert the words "such (grievous) hurt not being caused on grave and sudden provocation"; 4 *Mad. H. C. Rep. App.* 5.

Where a woman died from a chance kick in the spleen inflicted by her husband when provoked by her, the husband not knowing that the spleen was diseased and shewing, by the blow itself and his conduct immediately afterwards, that he had no intention or knowledge that the act would or was likely to cause hurt endangering human life, it was held that the person had committed an offence under Sect. 323, and not under Sect. 325; *Reg.* v. *Bysagoo Nushyo*, 8 *W. R. Cr.* 29. Where the accused, upon being insulted by a companion in a drunken brawl, threw him down upon the ground, and stamped his feet twice upon him, thereby causing his death within 20 days, it was held that the offence was punishable under Sect. 323 and not under Sect. 304A; *Reg.* v. *Radkia Baden*, *B. R. 9th October* 1872.

Where a person intentionally hurt another who was suffering from a disease of the spleen, but without the intention of causing death, or such injury as was likely to cause death, and without the knowledge that he was likely to cause death, and by his act caused the death of the other person, it was held that he was properly convicted of voluntarily causing hurt under Sect. 323; *Emp.* v. *Fox*, *I. L. R.* 2 *All.* 522; *Emp.* v. *O'Brien*, *ib.* 766; *Emp.* v. *Radhir Singh*, *I. L. R.* 3 *All.* 597. Where the intention is to cause grievous hurt, but there is no intention to cause death, the conviction should be of voluntarily causing grievous hurt; *Emp.* v. *Idu Beg*, *I. L. R.* 3 *All.* 776. It is necessary to discriminate between the definitions of those offences against life and the human body which are described in the Penal Code with reference to their results. These are:—(1) bodily injury which is sufficient in the ordinary course of nature to cause death; (2) bodily injury which is likely to cause death, either generally, or to the particular person to whom the injury is done; (3) bodily injury which endangers life. The first two have been discussed, *ante*, p. 374; and we must conclude from the fact that in defining grievous hurt the framers of the Code used the expression "hurt which endangers life," that they intended to draw a distinction between "hurt

which endangers life" and an "act which is likely to cause death," although there may be only a fine line between the two classes. An injury which is likely to cause death is one sufficiently severe to cause the *direct* and natural result of it to be a fatal one; such an act, of course, endangers life, but there are other acts which, though not likely to cause death, yet by their *consequences* do endanger life, and the fact, that this expression "endangers life" is used in connection with other results of injuries, points to the conclusion that what is to be looked at, under these sections, is not the slightness or gravity of the injury at the time of its infliction, but the results which follow. In a case where the prosecutrix was only seventeen days in hospital, but the medical evidence shewed that she was in danger for three days, it was held that grievous hurt had been caused; *Reg. v. Basoo*, 2 *W. R. Cr.* 29. It must, however, be proved that the life of the person injured was in danger, and if persons who have been drugged, though senseless, have never been in danger of losing their lives, the injury does not amount to grievous hurt; *Reg.* v. *Joy Gopal*, 4 *W. R. Cr.* 4.

An accused person struck a woman, who was carrying an infant in her arms, violently on the head and shoulders. One of the blows fell on the child's head, causing death. It was held that the accused had committed hurt on the infant under circumstances of aggravation sufficient to bring the offence within the definition of grievous hurt; *Emp* v. *Shai Rai*, *I. L. R.* 3 *Cal.* 623.

Scars on the face causing permanent disfigurement amount to grievous hurt; *Reg. v. Anta bin Dadoba*, 1 *Bom. H. C. Rep.* 101. Where a man was so injured that he had to go to hospital, but left it perfectly cured on the twentieth day, it was held by *Scotland*, C. J., that this day would count as one of the twenty days during which he had been unable to follow his ordinary pursuits; *Reg.* v. *Sheikh Bahadoor*, 2*nd Madras Session*, 1862.

Proof only that the prosecutor has been in hospital for twenty days is not sufficient; it must also be shewn that he was during that time unable to follow his ordinary occupation, and the Court ought not to draw that inference from the fact of his having been that time in hospital, but ought to have evidences of his

inability to follow his ordinary occupation; *Emp.* v. *Vasta Chella*, *I. L. R.* 19 *Bom.* 247.

Where the prisoners were charged under Sect. 148 with rioting armed with deadly weapons, and also under Sect. 324 with causing hurt with dangerous weapons, it was held they should be convicted and sentenced only under one or other of these sections and not under both, as the charges were in the nature of alternative charges; *Reg.* v. *Dina Sheikh*, 10 *W. R. Cr.* 63.

A person tried and acquitted on a charge of using criminal force cannot afterwards be charged with committing hurt in respect of the same transaction; *Kaptan* v. *Smith*, 16 *W. R. Cr.* 3.

ADMINISTERING DRUGS WITH INTENT.

Sect. 328. *Administering Drugs with Intent.*—**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.**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable

Charge.

That you, the said A B, on or about the day of , at , did administer to one C D a certain stupefying drug, to wit, opium, with intent to facilitate the commission of an offence, to wit, the offence of rape upon the said C D (*or* with the intent to cause or knowing that it was likely that you would thereby cause hurt to the said C D), and that you, the said A B, have thereby committed an offence punishable under Sect. 328 of the Indian Penal Code, and within, &c.

Evidence.

Prove the administering of the drug, and its nature. If the charge be that the administering was with intent to cause hurt, it

must be proved that the drug was capable of causing "bodily pain, disease, or infirmity"; if to facilitate the commission of a crime, then that its effect is such as would tend to that end, *e. g.*, laudanum or chloroform administered for the purpose of committing robbery or rape; any substance used to excite sexual passion to facilitate the commission of adultery. The intent, or knowledge, of the defendant, will ordinarily be inferred from the nature of the substance administered, and the way in which it is administered, and his acts before and afterwards. Where the defendant administered cantharides to a woman, and the jury found that it was administered with the intent to excite her sexual passion and desire, in order that the defendant might obtain connection with her, this was held to be an administering with intent to "injure, aggrieve, and annoy" her; *Reg.* v. *Wilkins*, 31 *L. J. N. S. M. C.* 72. A person who placed in his toddy pots juice of the milk-bush, knowing that, if taken by a human being, it would cause injury, and with intention thereby of detecting an unknown thief who was in the habit of stealing the toddy from such pots, and which toddy was drunk by and caused injury to certain soldiers who purchased it from an unknown seller, was held to have been rightly convicted of "causing to be taken an unwholesome thing with intent to injure"; and that Sect. 81, *ante*, p. 74, which says that, "if an act be done without any criminal intention, it is not an offence," did not apply to the case; *Reg.* v. *Dhania Daji*, 5 *Bom. H. C. Rep. C. C.* 59.

The words "other thing" must be read "other unwholesome thing." Hence, administering a substance as to the nature of which no evidence was given, but which was intended to act as a charm, was held to be no offence; *Reg.* v. *Jotee Ghoraee*, 1 *W. R. Cr.* 7; but where a deleterious drug is administered, although life is not endangered, an offence is committed under this section; *Reg.* v. *Joy Gopal*, 4 *W. R. Cr.* 4.

The word "offence" denotes, in this section, anything punishable under the Penal Code, or under any special or local law; Sect. 40, *ante*, p. 38.

CAUSING HURT WITH INTENT TO EXTORT, &c.

Sect. 327. *Voluntarily causing Hurt to extort.*—**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 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.

Sect. 328. See *ante*, p. 416.

Sect. 329. *Voluntarily causing Grievous Hurt to extort.*—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 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.

Sect. 330. *Voluntarily causing Hurt to extort Confession, &c.*—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 imprisonment 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.

Sect. 331. *Voluntarily causing Grievous Hurt to extort Confession, &c.*—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.

Sect. 332. *Voluntarily causing Hurt to Public Servant.*—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.

Sect. 333. *Voluntarily causing Grievous Hurt to Public Servant.*—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.

Offences under Sect. 332 *are triable by the Court of Session, a Presidency Magistrate or a Magistrate of the first class; those under the other sections are triable by the Court of Session. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable, except under Sects.* 330 *and* 332. *Not compoundable.*

Charge.

That you, the said A B, on or about the day of , at , did voluntarily cause (grievous) hurt to one C D, for the purpose of extorting from the said C D (*or* from a person interested in the said C D, to wit, E F) certain property, to wit, a sum of three hundred Rupees; and that you, the said A B, have thereby committed an offence punishable under Sect. 327 of the Indian Penal Code, and within, &c.

Charges under the other sections in this group may be drawn up by altering the above form to suit the circumstances of the case.

Evidence.

Prove that the defendant caused hurt or grievous hurt. The intent must be inferred from the circumstances of the case. It is not necessary that a demand should be made for the thing to be done, which is intended by the defendant should be done in consequence of the hurt; as it has been held that to support an indictment for an assault with intent to rob, no actual demand of money, &c., is necessary; *R.* v. *Trusty*, 1 *East, P. C.* 418; *R.* v. *Sharwin*, *ib.* 421. To bring a case under the provisions of the first part of Sect. 330, it must be proved that the hurt to the complainant was caused with intent to extort a confession of some offence or misconduct punishable under the Penal Code, or the laws mentioned in Sect. 40, *ante*, p. 38. Witchcraft is neither an offence nor misconduct within the meaning of this section, and it, therefore, does not apply to a case where the confession extorted by hurt, or

grievous hurt, was in reference to a charge of witchcraft; *Reg.* v. *Baboo Moondu*, 13 *W. R. Cr.* 23. It does not matter under Sects. 330 and 331 whether the offence or misconduct has been in fact committed or not, so that a charge may be brought under this section when no offence has been committed by the prosecutor; *Reg.* v. *Nim Chand*, 20 *W. R. Cr.* 41.

Under the latter part of the section the demand must be in respect of property. E B, in order to constrain his wife to satisfy his demand that she should return to his house, caused hurt to her; held that he could not be convicted under this section; *Emp.* v. *Ella Boyan*, *I. L. R.* 11 *Mad.* 257.

Sections 327, 329, 330, *and* 331. In these sections the word "offence" denotes anything punishable under the Penal Code or under any special or local law; Sect. 40, *ante*, p. 38.

A policeman who stands by acquiescing in an assault on a prisoner committed by another policeman for the purpose of extorting a confession is guilty of abetment of an offence under Sect. 330: *Reg.* v. *Latifkhan*, *I. L. R.* 20 *Bom.* 394.

The words "in the discharge of his duty as such public servant" in the earlier portion of Sect. 332 and Sect. 333 mean in the discharge of a duty imposed by law upon such public servant in the particular case, and do not cover an act done by him in good faith under color of his office, unless imposed as a duty on him by law in the particular case. Thus, friends of an accused who has been taken in custody by the Police under a *copy* of a warrant issued for his arrest, who in rescuing him caused hurt to the Police were held to have committed offences under Sects. 147 and 323, but not under Sect. 332; *Reg.* v. *Dalip*, *I. L. R.* 18 *All.* 246.

ACTS ENDANGERING LIFE.

Sect. 336. *Act endangering Life.*—**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 which may extend to two hundred and fifty Rupees, or with both.**

Sect. 337. *Hurt caused by Act endangering Life.*—**Whoever causes hurt to any person by doing an 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.

Sect. 338. *Grievous Hurt caused by Act endangering Life.*— **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.**

Offences under Sect. 336 *are triable by any Magistrate; those under Sects.* 337 *and* 338 *by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Offences under Sect.* 336 *are not compoundable, but those under Sects.* 337 *and* 338 *are, with the permission of the Court in which the case is pending.*

Evidence.

Prove the doing of an act by the defendant so rashly or negligently as to endanger human life, &c.; or so as actually to cause hurt or grievous hurt. The rashness or negligence is the offence, and the result of that negligence merely goes to increase the punishment. There is, therefore, no necessity to prove any intention to do hurt or grievous hurt, or any knowledge that the act done was likely to cause hurt or grievous hurt. On these three sections see, also, the remarks on rash driving and negligence and negligent acts; pp. 342 and 349.

Plying a boat thoroughly out of order and with a crack in it, and taking therein a hundred passengers, is not a negligent act endangering human life or the personal safety of passengers within Sect. 336, but should be charged as an offence under Sect. 282; *Reg.* v. *Khoda Jada*, 1 *Bom. H. C. Rep.* 13. The defendant was being driven in a carriage to her house through the streets of the town, between the hours of 7 and 8 P.M. The carriage was being

driven at the ordinary rate and in the middle of the road; the night was dark, and the carriage without lamps, owing to a violation of a distinct order of the accused, on discovering which, she ordered careful driving, and the horse-keeper and the coachman were shouting out to warn foot-passengers. The defendant's carriage came in contact with the complainant's father, an old deaf man, who was thereupon knocked down and killed. Upon a reference to the High Court, it was held that the question for the Court was, whether there was any evidence that the death of the deceased was induced by an act negligently and rashly directed by the accused; and further held, that there was no such evidence; *Mad. H. C. Rulings*, 17*th August* 1871; 6 *Mad. H. C. Rep. App.* 31.

WRONGFUL RESTRAINT AND CONFINEMENT.

Sect. 339 *Wrongful Restraint*—**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.**

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.

Sect. 340. *Wrongful Confinement*—**Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said "wrongfully to confine" that person.**

Illustration.

(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.**

Sect. 341. *Punishment for Wrongful Restraint.*—**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.**

Sect. 342. *Punishment for Wrongful Confinement.*—**Whoever wrongfully confines any person shall be punished with imprisonment of either descripton for a term which may extend to one year, or with fine which may extend to one thousand Rupees, or with both.**

Sect. 343. *Wrongful Confinement for three or more Days.*—**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.**

Sect. 344. *Wrongful Confinement for ten or more Days.*—**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.**

Sect. 345. *Wrongful Confinement when Writ has been issued for Liberation.*—**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.**

Offences under Sect. 341 *are triable by any Magistrate; those under Sects.* 342 *and* 343 *by a Presidency Magistrate, or a Magistrate of the first or second class; those under Sects.* 344 *and* 345 *by the Court of Session, or a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the*

first instance. Police officers may arrest without a warrant, except under Sect. 345. *Defendants are bailable. Offences under Sects.* 341 *and* 342 *are compoundable, those under the other three sections are not compoundable.*

Charge.

That you, the said A B, on or about the day of at , did wrongfully confine (*or* keep in confinement) a certain other person, to wit, C D (knowing at the time of such confinement that a writ for the liberation of the said C D had been duly issued); and that you, the said A B, have thereby committed an offence punishable under Sect. 342 (*or* 345) of the Indian Penal Code, and within, &c

Evidence.

Prove the restraint or confinement as defined in Sects. 339 and 340. The restraint must be *wrongful*, i. e., with the view of preventing any person from going in any direction in which he has a *right* to go. Therefore, the cases of restraint and confinement under a warrant, or by virtue of the power given to constables to arrest in certain cases without a warrant, or wherever an arrest is strictly legal, are excluded from the operation of these sections; *Emp.* v *Amarsang*, *I. L. R.* 10 *Bom.* 506, but an arrest by a police officer who had no power to make the arrest in question does amount to wrongful restraint, *in re Mukund Babu*, *I. L. R.* 19 *Bom.* 72. But where a superintendent of police illegally wrote a letter to a person, directing him to present himself before a magistrate, and sent two constables to accompany him and prevent him from speaking to any one, it was held that this amounted to wrongful confinement, *Parankusam* v *Stuart*, 2 *Mad. H. C. Rep.* 396. If a police officer detain a person for a single hour, except on reasonable grounds, justified by the circumstances of the case, he is guilty of wrongful confinement; *Sheo Surun Sahai* v. *Mahomed Fuzul Khan*, 10 *W. R. Crim.* 20; the reasonableness of the grounds must be judged by all the circumstances of the case, including the position and education of the accused; *Bhavoo* v. *Mulji*, *I. L. R.* 12 *Bom.* 377. A invited B to his house in order to be ready to give evidence in a judicial proceeding. A used no physical coercion nor threat of any kind to detain B in his

house, but B, from a mere general dislike or dread, of giving offence to A, remained there; it was held the conduct of A did not amount to wrongful restraint or to any offence; *Reg.* v. *Lakshaman Kalyan*, *B. R.* 11*th January* 1875. Where the complainant had for the purpose of removal placed certain goods upon a cart, and the accused came and unyoked the bullocks, and turned the goods of the cart into the road, but the complainant was left at liberty to, and did, go away, leaving the goods there, it was held that a conviction under Sect. 341 could not be sustained, as there was no restraint at all of the complainant; *Juggeshwar Dass* v. *Koylash Chunder*, *I. L. R.* 12 *Cal.* 55.

The definition of imprisonment as given by *Coleridge*, J., in *Bird* v. *Jones*, 7 *Q. B.*, p. 714, is as follows:—"A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be moveable or fixed; but a boundary it must have, and that boundary the party imprisoned must be prevented from passing; he must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom; it is one part of the definition of freedom to be able to go withersoever one pleases; but imprisonment is something more than the mere loss of this power; it includes the notion of restraint within some limits defined by a will or power exterior to our own."

No question of malice arises under Sects. 341 or 342; *Dhania* v. *Clifford*, *I. L. R.* 13 *Bom.* 376.

Under Sect. 345, the confinement must be proved; also that a writ for the liberation of the person so confined had been issued, and that the fact of its issue had come to the knowledge of the defendant; this need not be shewn by proving that the writ for liberation had been served on him, for he is not charged with disobedience to the writ; but it will be sufficient to shew by direct evidence, or by circumstances from which knowledge can be inferred, that he knew of the writ being issued. If the defendant be also charged under Sect. 174, *ante*, p. 195, with disobedience to the writ, then the actual service of it on him must be proved,

as no one is responsible for disobedience to an order of any authority, unless it be shewn that it has been legally and officially brought to his knowledge.

Under Sect 344, fine alone is not a legal punishment; *Reg.* v. *Bahijee*, 1 *Bom. H. C. Rep.* 39.

AGGRAVATED WRONGFUL CONFINEMENT.

Sect. 346. *Wrongful Confinement in Secret.*—**Whoever wrongfully confines any person, in such a 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.**

Sect 347. *Wrongful Confinement to extort Property.*—**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 any thing 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.**

Sect. 348 *Wrongful Confinement to extort Confession.*—**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.

Offences under Sects. 346 *and* 347 *are triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first or second class; those under Sect.* 348, *by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class. A summons should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.*

Evidence.

In order to render a person liable under Sect. 346, it must be shewn that the wrongful confinement was of such a nature as to indicate an intention that the person so confined should not be discovered; *Emp.* v. *Sreenath Banerjee, I. L. R.* 9 *Cal.* 221.

Sections 347 *and* 348.—In these sections the word "offence" denotes a thing punishable under the Penal Code, or under any special or local law; Sect. 40, *ante*, p. 38.

CRIMINAL FORCE AND ASSAULT.

Sect. 349. *Force.*—**A person is said to use force to another if 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:**

Firstly, **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.

Sect 350. *Criminal Force.*—Whoever intentionally uses force to any 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.

Sect. 351. *Assault.* 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 preparations such a meaning as may make those gestures or preparations amount to an assault.

Illustrations.

(*i*) 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.

(*j*) 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.

(*k*) 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.

Sect. 352. *Punishment for Assault, &c.*—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.

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.

Sect. 353. See *post*, p. 435.

Sects. 354 and 355. See *post*, pp. 436-437.

Sects. 356 and 357. See *post*, p. 438.

Sect. 358. *Assault on Provocation.*—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.

Explanation.—The last section is subject to the same explanation as Sect. 352.

Triable by any Magistrate. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Compoundable.

Evidence.

Prove some act done by the defendant which brings his conduct within the words either of Sect. 350 or Sect. 351. It must also be shewn under what circumstances the act was done, whether on grave and sudden provocation given by the person on whom the act was committed or otherwise, and this is a duty laid upon the prosecution, for it is necessary under the words of Sect. 352 to allege the presence or absence of these extenuating circumstances in the charge; a very slight amount of evidence will, however, be sufficient on the part of the prosecutor to shew the absence of provocation, as that is a matter really of defence, and its existence would be better known to the accused, who alleges that he was provoked, than to the prosecutor.

The mathematical definition of force is "anything which causes or tends to cause a change in the state of any body, whether the state be one of motion or rest." This definition, slightly elaborated and explained, the Commissioners have adopted. If force be used under the circumstances detailed in Sect. 350, it is criminal force. The difference between criminal force and assault is that the latter is something less than the former, the force being cut short before the blow actually falls. Under the Penal Code the term "assault" only includes a portion of what are, under the English law, assaults, *i. e.*, that portion which are attempts to commit a forcible crime against the person of another. Presenting a loaded gun at a man who is within range of the gun is an assault; so is pointing a pitchfork at him, when within reach of it; 1 *Hawk. c.* 15, *s.* 1. But if a man strike at another, but at such a distance that he cannot by any possibility touch him, it is no assault; *Com. Dig. Battery* (*c*). But if A advance in a threatening attitude towards B to strike him, and be stopped just before he is near enough for his blow to take effect, it is an assault; *Stephens* v. *Myers*, 4 *C. and P.* 349.

An assault has been defined in the High Court at Bombay as "gestures calculated to excite the apprehension that the person making them is about to use criminal force, coupled with a present ability to carry the gestures into effect. Words do not amount

to an assault, but, accompanied by gestures, they may amount to one, or they may shew that the gestures even do not constitute an assault. But to do this it must be clearly shewn to the person threatened that the party threatening has no intention to use immediate criminal force"; *Cama* v. *Morgan*, 1 *Bom. H. C. Rep.* 205.

The other cases of assault under the English law would under the Penal Code amount to the use of criminal force. Thus:—A master taking indecent liberties with a female scholar, without her consent, though she does not resist; *Reg.* v. *Day*, 9 *C. and P.* 722; a medical man unnecessarily stripping a female patient naked, under the pretence that he cannot otherwise judge of her illness, if he himself take off her clothes; *R.* v. *Rosinski*, 1 *Mood. C. C.* 19; parish officers cutting off the hair of a pauper in the poorhouse by force and against her will; *Forde* v. *Skinner*, 4 *C. and P.* 239; taking a new-born child from the mother, under pretence of taking it to an institution to be nursed, and instead, putting it into a bag, and hanging it on some palings by the wayside; *Reg.* v. *March*, 1 *C. and K.* 496; spitting in a man's face; *R.* v. *Cotesworth*, 6 *Mod.* 149; striking a horse upon which a man is riding, and thus causing him to be thrown; *Dodwell* v. *Burford*, 1 *Mod.* 24; *W. Jones*, 444; and every touching or laying hold (however trifling) of another's person or clothes in an angry, revengeful, rude, insolent, or hostile manner; 1 *Hawk. c.* 15, *s.* 2; see, also, *Rawlings* v. *Till*, 3 *M. and W.* 28; *Coward* v. *Baddeley*, 4 *H. and N.* 478. All cases of trifling assaults will be met by Sect. 95 of the Penal Code, *ante*, p. 103.

A blow which is entirely accidental; an injury received in playing at any *lawful* sport by consent, provided the injury be not the result of any unfair advantage taken by the party doing it; reasonable chastisement of a child by its parent or guardian; of a scholar by his schoolmaster, even for an offence against school discipline committed outside the school premises; *Cleary* v. *Booth* [1893], 1 *Q. B.* 465; a blow or any other violence necessary for self-defence; necessary force used in exercise of the right of defence of private property; the use of force by a

public servant within the sphere of his duties, are not offences under these or any other sections of the Penal Code.

Where the accused had been brought to a certain place to serve as a cooly, and attempted to run away, but was prevented from so doing by a *peon*, and, in the struggle which ensued, the accused seized the *peon's* wrist, it was held that the *peon's* act was illegal and amounted to wrongful restraint, and that the accused had committed no offence ; *Emp.* v. *Ganpati*, *B. R.* 12*th May* 1892.

A person tried and acquitted on a charge of using criminal force, under Sect. 352, cannot be tried afterwards, in respect of the same criminal matter, on a charge of causing hurt ; *Kaptan* v. *Smith*, 16 *W. R. Cr.* 3.

In the section in the Ceylon Penal Code, corresponding to Sect. 350, the word "illegally" is inserted after the word "intending," and between the words "he will" and "cause."

ASSAULT IN EXECUTION.

Sect. 353. *Assault in Execution of Duty.*—**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.**

Triable by a Presidency Magistrate or a Magistrate of the first or second class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.

Charge.

That you, the said A B, on or about the day of , at , did assault (*or* use criminal force to) C D, a public servant, to wit, a peon, in the execution of his duty as such

public servant; and that you, the said A B, have thereby committed an offence punishable under Sect. 353 of the Indian Penal Code, and within, &c.

Evidence.

Prove the assault or criminal force, and that it was offered to the complainant as a public servant acting in the execution of his duty. Or else prove that the offence was committed with the intention, or in consequence of the other circumstances, mentioned in the section. A Collectorate *Peadah*, who had been deputed to keep the peace during a distraint, was assaulted by the prisoner, while on his road to execute the order with which he had been entrusted, the prisoner attempting to deprive him of his *purwannah*. It was held that the prisoner was rightly convicted of assaulting a public servant in the execution of his duty; *Reg.* v. *Methi Mullah*, 13 *W. R. Cr.* 49.

A peon in the Revenue Department was deputed by a forest settlement officer, under the authority of rules printed at pp. 26 and 27 of *Nairne's Revenue Hand Book*, to impress fifteen carts for the use of the officer. The accused assaulted the peon and prevented him from seizing his cart. It was held that the foregoing rules had not the force of law, and that a public servant acting under them was not acting in execution of his duty, and consequently that the accused was not guilty under this section, but only under Sect. 352; *In re Rakhmaji*, *I. L. R.* 9 *Bom.* 558.

A warrant for the arrest of a person in execution of civil process should be signed in full by the officer issuing it, but if he only initials it, it is still the duty of the officer to whom it is entrusted to execute it, and an assault on the officer executing it will fall under this section; *Emp.* v. *Janki Prasad*, *I. L. R.* 8 *All.* 293.

ASSAULT WITH INTENT TO OUTRAGE.

Sect. 354. *Assault with Intent to outrage the Modesty of a Woman.*—**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.**

Sect. 355. *Assault with Intent to dishonour.*—**Whoever assaults or uses criminal force to any person, intending thereby to dishonour that 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 two years, or with fine, or with both.**

Note.

Act VI. of 1864, Sect. 4, provides whipping as a punishment, in addition to any other which may be awarded, on conviction for a second offence under Sect. 354.

Triable by a Presidency Magistrate or a Magistrate of the first or second class. A warrant should issue in the first instance, under Sect. 354; *a summons under Sect.* 355. *Police officers may arrest without a warrant under Sect.* 354, *but not under Sect.* 355. *Defendants are bailable. Offences under Sect.* 354 *are not compoundable, those under Sect.* 355 *are compoundable.*

Charge under Sect. 354.

That you, on or about the day of , at , did assault (*or* use criminal force to) a certain woman, to wit, C D, intending by such assault (*or* criminal force) to outrage the modesty of the said C D: and that you have thereby committed an offence punishable under Sect. 354 of the Indian Penal Code, and within, &c.

Under Sect. 355

That you, on or about the day of , at , did assault (*or* use criminal force to) one C D, otherwise than on grave and sudden provocation given by the said C D, intending by such assault (*or* criminal force) to dishonour the said C D, and that you have thereby committed an offence punishable under Sect. 355 of the Indian Penal Code, and within, &c.

Evidence.

The assault, or criminal force, must be proved as under the foregoing sections. Under Sect. 354, woman means a female human being of any age, Sect. 10, *ante*, p. 25. There is no definition of

what is an outrage to female modesty. This will differ according to the country and the race to which the woman belongs. In a place where many women consider themselves as dishonoured by exposure to the gaze of strange males, a man rudely thrusting his head into the covered palkee of a woman of rank, if she be a native, may well be deemed an outrage to female modesty. Such an act done to a European lady would not be of such a heinous nature. Nor, in the former case, would the act be so reprehensible as that of turning up the clothes of a female, whether in the public streets or elsewhere, without her consent. There is a great difference in the nature of offences of this kind, as may be gathered from the fact that, for a second offence, the offender may be punished with whipping; some may be almost harmless, while others are of the gravest description. In order to convert an indecent assault upon a woman into an attempt to commit rape, the evidence must shew that he intended (if not interrupted) to complete the offence; *Emp.* v. *Shankar*, *I. L. R.* 5 *Bom.* 403.

The question as to what will dishonour a man will also much differ in various cases, and in all it will be a matter of fact to be proved, in most instances, solely by the oath of the complainant, unless the act be one which is universally admitted to be one causing dishonour.

ASSAULT IN ATTEMPTING TO STEAL OR CONFINE.

Sect. 356. *Assault in attempting to steal.*—**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.**

Sect. 357. *Assault in attempting to confine.*—**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.**

Sect. 358. See *ante*, p. 482.

Triable by any Magistrate. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable under Sect. 356, *but they are under Sect.* 357. *Not compoundable.*

Charge.

That you, on or about the day of , at , did assault (*or* use criminal force to) C D, in attempting to commit theft of certain property, to wit, a gold watch and chain, then being worn by the said C D; and that you have thereby committed an offence punishable under Sect. 356 of the Indian Penal Code, and within, &c

Evidence.

Prove that the defendant attempted to rob, or wrongfully to confine, the complainant, and in such attempt committed an assault, &c.

KIDNAPPING, ABDUCTION, &c.

Sect. 359 *Kidnapping.*—**Kidnapping is of two kinds; kidnapping from British India, and kidnapping from lawful guardianship**

Sect 360 *Kidnapping from British India.*—**Whoever conveys any person beyond the limits of British India, without the consent of that person or of some person legally authorised to consent on behalf of that person, is said to kidnap that person from British India.**

Sect. 361. *Kidnapping from Lawful Guardianship.*—**Whoever takes or entices any minor under 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.

Sect. 362. *Abduction*—Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

Sect. 363. *Punishment for kidnapping.*—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.

Sect. 364. *Kidnapping or abducting in order to murder.*—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 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.

Sect. 365. *Kidnapping, &c., in order to confine secretly.*—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.

Sect. 366. *Kidnapping a Woman to compel Marriage, &c.*—**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.**

Sect. 367. *Kidnapping, &c., in order to subject to Slavery, &c.*—**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.**

Sect. 368. *Concealing a Kidnapped Person.*—**Whoever knowing that any person has 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.**

Sect. 369. *Kidnapping, &c., Child to steal Property*—**Whoever kidnaps or abducts any child, under the age of ten years, with the intention of taking dishonestly any movable 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.**

Triable by the Court of Session, with the exception of those under Sect. 363, which are triable by the Court of Session, a Presidency

Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That you, on or about the day of , at , did kidnap a certain person, to wit, C D, from British India *or* from lawful guardianship, (*or* with the intention that such person should be murdered), and that you have thereby committed an offence punishable under Sect. 363 (*or* 364) of the Indian Penal Code, and within, &c.

Evidence.

Under these sections kidnapping is an offence irrespective of any intent with which it is committed. Kidnapping from British India consists in conveying a person beyond its limits without his own consent, or that of his lawful guardian, without reference to the intention with which that person is so conveyed. Kidnapping from lawful guardianship can only be committed in respect of a minor or an insane person, but in this case also intention is not of the essence of the offence. To support a charge of kidnapping from lawful guardianship, it must be shewn that the accused *took* or *enticed away* from lawful guardianship the person alleged to have been kidnapped; *Reg.* v. *Neela Bebee*, 10 *W. R. Cr.* 33; without consent of the guardian; *Reg.* v. *Mohim Chunder Sil*, 16 *W. R. Cr.* 42. The consent of the person kidnapped is immaterial under Sect. 361.

The word "take" implies a bodily removal by the defendant, not necessarily by force, actual or constructive; *Reg.* v. *Manketow*, *Dears. C. C.*, p. 163; a mere leading of a not unwilling child would be sufficient. "Enticing" is an act of the defendant by which the person kidnapped is induced of his own accord to go to the kidnapper. The means used to entice need not be deceitful; *Reg.* v. *Bhungee Ahur*, 2 *W. R. Cr.* 5; *Reg.* v. *Sookee*, 7 *W. R. Cr.* 36; they may be the expectation of a present, which is actually gratified; or the common blandishments of a lover; *R.* v. *Twistleton*, 1 *Lee.* 257; 1 *Hawk. c.* 16. *s.* 10. In abduction, however, the means must be either forcible or deceitful.

Abduction is not an offence *under these sections*, unless it be with one of the intents expressly provided against. The intent with which the abduction took place must be specified in the warrant and charge, and be proved at the trial; *In re Bidhumukí*, 6 *Ben. L. R. App.* 129; and 15 *W. R. Cr.* 4. It must also be shewn that there was some force or deceit practised on the person abducted; *Reg.* v. *Komul Dass*, 2 *W. R. Cr.* 7.

The general principles as to the principal offence involved in these sections are admirably laid down by *Bramwell*, B., in the case of *Reg.* v. *Olliffe*, 10 *Cox's Crim. Cases*, p. 404.—"If a young woman leaves her father's house without any persuasion, inducement, or blandishment held out to her by a man, so that she has fairly got away from home, and then goes to him, although it may be his moral duty to return her to her parents' custody, yet his not doing so is no infringement of this Act of Parliament, for the Act does not say he shall restore her, but only that he shall not take her away." See, also, *Reg.* v. *Neela Bebee*, 10 *W. R. Cr.* 33. "It is, however, equally clear that, if the girl, acting under persuasion, leaves her father's house, although he is not present at the moment, yet if he avails himself of that leaving, which took place at his persuasion, that would be a taking her out of the father's possession, because the persuasion would be the motive cause of her leaving. Again, although she may not leave at the appointed time, and although he may not wish that she should have left at that particular time, yet if, finding she has left, he avails himself of that to induce her to continue away from her father's custody, in my judgment, he is also guilty, if his persuasion operated on her mind so as to induce her to leave." If a woman be forcibly taken away, and afterwards married, or defiled with her own consent, it is within the provisions of these sections, for the offender is not to escape by having prevailed over the weakness of a woman whom he originally got into his power by such base means; *Fulwood's Case*, *Cro. Car.* 488; *Swenden's Case*, 5 *St. Tr.* 150; 1 *Hale*, 660. And so, too, if she be taken away and married with her own consent, if this be effected by means of fraud, for she cannot be considered, while under the influence of fraud, to be a free

agent; *R.* v. *Wakefield, Lancaster Assizes*, 1827. Where a girl was persuaded by the defendant to leave her father's house and go away with him, without the father's consent, and accordingly left her home alone by a preconcerted arrangement between them, and went to a place appointed, where she was met by the prisoner, and they then went away together, without the intention of returning; this was held to be a taking of the girl out of the father's possession, and certainly it would amount to an enticing; *Reg.* v. *Mankletow, Dears. C. C.* 159. So, too, it would be a taking where the prisoner induced a girl to go with him and get married, although she returned after an hour and continued to live with her father, who knew nothing of what had happened, as the girl, after her marriage, could not be held to be in her father's possession, although she was in his house, because she was in the lawful possession of her husband, and never could be in the possession of her father in the same way as before; *Reg.* v. *Baillie*, 8 *Cox's Crim. Cases*, 238. So, where the defendant, by concert with the girl, met her, and stayed with her away from her father's house for several nights, sleeping with her; and the jury found that the father did not consent, and that the defendant knew that he did not, and that he took the girl away with him in order to gratify his passions, and then let her return home, and not with the intention of keeping her away from her home permanently, the conviction was held right; *Reg.* v. *Timmins*, 1 *Bell, C. C.* 276. Where a girl under sixteen was found in the streets by herself, and seduced away, it was held that she was not taken out of the possession of her father, although he was living in the same place, and the girl was living with him; *Reg.* v. *Green*, 6 *F. and F.* 274; see, also, *Reg.* v. *Hibbert, L. R.* 1 *C. C.* 184. In Calcutta, however, it has been ruled that the enticing away of a girl playing in the public streets was a kidnapping from lawful guardianship; *Reg.* v. *Mussamut Oozeerun*, 7 *W. R. Cr.* 98. So, too, if the kidnapping takes place while the girl is visiting a neighbour; *Reg.* v. *Goorooloss*, 4 *W. R. Cr.* 7; *Reg.* v. *Koordan Singh*, 3 *W. R. Cr.* 15; but not if she has run away from home in consequence of ill-treatment; *Reg.* v. *Gunder Singh*, 4 *W. R. Cr.* 6. A was indicted for fraudulently alluring C

out of the possession of her mother and stepfather, the latter having the lawful care of her, and B with being an accessory before the fact. C was sent by her mother to live with her grandmother. Instead of going there, she went to B's house, and did not return home when desired by her mother. After remaining with B a month, she left with A, her paternal uncle, and was married to him without her mother's knowledge. It was held that there was no evidence that the alluring was fraudulent, or that the girl was taken out of her mother's possession, and that the facts did not support the indictment, *Reg.* v. *Burrell*, *I. & C.* 354. Where the accused knowing that a minor had left his home without the consent of his parents, and at the request of the kidnapper, undertook to convey the minor from a place in India to Ceylon, it was held that so long as the process of taking the minor out of the keeping of his lawful guardian continued, the offence of kidnapping might be abetted; *Reg.* v. *Samia Kaundan*, *I. L. R.* 1 *Mad.* 173.

If the offence be under Sect. 361, the child must be shewn to be under fourteen if a male, and under sixteen if a female, and it will be no defence to say that the accused did not know the child was under the age, but thought he or she was over the specified age, unless he has substantial ground for supposing that such is the fact, so as to bring the case within Sect. 79 of the Penal Code, *ante*, p. 61; for it was ruled in the case of *Reg.* v *Ollifier*, *supra*, that a man deals with unmarried girl at his peril, and in that case the fact that she had told him she was seventeen was held not to excuse him. See, also, *Reg.* v. *Robins*, 1 *F. and F.* 50, where *Cockburn*, C. J., ruled to the same effect; and *Reg.* v. *Prince*, *L. R.* 2 *C. C.* 154. A child under ten years of age is *primâ facie* subject to guardianship, and any one removing such child, without permission properly obtained, takes the risk of such act upon himself; and the fact of having omitted to enquire whether the child had a guardian or not is no defence; *Emp.* v. *Umsadbuksh*, *I. L. R.* 3 *Bom.* 178.

Lawful Guardian.—The lawful guardian of a legitimate child is its father during his lifetime, except under Mahomedan law, where the mother is entitled to the custody of her sons up to seven years,

and her daughters up to puberty according to the Soonee schools, but only up to the age of seven years according to the Shiah school. After the death of the father or mother the lawful guardian must be ascertained by the law governing the class to which the child belongs A mother cannot have any right to the custody of her legitimate child adverse to that of the father. Ordinarily the custody of the mother is the custody of the father, and any removal of the children from place to place by the mother ought to be taken to be consistent with the right of the father as guardian, and not as a taking out of his keeping. But where a Hindu woman left her husband's house, taking with her her infant daughter and went to the house of A, and on the same day the daughter was married to the brother of A without her father's consent; it was held that A was rightly convicted of the offence of abetment of kidnapping, *Emp* v *Prankrishna, I. L R* 8 *Cal.* 969. The husband of a Hindu girl of fifteen is her lawful guardian; consequently, if her father removes her from her husband's custody without his consent, he commits the offence of kidnapping from lawful guardianship; *In re Dhuromdhur, I. L R* 17 *Cal.* 298.

The mother of an illegitimate child is its proper and natural guardian during the period of nurture, and where the mother on her death-bed entrusts the care of such child to a person who accepts the trust and maintains such child, such person is lawfully entrusted with the care of the minor. The explanation of the words "lawful guardian" in Sect 361 is intended to obviate the difficulty the prosecution might be put to in being bound to prove strictly in cases of abduction that the person from whom the minor had been abducted was the guardian of such minor in the strict legal acceptation of the word; *Emp.* v. *Pemanth, I. L. R.* 8 *Cal* 971

The fact that a betrothal, not amounting to a marriage or transfer of guardianship, has taken place between the accused and the girl, is no answer to the charge, though it may diminish the heinousness of the offence; *Reg.* v. *Gooroodoss*, 4 *W R Cr.* 7; nor is any nearness of relation: an uncle may be convicted if he takes a minor niece from legal guardianship; *Reg* v. *Modhoo Paul*, 3 *W. R.* Cr. 9

Under Sect. 363 a subject of an independent State is amenable to the British courts for the offence of kidnapping from British India, though, if the person so kidnapped were murdered beyond our territories, there would be no jurisdiction in respect of the homicide; *Reg.* v. *Dhurmonarain*, 1 *W. R. Cr.* 39.

If the charge be framed under Sect. 364 or any of the following sections, the intent must be laid, and proved as laid, either directly or circumstantially.

Where a procuress induced a married woman of the age of twenty to leave her husband, and the facts shewed that the wife "had made her deliberate choice, and was determined of her own free will to leave her husband, and become a prostitute in Calcutta," the Calcutta High Court held that no conviction could be sustained under Sect. 366, but that there was quite sufficient evidence to convict the prisoner of enticing under Sect. 498, "for whatever the wife's secret inclinations were, she would have had no opportunity of carrying them out had not the prisoner interposed"; *Reg.* v. *Sumotee*, 1 *W. R. Cr.* 45. Section 366 provides for acts, to which the woman is not at the time a consenting party, committed for the purpose of enabling thereafter force or fraud to be brought to bear upon the woman in order to bring about marriage or illicit intercourse.

Section 368 applies to a person who assists in concealing a kidnapped or abducted person, and not to the kidnapper; *Reg.* v. *Sheikh Oozeer*, 6 *W. R. Cr.* 17. It is not necessary to prove that the person concealed was abducted by any particular person. If there is proof of abduction having been committed, and that the accused knew of it, that is sufficient, although a person charged with the abduction has been acquitted; *Reg.* v. *Ameer Daraz*, 4 *W. R. Cr.* 3.

Under Act VII. of 1871 (the Indian Emigration Act), Sect. 71, any person making a contract with any native of India, except under the provisions of that Act, for labour at any place beyond British India, to which emigration is not authorized, shall be deemed to have committed the offence specified in Sect. 363 of the Penal Code. A similar provision is also to be found in Mad. Act V. of 1866, Sect. 16. See, also, the notes to Sects. 370 and 371

for the provisions of 39 and 40 Vict. c. 49, in respect to offences under Sect. 367 committed in certain places out of British India.

TRAFFICKING IN HUMAN BEINGS.

Sect. 370. *Buying, &c., any Person as a Slave.*—**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.**

Sect. 371. *Habitual dealing in Slaves.*—**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.**

Sect. 372. *Selling any Minor for purposes of Prostitution, &c.*—**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.**

Sect. 373. *Buying any Minor for purposes of Prostitution.*—**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.**

Sect. 374. *Unlawful Compulsory Labour.*—**Whoever unlawfully compels any person to labour 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.

Offences under Sects. 370 *and* 371 *are triable by the Court of Session; those under Sects.* 372 *and* 373 *by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class; and those under Sect.* 374, *by any Magistrate. A warrant should issue in the first instance. Police officers may arrest without a warrant, except under Sect.* 370. *Defendants are bailable under Sects.* 370 *and* 374, *but not under Sects.* 371-373. *Offences are not compoundable, except under Sect.* 374.

Evidence.

Slavery.—A slave is a creature without any rights or status whatever, who is, or may become, the property of another as a mere chattel, the owner having absolute power of disposal by sale, gift, or otherwise, over the slave without being responsible to any legal authority. In the East, there is a modified kind of slavery, for children are purchased from their parents or strangers and are brought up as domestic servants, having little or no personal liberty conceded to them, and though they are not ordinarily sold, yet they are transferred from one member of a family to another, by way of gift. A person is treated as a slave if another asserts an absolute right to restrain his personal liberty and to dispose of his labour against his will, unless that right is conferred by law, as in the case of a parent, guardian or jailor. Any person who, in any way, deals with another, as described in Sect. 370, with the intention that the person dealt with should come under the power of another entirely and lose his own liberty of action against his will, would bring himself within the provision of this section; *Emp.* v. *Ram Kuar, I. L. R.* 2. *All.*, p. 725. Where, however, R, having obtained possession of D, a girl about eleven years of age, disposed of her to a third person, with intent that such person should marry her, and such person received her with that intent,—it was held that R could not be convicted of disposing of D as a slave; *ib.* But where S transferred to A for twenty-five rupees his rights in a girl of thirteen years of age, and in a document in which the transaction

was recorded, the girl was described as a *vellati*, a slave-girl purchased by S from P ,—it was held that A was guilty of buying the girl as a slave within the meaning of the section; *Amina* v. *Emp.*, *I. L. R.* 7 *Mad.* 277.

By the 39 and 40 Vict. c. 46, s. 1, it is enacted that "if any person, being a subject of Her Majesty, or of any Prince or State in India in alliance with Her Majesty, shall, upon the high seas, or in any part of Asia or Africa which Her Majesty may think fit to specify by any order in Council in this behalf, commit any of the offences defined in Sects. 367, 370 and 371" of the Indian Penal Code, "or abet within the meaning of the said Penal Code the commission of such offence, such person shall be dealt with, in respect of such offence, or abetment, as if the same had been committed in any place in British India in which he may be or may be found."

Section 2 provides for the application of this Act by order in Council to any future amendments of such sections.

Section 3 gives certain powers to the High Courts with respect to issuing commissions to obtain evidence of such offences.

By an order in Council, dated the 30th April 1877, and published in the *London Gazette*, No. 24466, p. 3447, on the 1st June 1877, it was provided that this Act should apply to the following parts of Asia and Africa:—

(*a*) The territories of the Khan of Khelat and of the Sultan of Muscat in Mekran and Arabia.

(*b*) The coasts of Beloochistan and of the Bunder Abbas districts and the shores of the Persian Gulf.

(*c*) The coast of Arabia from Ras Mussendom to Cape Bab-el-Mandeb.

(*d*) The territories of the following tribes near Aden, *viz*:—

The Abdali.	The Amir.
The Foodli.	The Subahi.
The Akrabi.	The Gafai.
The Howshabi.	The Oulaki.
The Alawi.	

(*e*) The coast of Africa from Ras Sejarme to Delagoa Bay.

(*f*) The territories of the Sultan of Zanzibar.

(*g*) The sea and islands within ten degrees of latitude and longitude from such coasts and shores respectively.

Trafficking in Minors for Prostitution.—Under these sections it must be shewn that possession of the minor has been obtained under a distinct arrangement that the minor's person should be for some time completely in the keeping and under the control and direction of the party having the possession. The words "buys" and "hires" convey that meaning according to their ordinary acceptation, and giving them due effect, the associated words "otherwise obtains possession" were not intended to do more than include other modes of obtaining the same kind of possession as that of a buyer or hirer. Complete possession and control of the minor's person obtained by buying, hiring, or otherwise with the intent or knowledge that, by the effect of such possession and control, the minor should, or would afterwards, be employed or used for either of the purposes stated is what the section was intended to make punishable as an offence; *Reg.* v. *Shaik Ali*, 5 *Mad. H. C. Rep.* 473. Therefore, where the prisoner met a girl eleven years old, in a street, and promised to give her a pice if she would accompany him into an uninhabited house close by, and allow him to have sexual intercourse with her, and the girl went willingly, and they were detected in the act, the girl having gone out without permission, not having attained the age of puberty, and the evidence tending to shew that she had not had sexual intercourse before, it was held that the prisoner had not committed any offence under Sect. 373; *ib.*; followed in *Emp.* v. *Sukee Raur*, *I. L. R.* 21 *Cal.* 97.

The offence is complete as soon as a girl is purchased or sold with the knowledge or likelihood that she will be employed for the purpose of prostitution, although the point of time for such employment may be remote by reason of her physical incapacity for the act; *Legal Remembrancer* v. *Karuna*, *I. L. R.* 22 *Cal.* 164; and even although she does not as a matter of fact enter upon prostitution until years after she has attained maturity, or never enters upon such a profession at all; *Imp.* v. *Chanda*, *I. L. R.* 18 *All.* 24; but the intention must be that she should be employed as a prostitute while a minor; *Legal Remembrancer* v. *Karuna*; following *Emp.* v. *Ramanna*, *I. L. R.* 12 *Mad.* 278.

It is not necessary, however, that present possession of the child should be given up; any disposition or dedication between two parties, by which one gives up a girl to a life of prostitution, comes within the section, although the girl may remain with the person who disposes of or dedicates her; *Reg.* v. *Jaili Bhaivin*, 6 *Bom. H. C. Rep. C. C.* 60. Thus, the dedication of a minor girl, under the age of sixteen years, to the service of a Hindu temple, by the performance of the *shej* ceremony, where it was shewn that it was almost invariably the case that girls so dedicated led a life of prostitution, was held to be a disposing of such minor, knowing she would be likely to be used for the purposes of prostitution; *ib.*; *Reg.* v. *Arunachellam*, *I. L. R.* 1 *Mad.* 164; see, also, *Emp.* v. *Basava*, *I. L. R.* 15 *Mad.* 75. So, too, where girls were disposed of and registered as dancing-girls of a pagoda for the purpose of being brought up as such, "it being abundantly proved that girls so sold and so registered are brought up as prostitutes, and that one principal purpose of such a transaction was that they should be so brought up"; *Ex parte Padmavati*, 5 *Mad. H. C. Rep.* 415. In this case, however, there would seem to have been a regular sale. Where a dancing-girl of a temple, falsely styling herself the mother of another girl (a minor), applied that this girl should be appointed in her place, and the temple authorities ordered that she should be entered in the pay abstract like other dancing-girls, there is *primâ facie* evidence of the disposal of a minor with the knowledge that she would be employed for immoral purposes; *Srinivasa* v. *Annasami*, *I. L. R.* 15 *Mad.* 41; see, also, *Emp.* v. *Tippa*, *I. L. R.* 16 *Bom.* 73.

Prostitution is not the essential condition or the necessary consequence of the adoption of a daughter by a dancing-girl, but it is an incident due to social influence; *Venku* v. *Mahalinga*, *I. L. R.* 11 *Mad.* 393; nor is prostitution the necessary result of teaching a girl singing; *Khubchund* v. *Beram*, *I. L. R.* 13 *Bom.* 150. The adoption of a daughter by a dancing-girl is no offence if she is to be brought up as a daughter, although she may have her choice when she attains her age of following the profession of a prostitute, or marrying; but if she is adopted in order to

follow the profession as a minor, it is an offence; *Emp.* v. *Ramanna*, *I. L. R.* 12 *Mad.* 273.

Where a certain person, falsely representing that a minor girl of a low caste was a member of a higher one, induced a member of such higher caste to take her in marriage, and to pay money in the full belief that such representation was true,—it was held, that such person could not be convicted under Sect. 372 or Sect. 373 inasmuch as although it was doubtful whether the marriage was valid or not under Hindoo law, yet the object of the accused was to dispose of the girl for the purpose of marriage and not for prostitution; *Reg.* v. *Dabee Singh*, 7 *W. R. Cr.* 55; *Emp.* v. *Sri Lal*, *I. L. R.* 2 *All.* 694.

Forced Labour.—The impressment of carts for the use of a forest settlement officer, under executive orders of Government, which have not the force of law, is an offence under Sect. 374; *In re Rakhmaji*, *I. L. R.* 9 *Bom.* 558. Where a person has induced another to consent to work for him on certain terms, he does not unlawfully compel him to labour when he insists that the work shall be done; *Madan* v. *Emp.*, *I. L. R.* 19 *Cal.* 572.

SEXUAL OFFENCES.

RAPE.

Sect. 375. *Rape.*—**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:—**

Firstly. **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 married.**

Fifthly. **With or without her consent, when she is under twelve 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 twelve years of age, is not rape.**

Sect. 376. *Punishment for Rape.*—**Whoever commits rape 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.**

Act VI. of 1864, Sect. 4, permits whipping to be added to above punishment on second conviction for rape.

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. If, however, the sexual intercourse was by a man with his own wife, then *a summons should issue in the first instance; police officers may not arrest without a warrant; and defendants are bailable. Not compoundable.*

Charge.

That you, on or about the day of , at , did commit rape on one C D; and that you have thereby committed an offence punishable under Sect. 376 of the Indian Penal Code, and within, &c.

Evidence.

Section 375 now appears as altered by Act X. of 1891, Sect. 1.

Under the English law, if it be proved that the defendant is under the age of fourteen years, he must be acquitted, whatever the nature of the evidence against him may be; for a boy under the age of fourteen years is presumed by that law incapable of committing a rape; 1 *Hale*, 630. There is no provision of a similar nature in the Penal Code, and, therefore, as far as legislative enactment goes, any male, above the age of seven, may be convicted of this offence, though it is necessary for the prosecution to prove in each case that the accused has attained the full state of puberty; *Emp.* v. *Gopala*, *B. R.* 16*th July* 1896. An opinion was expressed in former editions of this work that it was very doubtful whether a boy who had not attained the full state of puberty could be convicted of an attempt to commit rape, (although the strict interpretation of the two illustrations to Sect. 511 would seem to point to the opposite conclusion, provided the

accused at the time of the attempt was physically in a state to effect some penetration) because the power to have full connection is so much of the essence of the offence that it would be difficult to say that a child who was physically unable to commit the full offence had "attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion," so as to be guilty of committing the attempt. This opinion has since received judicial confirmation in *Emp.* v. *Gopala* (*supra*), where it was held that a person physically incapable of committing the offence of rape cannot be found guilty of an attempt to commit that offence. A person, however, proved to have the power of erection must be presumed to be physically capable of committing rape; *ibid.* A husband and a boy under the age of puberty may, however, be principals in the second degree, and be punished for aiding and abetting; 1 *Hale*, 620, 639; *R.* v. *Eldershaw*, 3 *C. and P.* 396; and if the husband of a woman abetted the commission of rape upon her and was present when the offence was committed, he would under Sect. 114 be deemed to have committed the principal offence. See, also, *Lord Audley's case*, 3 *State Trials*, 401.

A man may commit a rape upon his wife if she be under the age of twelve years. In a country where marriages among Mahomedans and Hindoos are usually contracted before the age of puberty, it is necessary to prevent men from prematurely taking advantage of their marital rights, although, in most instances, as the wife resides with her relations till she is old enough to go home to her husband, their protection is sufficient.

The final act must be *against the will of the woman*. It is no excuse that she consented at first, if the offence was afterwards committed by force against her will; nor is it an excuse that she consented after the fact; 1 *Hawk. c.* 16, *s.* 7; nor does the cessation of a genuine resistance amount to consent; *Reg.* v. *Akbar Kazee*, 1 *W. R. Cr.* 21. Even that the woman was a common whore, or the concubine of the ravisher, is no excuse; 1 *Hale*, 729; although such circumstances should operate strongly with the jury against the probability of the fact that connection was had with the woman against her consent; and if a woman

denies that she has voluntarily had connection with the prisoner prior to the alleged offence, evidence to prove such prior connection is admissible on his behalf; *Reg.* v. *Riley*, 18 *Q. B. D.* 481.

Or *without her consent.* If the connection took place while the woman was drunk, the liquor having been given her by the defendant (although only for the purpose of exciting her), it is rape; *Reg.* v. *Camplin*, 1 *Den. C. C.* 89. Or if the connection was with a woman of weak intellect, incapable of distinguishing right from wrong, and the jury found she was incapable of giving consent, or of exercising any judgment upon the matter, and that (though she made no resistance) the defendant had carnal knowledge of her by force, and without her consent, that is a rape; *Reg.* v. *Fletcher*, 2 *B. and M. C. C.* 63. In another case, the prosecutrix was an idiot girl. The prisoner admitted having had connection with her, but alleged consent. The girl was capable of recognising and describing the prisoner, but there was no evidence against him but the fact of connection and the imbecile state of the girl. It was held that, notwithstanding the girl was an idiot, there must be some evidence that the act was without her consent, and, therefore, there was no evidence to go to the jury; *Reg.* v. *Fletcher*, *L. R.* 1 *C. C.* 39; 12 *Jur. N. S.* 505. In a third case, the two cases just cited were referred to and the ruling in the former one upheld, the judge remarking that they did not think the Court in the second case intended to depart from the rule laid down in the first one, but that the apparent divergence arose from the amount of idiocy in the second being much slighter than in the first case; *Reg.* v. *Barratt*, *L. R.* 2 *C. C.* 81. See also, *ante*, p. 99. If the woman submit to criminal intercourse in the *bonâ fide* belief that she is being treated medically, she cannot be said to consent; *Reg.* v. *Carr*, 4 *Cox's Crim. Cases*, 220; *Reg.* v. *Flattery*, 2 *Q. B. D.* 410.

Or, *with her consent, where that consent has been obtained through fear of death or hurt.*

Or, *with her consent, when the man knows he is not her husband, and that her consent is given because she believes he is another man to whom she is or believes herself to be married.* In England it was doubtful until 1885 whether this was a rape, but by the 48 and

49 Vict. c. 69, s. 4, it enacted that a person so acting shall be deemed to be guilty of rape. In India, however, where, after the marriage-contract has been entered into, the parties do not see each other for a long space of time, it was from an earlier period considered necessary to protect women from the fraud of licentious men, and also to afford protection to a man who has connection with a woman to whom he believes he has been married in youth.

Or, *with or without her consent, when she is under twelve years of age.* In this case, the age of the girl must be strictly proved. Where the offence was committed on the 5th of February 1832, and the child's father proved that on his return home, after an absence of a few days, on the 9th of February 1822, he found the child had been born, and was told by the grandmother that she had been born the day before, and the register of baptism shewed that the child had been baptised on the 9th February 1822,—this evidence was held not to be sufficient to prove the child to be under 10 years of age, *R.* v. *Wedge*, 5 *C. and P.* 298. As a girl under twelve years of age cannot consent to a man having connection with her, so it has been held that the consent of a girl under that age to an attempt to have carnal knowledge of her is no answer to an indictment for such an attempt; *Reg.* v. *Beale*, 12 *Jur. N. S.* 12.

On a charge of rape, the fact that shortly after the commission of the crime the prosecutrix made a complaint relating to it, together with the circumstances under which and the terms in which she made it, may be given in evidence as relevant facts. But if, without making a complaint, she merely said she had been ravished, that is not relevant as conduct, though it may be relevant as a dying declaration, or as corroborative evidence; *Indian Evidence Act*, 1872, *Sect.* 8, *Ill. j.*

A dying declaration of a deceased person is evidence in a case of rape; *Reg.* v. *Bissorunjun Mookerjee*, 6 *W. R. Cr.* 75; 1 *Madras Jurist*, 368. This decision has been affirmed by legislative authority in the *Indian Evidence Act*, 1872, *Sect.* 32, *Ill. a.*

An indecent assault upon a woman does not amount to an attempt to commit a rape, unless the Court is satisfied that there was a determination in the accused to gratify his passion at all

events, and in spite of all resistance ; *Emp.* v. *Shankar, I. L. R.* 5 *Bom.* 403.

UNNATURAL OFFENCES.

Sect. 377. *Unnatural Offences.*—**Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or 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.**

Explanation.—**Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.**

Act VI of 1865, Sect. 4. Whipping may be added as a punishment on a conviction for a second offence.

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Evidence.

The evidence is the same as in rape. There are, however, two exceptions ; first, that it is not necessary to prove the offence to have been committed against, or without, the consent of the person upon whom it is perpetrated ; and, secondly, both agent and patient (if consenting) are equally guilty. A married woman who consents to her husband's committing an unnatural offence with her, is an accomplice, and, as such, her evidence requires corroboration under English law, although consent or non-consent is quite immaterial to the offence ; *Reg.* v. *Jellyman*, 8 *C. and P.* 604. If it be committed on a child under seven, the agent is guilty only ; if on one between seven and twelve, the agent is guilty only, unless the patient is sufficiently matured in understanding to be able to comprehend the nature of the offence ; see the case of *Reg.* v. *Allen*, 18 *L. J. N. S. M. C.* 72.

Where the defendant forced open a child's mouth and put in his private parts, and proceeded to the completion of his lust, the judges were of opinion that this did not constitute the offence of sodomy; *R.* v. *Jacobs, R. and R.* 331.

CHAPTER XVII.

OFFENCES AGAINST PROPERTY.

MISAPPROPRIATION OF PROPERTY.

THEFT.

Sect. 378. *Theft.*—**Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.**

Explanation 1.—**A thing so long as it is attached to the earth, not being moveable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth.**

Explanation 2. **A moving effected by the same act which effects the severance, may be a theft.**

Explanation 3.—**A person is said to cause a thing to move by removing an obstacle which prevented it from moving, or by separating it from any other thing, as well as by actually moving it.**

Explanation 4.—**A person who by any means causes an animal to move, is said to move that animal, and to move everything which, in consequence of the motion so caused, is moved by that animal.**

Explanation 5. **The consent mentioned in the definition may be expressed or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express 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 entrusted 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, then 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 authorised to give away alms. If this was A's impression, A has not committed theft.**

(*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 no 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.**

Sect. 379. *Punishment for Theft.*—**Whoever commits theft shall be punished with imprisonment of either description for a term which may** [illegible] **three years, or with fine, or with both.**

Note.

Section 75 provides for an increase of pu[illegible]r a second offence.

Act VI. of 1864. By Sects. 2 and 3 whipping may be substituted as a punishment for a first, and either substituted or added for a second offence.

Triable by any Magistrate. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That you, the said A B, on or about the day of , at , did commit theft of one gold watch, the moveable property of one C D, and that you, the said A B, have thereby committed an offence punishable under Sect. 379 of the Indian Penal Code, and within, &c.

Evidence.

Under English law, larceny or theft is the felonious stealing, taking and carrying away of goods which are the property of another, and in order to convict of larceny it is necessary to prove that the prisoner moved certain moveable property not his own with intent to steal it. Under the Penal Code theft is the moving of moveable property with the intention of dishonestly taking that property out of the possession of another person without his consent. The offences are in the main the same, though there is a difference in their description, inasmuch as in England stolen property is described as being *the property* of some one, and in India, *in the possession* of some one; but there are cases which will be referred to hereafter, in which an act, which is larceny in England, is not theft in India. The charge here given is in the form provided in the schedule to the Criminal Procedure Code, with the addition of the words "the property of," by which notice is given to the prisoner of the person against whom it is alleged that the taking was dishonest.

The property stated in the charge should be proved as laid, or else the charge should be amended; for although, according to the forms of charges given in the schedule to the Criminal Procedure Code, all that is necessary is to charge an accused person with theft on a certain day without stating of what or from whom, yet it has always been held that an accused is entitled to full information of the offence with which he is charged, and it certainly might interfere with his defence if he was not distinctly informed of the person from whom, and the articles he was alleged to have stolen. It is not necessary for the prosecutor to prove the theft of all the things laid in the charge; it will be sufficient to shew that some have been taken. Goods may be described by the name they are known in trade; as, for instance, a set of new handkerchiefs in the piece may be described as so many handkerchiefs, though they are not separated from each other, if the pattern designate each, and they are considered in trade as so many handkerchiefs; *R.* v. *Nibbs, R. and R.* 25. Coin may be described as so much money. Ingots of tin, or bars of iron, may be described as so many pounds weight of tin or iron; but when an article has

obtained in common parlance a name of its own, it would be wrong to describe it by the name of the material of which it is composed; *Reg.* v. *Mansfield, C. and Mar.* 140. A charge of theft of live animals need not state that they were alive, because the law will presume them to be so, unless the contrary be stated; but if, when stolen, the animals were dead, that fact should be stated; *R.* v. *Edwards, R. and R.* 497; *R.* v. *Halloway*, 1 *C. and P.* 128; unless the animal have the same appellation when dead as it had when alive, and it make no difference to the charge whether it were alive or dead; *R.* v. *Puckering*, 1 *Mood. C. C.* 242.

The things stolen must be *moveable property*, as defined by Sect. 22; see *ante*, p. 30. A boat may be the subject of theft, for although, for some purposes under the Penal Code, it is classed with a house, it does not therefore cease to be moveable property; *Reg.* v. *Mehar Dowalia*, 16 *W. R. Cr.* 63. Anything which is attached to the earth, not being moveable property, is not the subject of theft; but it becomes capable of being the subject of theft as soon as it is severed from the earth. Salt, which has been collected from a swamp where it had crystallized, is moveable property; *Reg.* v. *Tamma, I. L. R.* 4 *Mad.* 228. So in England, larceny cannot be committed of corn, grass, trees, and the like, which adhere to the freehold, or of lead or other things attached to a house, and the severance of these things was, and in many cases still is, only a trespass; but if the owner or a stranger sever them, and another man come and steal them, or if the thief sever them at one time, and at another time come and take them away, so that the asportation cannot be looked upon merely as a continuance of the severance, it is larceny; *Inst.* 109; 1 *Hale*, 510; *Reg.* v. *Townley, L. R.* 1 *C. C.* 315. *Explanation* 2 and *Illustration* (a) alter this principle of English law and make it theft, if a man *with the intention of stealing* anything attached to land or a house, only severs it and then leaves it where it fell. A man who removes earth forming a portion of the soil is not guilty of theft; *Explanation* 1 refers to things which are attached to the earth, and not to earth itself; *Emp* v. *Kotayya, I. L. R.* 10 *Mad.* 255; but this case has been

dissented from in Bombay, and an accused convicted of theft for carting away earth; *Emp* v. *Shivram*, *I. L. R.* 15 *Bom.* 702. Persons may be convicted of mischief in cutting down a tree fixed to the freehold, and then for subsequently stealing the tree so cut down; *Reg.* v. *Narayan Krishna*, 2 *Bom H. C. Rep.* 392; *Emp.* v. *Krishna*, *B. R.* 10*th January* 1889. But a prisoner cannot be convicted of mischief in killing a buffalo, and then of theft in taking away its carcase; *Reg.* v. *Sahrai*, 8 *W. R. Cr.* 31.

The property stolen must have been in the *possession* of some one; theft cannot be committed of property in the possession of no one; it cannot be committed in respect of wild animals; *Reg.* v. *Shickle*, *L. R.* 1 *C. C.* 158; though it may of the same animals when caught and in confinement. Fish in a running stream are not the subject of theft, although the prosecutor may have the sole right of fishing in that part of the stream in which they are, for it is manifest that the fish come and go of their own accord, and it is mere accident whether a particular fish is within the boundary of the prosecutor's rights or not; *Hurimoti Muldock* v. *Denonath Malo*, 19 *W. R. Cr.* 47; *Bhusun Parui* v. *Denonath Banerji*, 20 *W. R. Cr.* 15; *Reg.* v. *Ravu Pothadu*, *I. L. R.* 5 *Mad.* 390; *Bhagiram* v. *Mar*, *I. L. R.* 15 *Cal.* 388; nor are fish in an ordinary irrigation tank; *I. L. R.* 5 *Mad.* 391, *n.*; nor fish in a private tank fed by natural streams at a time when the floods are high and the fish can leave it at any time; *Mayaram* v. *Nichala*, *I. L. R.* 15 *Cal.* 402, but fish in an enclosed tank belonging to the prosecutor are the subject of theft; *Emp.* v. *Shaik Adam*, *I. L. R* 10 *Bom.* 193; and so are fish in a private tank supplied by natural streams at a time when they are restrained of their liberty, and subject to the will of the owner of the tank; *Mayaram* v. *Nichala*, *ubi supra*. Such fish are "practically in the power and dominion of the prosecutor"; *Reg.* v. *Shickle*, *ubi supra*. The possession must be that of the prosecutor either personally or by his wife, clerk or servant; and if in their possession, the possession must have been on his account. Possession of wood by a forest inspector, who is a servant of Government, is the possession of Government, and a dishonest removal of it, without the payment of the necessary fees, even with the servant's consent, is theft; *Reg.* v. *Hanmanta*, *I. L. R.*

1 *Bom.* 610. So where a swamp, the property of Government, had been surrounded by guards to prevent salt being taken from it, the taking of salt spontaneously produced, without the authority of Government, amounts to theft; *Reg.* v. *Tamma Ghantaya*, *I. L. R.* 4 *Mad.* 228. The taking of property belonging to a firm from one of its servants, by a member of the firm, is not theft, although it be against the will of the servant, because the possession of the servant is in law the possession of each member of the firm; *Kiamudden* v. *Allah Buksh*, 6 *Ben. L. R. App.* 133 and 15 *W. R. Cr.* 51; nor is the removal of property by one of two joint owners, unless the removal be a dishonest removal; *Virankutti* v. *Chiyamu*, *I. L. R.* 7 *Mad.* 557. There is no need to prove whose the stolen property is, or whether in fact it is the property of any one. But theft cannot be committed in respect to a thing of which the prosecutor has given up both possession and property. Thus, if a man digs up the carcase of a bullock, which the owner, suspecting to have been poisoned, caused to be buried, he cannot be convicted of theft; *Mad. H. C. Ruling*, *5th February* 1869; 5 *Mad. H. C. Rep. App.* 36. See, also, *Emp.* v. *Bandhu*, *I. L. R.* 8 *All.* 51, which was the case of receiving a bull which had been set at large at the time of performing funeral ceremonies; and *Emp.* v. *Nihal*, *I. L. R.* 9 *All.* 348, followed in *Romesh* v. *Hiru*, *I. L. R.* 17 *Cal.* 852. A bull dedicated to the idol in a particular temple and allowed to roam at large is not *res nullius*, but the ownership is *primâ facie* in the trustees of the temple; *Emp.* v. *Nalla*, *I. L. R.* 11 *Mad.* 145, which does not impeach *Emp.* v. *Bandhu*; *Romesh* v. *Hiru*, *ubi supra*.

The *smallest amount of moving* will satisfy the requirements of the term "move." Taking goods out of the chest and laying on the floor is sufficient, if it be with the intent to steal them; *Reg.* v. *Simpson*, *Kel.* 31; so is the removal of a cask from one end of a waggon to another; *Reg.* v. *Walsh*, 1 *Mood. C. C.* 14. A letter being found in the pocket of a postman who ought to have delivered it, he giving an untrue reason for not having delivered it, is a sufficient moving, if he intended to steal it; *Reg.* v. *Poynton*, 8 *Jur. N. S.* 1218, and *L. and C.* 247. And where the accused drew a book from the inside pocket of the prosecutor's

coat, about an inch above the top of the pocket; but whilst the book was still about the person of the prosecutor, the prosecutor put up his hand suddenly, upon which the accused let the book drop, and it fell into the prosecutor's pocket,—this was considered a sufficient asportation; *Reg.* v. *Thomson*, 1 *Mood. C. C.* 78. But where there is any attachment, as a string fastening goods to a counter, the mere moving of the goods is not sufficient; *Anon.* 2 *East, P. C.* 556; *R.* v. *Wilkinson*, 1 *Hale*, 508. In these cases there would be an attempt to commit theft under Sect. 511.

The property must be taken *dishonestly*, *i. e.*, with the intention of depriving the possessor of the possession of it, or, in the words of the Code itself, with the "intention of causing wrongful gain to one person or wrongful loss to another person." It is not sufficient that all the physical acts necessary to constitute theft be present, to these must be added the dishonest intention, and the jury or magistrate must find that there was such intention, or the accused cannot be convicted; *Reg.* v. *Farnborough* [1895], 2 *Q. B.* 484. The intention may, however, and, in most cases, must, be inferred from all the surrounding circumstances, as it is impossible to judge of what is passing in a man's mind, except by what he does and says. The taking of almost valueless pods from a tree standing on Government ground is not theft; *Reg.* v. *Kavya bin Raoji*, 5 *Bom. H. C. Rep. C. C.* 35. Where an accused charged with murder took a boat from a place where it had been secured by the owner, in order to escape pursuit, and, after proceeding for some distance in it, abandoned it, it was held that, as it was evidently not his intention to convert it to his own use, or cause wrongful loss to the owner, he could not be convicted of theft; *Adu Shikdar* v. *Emp.*, *I. L. R.* 11 *Cal.* 635.

If the taking be dishonest, it will be theft, even though the accused did not intend to retain the thing permanently. See *Illustration* (*l*), *ante*, p. 461. A person who seizes the boat of a rival ferryman in order to prevent him earning fees for transporting passengers, and in order to increase his own, is guilty of theft of the boat; *Emp.* v. *Nagappa*, *I. L. R.* 15 *Bom.* 344. Where the accused loosed cattle which were in a pen belonging to their owner, and removed them to the pound in order to share

with the pound-keeper the fees which would have to be paid to release them, it was held that this amounted to theft; *Paryag* v. *Arju Mian*, *I. L. R.* 22 *Cal.* 139.

If there be a dishonest intention, there may be a theft of goods in the possession of another, even although the goods be the property of the taker; *Rex.* v. *Wilkinson*, *R. and R.* 470; or the taker be part-owner; thus, where 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, the baillee being answerable to the society for its safe custody, this was holden to be larceny; *R.* v. *Bramley*, *R. and R.* 478; *Reg.* v. *Webster*, *L. and C.* 77; *Virankutti* v. *Chiyamu*, *I. L. R.* 7 *Mad.* 557; *Emp.* v. *Ponnurangam*, *I. L. R.* 10 *Mad.* 186. If property be lawfully in charge of a police constable, and the owner furtively takes it out of the possession of the constable, he may be convicted of theft, as the constable has a special property therein in respect of the lawful purpose for which it was in his possession; *Emp.* v. *Sheikh Hussain*, *B. R.* 8*th September* 1887. Act XXI. of 1860, Sect. 11, specifically provides that a member of a literary, &c., society established under that Act, committing theft, &c., of the property of the society, may be punished as if he were not a member. Where a distress has been made on crops for rent and notice duly given to the registered proprietors of the land, the owners and occupiers of the land, other than the registered proprietors, may be guilty of theft, if, knowing of the distress, they dishonestly remove their own crops; *Emp.* v. *Ramasami*, *I. L. R.* 16 *Mad.* 364.

The fact that the goods taken, or their proceeds, are intended to be applied in paying off just debts of the prosecutor does not prevent the taking without his consent from being a theft: thus the taking of property by the prisoner in satisfaction of a debt due to him by the prosecutor is a theft; *Reg.* v. *Preonath*, 5 *W. R. Cr.* 68; so, also, where the prisoner took the prosecutor's bullocks and distributed them among the creditors of the latter; *Reg.* v. *Madaree*, 3 *W. R. Cr.* 2. To the same effect is *Emp.* v. *Sri Churn Chungo*, *I. L. R.* 22 *Cal.* 1017 (*F. B.*); overruling *Prosonno* v. *Uday Sant*, *ib.* 669, which has also

been dissented from in *Emp.* v. *Agha Muhammad*, *I. L. R.* 18 *All.* 88.

Theft is not committed when property is taken under a claim of right; *Reg.* v. *Bhikaji Kasinath*, *B. R.* 16*th September* 1869; *Emp.* v. *Nagappa*, *I. L. R.* 15 *Bom.* 344; but the mere assertion of a claim of property or right, or the mere existence of a doubt as to right, is not sufficient to justify an acquittal in a case of plunder of crops; the claim to the property must be shewn by evidence to be fair and good; *Nassib Chowdhry* v. *Nannoo Choudhry*, 15 *W. R. Cr.* 47. The mere plea by an accused that the property was his own, unsupported by any proof or circumstances which tend to indicate that there is some truth in his statement is not sufficient; *Reg.* v. *Kali Churn Misser*, 7 *Ben. L. R. App.* 55, and 16 *W. R. Cr.* 18. A Hindoo, intending to separate from his family, emigrated to Demerara as a coolie. After an absence of thirty years, he returned to his family, bringing with him money and other moveable property which he had acquired in Demerara by labour as a coolie. On his return to his family he lived in commensality with them, but did not treat such property as joint family property, but as his own. It was held that such property was his own, and that his brother was not a joint owner of it, and could properly be convicted of theft in respect of it; *Emp.* v. *Sita Ram Rai*, *I. L. R.* 3 *All.* 181.

Where the prisoner acting *bonâ fide* in the interests of his employers, and finding a party of fishermen poaching on his master's fisheries, seized their nets and refused to give them up without his master's orders, it was held that this did not amount to theft; *Reg.* v. *Nobin Chunder*, 6 *W. R. Cr.* 79, referred to in *Emp.* v. *Nagappa*, *I. L. R.* 15 *Bom.* 344.

The principle, that theft is not committed where property is taken under a claim of right, has been somewhat broken in upon by a decision in Bombay, in the case of *Emp.* v. *Gangaram Santaram*, *I. L. R.* 9 *Bom.* 135. In this case the prisoner was indebted to the prosecutor, and, in his absence, the prisoner's wife handed over a quantity of his tools to the prosecutor in part-payment of the debt. This was alleged by the prosecutor, but not proved, to have been done, by the authority of the

prisoner. When the prisoner learnt what had been done, he at once went to the prosecutor's house, and in his absence, and against the wish of his wife, took back all his tools. Thereupon he was charged with theft and convicted. From the report, it does not appear that the judges, who decided the case, considered whether the taking was *dishonest* as distinguished from *unlawful*, although no taking can amount to a theft unless it is a dishonest taking. But the judgment was as follows:—" The prisoner Gangaram may have been in a position to recover his tools from Girju. But the latter held by an apparent title, or at least an assertion of title, that was not plainly illusory. Now the law is, that against even a colour of right, a person aggrieved shall not take the law into his own hands; see *Cape* v. *Scott*, *L. R.* 9 *Q. B.* 277." It is quite true that a person aggrieved ought not to take the law into his own hands; and if he does so, he will render himself liable to be sued for damages, or for a return of the thing which he has unlawfully taken, and that was all that was decided in the case of *Cape* v. *Scott*, which was an action of replevin by one commoner against another for the seizure of his cattle; but the liability to a suit for damages is a very different affair from a prosecution for theft, and in order that a man should render himself liable to the latter, he must not only have unlawfully taken the law into his own hands, and seized what did not belong to him, but he must have done so dishonestly. In England, in order to amount to larceny, the taking must be *felonious*, *i. e.*, without any colour of right to excuse the act, a taking which was not *bonâ fide* under a claim of right. In the present case the prisoner clearly repudiated the act of his wife and claimed the tools, as still being his own; consequently, it is difficult to see how the taking was dishonest, for it is to be remembered that the prosecutor did not allege that he had paid money for the tools, only that they had been given to him in part-payment of a pre-existing debt. It is difficult to understand, after looking at the circumstances of the case as disclosed in the report, how the two judges who decided the case could have come to the conclusion that the prisoner intended to take dishonestly his tools out of the possession of the prosecutor.

Where the prosecutor parts with the possession of any property, without any trick being played upon him, to another person in order that this person may dispose of the property for him, and after disposing of it, he appropriates the proceeds to his own use, this is not a theft of the property so delivered, though it may amount to a criminal breach of trust. The appropriation of the proceeds may, however, amount to a theft of them:—The prosecutor gave a mare of his into the care of the prisoner, telling him it is was to be sold on the following Wednesday. On the next Wednesday the prosecutor did not go himself to sell his mare, but sent his wife, who went to where the prisoner was and saw him riding her about a horse-fair, and sell her to a third party, and receive the money. The prosecutor's wife subsequently asked the prisoner to give her the money, saying she would pay his expenses; this the prisoner declined to do, and eventually absconded with the money; it was held that a conviction for larceny could be sustained; *Reg.* v. *De Banks*, 13 *Q. B. D.* 29.

The cases of larceny by tricks or cheating would hardly seem to come under the definition of theft in the Penal Code. The question of larceny in these cases under the English law depends upon whether the prosecutor intended to part with the *property* in the money or article he hands over, or whether he intended only to part with the *possession*, still retaining the property in himself. If he intended to retain the *property*, the appropriation of the money by the person to whom he delivered it is larceny; if he intended to part with with the *property* in the money, it is not larceny. Under the Penal Code the question is whether he *consents that the possession* of the property should pass; if he does it is no theft, but the accused may be charged with cheating, or possibly with extortion. There may be, however, some cases just on the margin in which the offence would be theft under the Penal Code. The following is, *perhaps*, one of them:—The prisoner was a depositor in a Post Office Savings' Bank, in which eleven shillings stood to his credit. He gave notice in the ordinary form to withdraw ten shillings. A warrant for ten shillings was duly issued to the prisoner, and a letter of advice was duly sent to the post office. When the prisoner went to receive

the money, the clerk at the post office looked at a wrong letter of advice, and placed £ 8-16-10 on the counter before the prisoner, who took it up and went away, having at the time of taking the money up the *animus furandi*; it was held that the prisoner was guilty of larceny; *Reg.* v. *Middleton*, *L. R.* 2 *C. C.* 38. The fact that it is consent to the transfer of possession which the Penal Code looks to, appears from the following case:—A sought the aid of B, with the intention of committing a theft of the property of B's master. B, with the knowledge and consent of his master, and for the purpose of procuring A's punishment, aided A in carrying out his object. On the prosecution of A for theft, it was held that as the removal of the property had been with the consent of the owner, the offence of theft had not been committed; *Emp.* v. *Troylukho Nath*, *I. L. R.* 4 *Cal.* 366. In England under similar circumstances it has been ruled to the contrary; *R.* v. *Egginton*, 2 *Bos. and P.* 508; *R.* v. *Williams*, 1 *C. and K.* 195.

Husband and wife.—There is another class of cases which requires notice, *viz.*, those in which the relation of husband and wife has to be taken into account.

There is no presumption in law in India that husband and wife constitute one person for the purpose of the criminal law. Where there is no community of property, each may commit theft of the the property of the other, if there be a dishonest intention in the taking; *Emp.* v. *Butchi*, *I. L. R.* 17 *Mad.* 401. It was, however, ruled by *Scotland*, C. J., at the *4th Madras Session*, 1864, in *Reg.* v. *Venkata Reddy*, that if the goods of a husband be taken with the consent or privity of the wife, it is not a theft, as she has an implied authority to dispose of them; see, also, *Reg.* v. *Avery*, 28 *L. J. N. S. M. C.* 185; *Bell*, *C. C.* 150. No amount of legislation as to the property which husband and wife have in their respective wealth will, however, affect this question, because although each may possess property independently of the other, yet when any portion of the property itself or of the income thereof is for the time being in the process of being used, while husband and wife are living together, the question must always arise as to the authority of each to use the property of the other, which is or

may be implied from their relations one to another. Under ordinary circumstances the law must assume that, while husband and wife are living together, each has authority to dispose, in certain well-known ways, of the property of the other, which is apparently in the possession or under the control of both. Under the last Married Woman's Property Act, that of 1882, while husband or wife is liable criminally in respect of property belonging to the other, it is only when they are living apart, or when the act is done at the time one deserts the other, and no criminal proceeding can be taken by one against the other while they are living together, nor afterwards in respect of any act done whilst they were living together. It has been held in India that a Hindoo husband cannot be convicted of robbing his wife, the wife, according to Hindoo law, being completely under the control of her husband; 1 *Mor. Dig. N. S.* 129, *s.* 185; but it may be doubtful whether this argument avails in favour of a Hindoo husband who dishonestly takes his wife's *stridhun*, over which she has absolute control; 1 *Stra. H. L.* 27, 28: or in favour of a Mahomedan husband, who gets no right over his wife's property by marriage; *Mac. M. L.* 254.

But whatever may be the position of a Hindoo or Mahomedan wife legally with respect to her own property, very careful consideration ought to be given to the question of the amount of control to be inferred in each over the property of the other from the fact of their living in commensality, and also the time at, and the circumstances under, which the property was taken, for, while no theft might be committed while both were continuing to live together, theft might be committed if goods of one were taken by the other at the time of desertion.

The High Court at Bombay has ruled that a Hindoo woman who removes from the possession of her husband, and without his consent, her *palla* or *stridhun*, cannot be convicted of theft, as she is only removing that over which her ownership, on this side of India, seems undoubted; and likewise that any person who joins her in the act cannot be convicted of theft; *Reg.* v. *Natha Kalyan*, 8 *Bom. H. C. Rep. C. C.* 11. In this case the Court did not go into the question as to whether a Hindoo wife can be convicted of

theft in respect of a taking of her husband's propetry out of his possession, and without his consent, for the purpose of permanently depriving him of the benefit of it and thereby causing him loss; but in the case of *Reg.* v. *Khatabai*, 6 *Bom. H. C. Rep. C. C.* 9, it was held that a Mahomedan wife might commit theft from her husband of things which were his exclusive property, on the ground that no such unity of interest exists beween a Mahomedan husband and wife, as exists between an English husband and wife.

If a woman, however, take the goods of her husband, and give them to her avowterer, who, knowing it, *carries them away*, the avowterer is guilty of stealing: *Dalt. c.* 104; and where a stranger *took* the goods of the husband *jointly* with the wife, this has been holden to be stealing in him, he being her adulterer; *R.* v. *Toltree*, 1 *Mood. C. C.* 243; *Reg.* v. *Featherstone*, *Dears C. C.* 369; and so, too, though no adultery have then been committed, but the goods are *taken* with the intent that the wife shall elope and live in adultery with the stranger; *Reg.* v. *Tollett*, *C. and Mar.* 112; *Reg.* v. *Thompson*, 1 *Den. C. C.* 549. Where the prisoner, who was in the employment of the prosecutor, went away with the intention of committing adultery with the prosecutor's wife, and, when going away, was concerned in *taking* some of his property, although the wife swore that the prisoner had by her orders assisted in taking away the property, the court held that he was properly convicted of larceny; *Reg.* v. *Mutters*, 11 *Jur. N. S.* 144. An adulterer, however, cannot be convicted of stealing the goods of the husband brought by the wife to his house, in which the adultery is afterwards committed, merely upon evidence of their being there; *Reg.* v. *Rosenberg*, 1 *C. and K.* 233. The wife in England cannot steal her husband's goods, whether she has committed adultery on not; therefore, the adulterer cannot be convicted of receiving goods of the husband which come into his possession from the wife; but if he, acting in concert with the wife, *takes* or helps her to take the husband's goods, then he is guilty of larceny; *Reg.* v. *Kenny*, 2 *Q. B. D.* 307. *Illustration* (*o*) to Sect. 378 seems to be intended to support this distinction, for it speaks of A *taking*, not receiving, the property.

Possession of the stolen goods is often the only evidence available as to the theft. Section 114, *Illustration* (a), of the *Evidence Act, I. of* 1872, provides that "the court may presume that a man, who is in possession of stolen goods *soon after* the theft, is either the thief, or has received the goods knowing them to be stolen, unless he can account for his possession." In Calcutta, in *Ishan Muchi* v. *Emp.*, *I. L. R.* 15 *Cal.* 511, two judges seem to have overlooked this illustration, and held that, where there is nothing established but possession of stolen property found concealed, there can be no presumption of criminal receipt of the goods, but only that the possessor was the thief.

The Criminal Procedure Code, 1882, Sect. 517, provides for the disposal of property in respect of which an offence appears to have been committed, and under this section stolen property may be restored to the owner. When loss is occasioned to a person whose property has been stolen, it is not illegal for the trying magistrate to award a portion of the fine inflicted on the accused as amends to the owner of such property, although the stolen property is recovered and restored to the owner; *Reg.* v. *Yesappa*, 5 *Bom. H. C. Rep. C. C.* 41.

THEFT IN A DWELLING-HOUSE.

Sect. 380. *Theft in a Dwelling-house.*—**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.**

Note.

Section 75 provides for increase of punishment for a second offence.

By Act VI. of 1864, Sects. 2 and 3, whipping may be substituted as a punishment for a first, and either substituted or added for a second, offence.

Triable by any Magistrate. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That you, the said A B, on or about the day of , at , did, in a building used as a human dwelling, commit theft of one gold watch, of the moveable property of one C D, and that you, the said A B, have thereby committed an offence punishable under Sect. 380 of the Indian Penal Code, and within, &c.

Evidence.

Prove the theft, and that it was committed in a building, tent, or vessel which is used as a human dwelling, or for the custody of property. An unfinished house will not come within these words, for it is not used as a human dwelling, and *quære* whether it would even come under the words, "used for the custody of property," if the workmen's tools were left in it at night for safety, though it might possibly be held so to do.

The property must be under the protection of the *house*; *Reg.* v. *Ishree Persaud*, 24 *W. R. Cr.* 49; not the *person* of the prosecutor at the time they are stolen. As, for instance, where the defendant procured money to be delivered to him for a particular purpose, and then ran away with it; *R.* v. *Campbell*, 2 *Leach*, 564; and where the prosecutor, by the trick of ring-dropping, was induced to lay down his money upon a table, and the defendant took it up and carried it away; *R.* v. *Owen*, 2 *Leach*, 572; 2 *East*, *P. C.* 645; these cases were held not to be stealing in a dwelling-house. But if one, on going to bed, put his clothes and money by his bedside, these are under the protection of the house, and not of the person; *R* v. *Thomas*, *Car. Sup.* 295. So, where a man went to bed with a prostitute, having put his watch in his hat on a table, and the woman stole the watch while he was sleep,—this was held to be a stealing in the dwelling-house, and not from the person; *R.* v. *Hamilton*, 8 *C. and P.* 49. The theft of a cloth, spread out to dry on the top of a house, to which the prisoner got access by scaling a wall, is not theft in a dwelling-house, but simple theft; and the fact that the roof was used for domestic purposes makes no difference; *Mad. H. C. 17th March* 1886, 1 *Mad. Jur.* 282. But a cattle-

shed is "a building used for the custody of property"; *Mad. H. C. 24th November* 1866. It is a question for the court, and not for the jury, whether goods are under the protection of the dwelling-house, or in the personal care of the owner; *R. v. Thomas, supra.* Where the prisoners were charged with having stolen a sum of money shut up in a box, and placed in the police treasury building, over which they, as *burkandaz es*, were placed on guard, it was held that they should have been charged under this section, and not under Sect. 409; *Reg* v. *Janokenath*, 2 *W. R. Cr.* 55.

It will be sufficient to prove that the theft was committed either in the dwelling-house, or in some building occupied therewith and connected or communicating therewith, either immediately or by means of a covered and enclosed passage leading from one to the other.

It is not necessary to shew that the prisoner entered the building unlawfully, *Reg.* v. *Ishree Persaud*, 24 *W. R. Cr.* 49.

Where the prisoner stole property at night, belonging to two different persons, from the same room of a house, it was held that he could not be convicted and sentenced for two offences; *Reg.* v. *Sheikh Mowah*, 11 *W. R. Cr.* 38. On a conviction under this section, fine cannot be substituted for, though it may be added to, imprisonment; *Sheikh Dullo* v. *Zamah*, 16 *W. R. Cr.* 17

THEFT BY A SERVANT

Sect. 381. *Theft by a Servant.* —**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.**

Note.

Section 75 provides for increase of punishment for a second offence

By Act VI of 1864, Sects. 2 and 3, whipping may be substituted as a punishment for a first, and either substituted or added for a second, offence.

Triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first or second class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That you, the said A B, being a clerk (*or* servant, *or* employed in the capacity of a clerk *or* servant) to one C D, did commit theft in respect of certain property, to wit, six hundred Rupees, of the moveable property of the said C D; and that you, the said A B, have thereby committed an offence punishable under Sect. 381 of the Indian Penal Code, and within, &c.

Evidence.

Prove the theft; and prove that the defendant was a clerk or servant to C D, or employed by him in the capacity of a clerk or servant. An apprentice is a servant; *R.* v. *Mellish*, *R. and R.* 80; a collector of poor and other rates is a servant; *Reg.* v. *Callahan*, 8 *C. and P.* 154; an assistant overseer is properly described as a servant to the inhabitants of the parish; *Reg.* v. *Carpenter*, 12 *Jur. N. S.* 380; a director of a limited company who is also employed to collect moneys for the company is a servant; *Reg.* v. *Stuart* [1894], 1 *Q. B.* 310; a hired boatman is not a servant; *Reg* v. *Bawool Manjee*, 8 W. *R. Cr.* 32. The mode in which the defendant is remunerated for his services is immaterial. Where a defendant, who was employed as a master of a barge, to carry out and sell coals, and was allowed a portion of the profits, after deducting the price of the coals at the colliery, for his labour, took a quantity of coals, sold them, received the price, and absconded with the money, it was held that he was a servant by the majority of the judges; *R.* v. *Hartley*, *R. and R.* 139. The driver of a hackney-coach, hired for the day, is not the servant of the hirer; *R.* v. *Haydon*, 7 *C. and P.* 445. It is not necessary that the employment should be permanent; if it be only occasional, it will be sufficient. Where the prosecutor, having agreed to let the defendant carry out parcels

when he had nothing else to do, for which the prosecutor was to pay him what he pleased, gave him an order for two pounds, which he received and appropriated; he was held to be a servant; *R.* v. *Spencer*, *R. and R.* 299. So, where a driver, who was employed to drive two cows to a purchaser, and receive the purchase-money, appropriated it, he was held to be a servant; *R.* v. *Hughes*, 1 *Mood. C. C.* 370. But where the treasurer of a charitable institution, in his individual capacity, directed the defendant (who was the schoolmaster of the charity school, appointed by a committee, of which the treasurer was a member, and whose duty was confined entirely to the instruction of the children) in one single instance to receive a voluntary contribution for which he was to have no remuneration, it was held that he was not a clerk, or servant; *R.* v. *Nicholson*, 1 *Mood. C. C.* 259. The person employed to collect the sacrament money from the communicants is not the servant of the minister, churchwardens, or poor; *R.* v. *Burton*, 1 *Mood. C. C.* 237.

The real test of servant or no servant is, whether the defendant be under the control of the prosecutor or not; whether the prosecutor can point out what he is to do with his time, or whether he can do what he likes when he likes. The relation of master and servant exists only between persons of whom the former has the *order and control* of the work done by the latter, the former retaining the power of controlling how and when the work is to be done; *Sadler* v. *Henlock*, 4 *E. and B.* 570, 578; *Yeomans* v. *Noakes*, 6 *Q. B. D.* p. 532. *Cockburn*, C. J., in the case of *Reg.* v. *May*, 30 *L. J. N. S. M. C.*, p. 83, says:—"The position of clerk or servant implies control. The great insurance companies have agents, oftentimes resident solicitors, in most towns, who receive commission on the business they introduce—are they clerks, or servants of the companies? Suppose a manufacturer in the West Riding of Yorkshire says to a merchant in London, 'I will allow you a commission on all orders you may get me for shipment of my goods abroad'—can you fairly call the merchant the clerk of the manufacturer?" In a more recent case, *Reg.* v. *Bowers*, 35 *L. J. N. S. M. C.*, p. 208, *Erle*, C. J., in delivering the judgment of the court, says:—"A clerk or servant must be under the orders of his

master, or employed to receive the moneys of his master, to be within the statute; but, if a man be intrusted to get orders and to receive money, getting the orders when and where he chooses, and getting the money when and where he chooses, he is not a clerk or servant." The defendant, however, is not less the servant of the prosecutor because he is employed by others also; *R.* v. *Batty*, 2 *Mood. C. C.* 257.

If the defendant, entrusted with a note to be changed into coin, gets it so changed, and on his road back appropriates the money to his own use, it is theft as a servant, for, by Sect. 27, *ante*, p. 33, the possession of the clerk on account of his master is the possession of the master; consequently, if the clerk appropriate the charge to his own purposes, he does virtually take it out of his master's possession.

THEFT AFTER PREPARATION FOR VIOLENCE.

Sect. 382. *Theft after preparing to use Violence.*—**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 appre-**

hend A. A has committed the offence defined in this section.

Note.

Section 75 provides for increase of punishment for a second offence.

By Act VI of 1864, Sects. 2 and 3, whipping may be substituted as a punishment for a first, and either substituted or added for a second, offence.

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That you, the said A B, on or about the day of , at , did commit theft of one gold watch of the moveable property of one C D, having previously to the commission of such theft made preparation for causing fear of death to the said C D, to wit, by arming yourself with a loaded pistol, in order to the committing of such theft: and that you, the said A B, have thereby committed an offence punishable under Sect. 382 of the Indian Penal Code, and within, &c.

Evidence.

Prove the theft, and further that in order to commit the theft or to effect his escape, or to carry off the property stolen, the prisoner had made preparation for the acts mentioned in the section; if hurt, &c., is actually caused or attempted to be caused when the theft is committed, the offence is robbery, and should be punished under Sect. 392; *Reg.* v. *Hushrut Sheikh*, 6 W. R. Cr. 85.

EXTORTION.

Sect. 383. *Extortion.* - **Whoever intentionally puts any person in 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 moneys to A. Z signs and delivers the note. A has committed extortion.

(*c*) A threatens to send clubmen to plough up Z's field, unless Z will sign and deliver to B a bond binding Z under 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.

Sect. 384. *Punishment for Extortion.* Whoever commits extortion shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Sect. 385. *Threat of Injury in order to extort.*—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.

Sect. 386. *Extorting by Fear of Death.*—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.

Sect. 387. *Putting in Fear of Death in order to extort.*—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 for a term which may extend to seven years, and shall also be liable to fine.

Sect. 388. *Extortion by Threat of Accusation of an Offence.*—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 Sect. 377, may be punished with transportation for life.

Sect. 389. *Putting Person in Fear of Accusation in order to extort.*—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 Sect. 377, may be punished with transportation for life.

Note.

Section 75 provides for increase of punishment for a second offence, except under Sect. 3

By Act VI of 1864, Sects. 2 and 3, whipping may be substituted as a punishment for a first, and either substituted or added for a second, offence under Sects. 388 and 389.

Offences under Sects. 384 *and* 385 *are triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first or second class; those under Sects.* 386-389, *by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable under Sects.* 384 *and* 385 *but not under Sects.* 386-389. *Not compoundable.*

Charge.

That you, the said A B, on or about the day of , at , did commit extortion, to wit, by putting one C D in fear of an accusation against him, the said C D, of having committed an offence punishable with death, to wit, the offence of murder (*or* an offence punishable under Sect. 377 of the Indian Penal Code, to wit, an unnatural offence), and thereby dishonestly induced the said C D to deliver to you, the said A B, five hundred Rupees; and that you have thereby committed an offence punishable under Sect. 389 of the Indian Penal Code, and within, &c.

Evidence.

Extortion is the obtaining money by means of a threat, which is made by the defendant, not directly in the presence of the prosecutor, or one which is not to be put in execution forthwith. If the prisoner make a threat of death, hurt, or wrongful restraint, in the presence of the prosecutor, which is to be put in execution, forthwith, the offence is that of robbery; see *post*, p. 487. Threats of bodily injury would, to constitute this offence, generally be made by letter; those of accusations, either by word of mouth or by letter. The mere going about collecting money, upon an assertion that an order had been made to tax the persons upon whom the demand was made, is not extortion, but cheating; 5 *R. J. and P.* 147.

If the threat be by letter, then it is for the jury to determine whether the letter amounts to a threat to accuse the prosecutor of the offence mentioned: *R.* v. *Girdwood*, 2 *East, P. C.* 1120.

If it does not appear from the letter itself of what offence the defendant threatened to accuse the prosecutor, the defendant's declaration of the meaning of the letter may be given in evidence to explain it; *R.* v. *Tucker*, 1 *Mood, C. C.* 134. Both the threat and the intent may be inferred, even against the declaration of the prisoner at the time, and in the absence of express proof from the letter itself, from the prisoner's previous and contemporaneous, and even from his subsequent, conduct and expressions to third parties; *Reg.* v. *Menage*, 3 *F. and F.* 310. A prisoner was convicted upon an indictment for threatening a boy's father, to accuse the boy of an abominable crime upon a mare, with intent to extort money. It was proved that before giving information against the boy, the prisoner stated to the father that the offence had been committed, and unless the father bought the mare of him at a certain price, he would accuse the boy. The conviction was upheld; *Reg.* v. *Redman*, *L. R.* 1 *C. C.* 12 The threat must be to accuse, not to bring a witness to support a charge already made; *R.* v. *Gill*, *Arch. Crim. Pl. 20th Edit.* 482. But it need not be to accuse before a judicial tribunal; a threat to charge before a third person is sufficient; *R.* v. *Robinson*, 2 *M. and Rob.* 14. And it is immaterial whether the prosecutor be innocent or guilty of the offence which is imputed to him; *R.* v *Gardner*, 1 *C. and P.* 479; *Reg.* v. *Cracknell and Walker*, 10 *Cox's Crim. Cases*, 408; *Reg.* v. *Mobarrul*, 7 *W. R. Cr.* 28.

A letter written to a banker, stating that it was intended by a cracksman to burn his books, and cause his bank to stop, and that if £250 were put in a certain place, the writer of the letter would prevent the mischief, but if the money were not put there, it would happen, was held to be a letter demanding money, with menaces; *Reg* v. *Smith*, 1 *Den. C. C.* 510. Where the prosecutrix gave L, a travelling knife-grinder, six knives to grind for her, the proper charge for which would be one shilling and threepence, and L, having ground them, demanded with threats five shillings and sixpence for grinding them, which the prosecutrix, being frightened, paid; it was held that L was rightly convicted of demanding money with menaces; *Reg.* v. *Lovell*, 8 *Q. B. D.* 185. The obtaining of money from a person against his will under,

a threat, or refusal, to make use of real or supposed influence to deprive him of an appointment, constitutes extortion; *Meer Abbas* v. *Omed Ali*, 18 *W. R. Cr.* 17.

The threats or menaces need not be made directly to the prosecutor; it is sufficient if they are caused to come to his knowledge through a third party; *R.* v. *Paddle*, *R. and R.* 484. Proof that the defendant dropped a letter in a place where he knew the prosecutor would come, and that it was picked up by another person, and by him delivered to the prosecutor; *Reg.* v. *Lloyd*, 2 *East, P. C.* 1122; *R.* v. *Wagstaff*, *R. and R.* 398; or that the letter is in the handwriting of the defendant, and that it came to the prosecutor by post; *R.* v. *Heming*, 2 *East, P. C.* 1116; has been held sufficient proof of a sending by the defendant. The leaving of a letter, directed to A, near A's house, with an intention that it should not only reach A, but B also, was held to be a sending of it to B, by whom it was afterwards seen; *Reg.* v. *Grimwade*, 1 *Den. C. C.* 30.

Where, by arrangement among several persons, the threat is used by some, and the property obtained by that threat is received by the others, all are equally guilty of extortion; *Reg.* v. *Shankar Bhagvat*, 2 *Bom. H. C. Rep.* 394.

Delivery of the property by the person put in fear is essential to the offence of extortion. Therefore, if no such delivery takes place, but the person intimidated passively allows the offenders to take away the property, this would not be extortion, but robbery, if the threat came under the terms of Sect. 390, *post*, p. 487; *Reg.* v. *Dulelooldeen*, 5 *W. R. Cr.* 19.

Abdul Kadar was a man who purchased from Government the privilege of carrying away any firewood he might find lying in the jungles of the Sanjan and Mahim *talukas* during certain months of the hot season. He had no proprietary right in the wood until after he had collected it, and was not to set up *nakas* and take fees, or to sublet the contract, but there was in his contract no reservation of the rights of the villagers, although they had been formerly in the habit of collecting the wood for their own use. He was charged with having extorted money from the complainants under threats of detaining certain cartloads of fire-

wood they had collected in the jungle and were taking home. It was held that, as the prisoner might have believed in good faith that he had such a right as he had put forward, even though he was wrong in his construction of the contract, he could not be said *dishonestly* to have induced the delivery of the property; *Reg.* v. *Abdul Kadar*, 3 *Bom. H. C. Rep. C. C.* 45.

Where a complainant charged a person who was one of the public servants mentioned in Sect. 167 of the old Criminal Procedure Code (Sect. 197 of that of 1882) with committing acts which, if committed by a private individual, would have constituted the offence of extortion, it was held that it was not illegal for the judge to treat the case as one of extortion, and to proceed with the trial without any sanction for the prosecution, although it would have been more judicious to have treated it as an offence under Sect. 161 of the Penal Code, and have obtained the necessary sanction for the prosecution; *Reg.* v. *Parshram*, 7 *Bom. H. C. Rep. C. C.* 61.

Sections 388 *and* 389. *Threatening to charge with an Offence.*—The word "offence" in these sections denotes a thing punishable under the Penal Code, or under any special or local law; Sect. 40, *ante*, p. 38.

ROBBERY.

Sect. 390. *Robbery.*—**In all robbery there is either theft or extortion.**

When Theft is Robbery.—**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.**

When Extortion is Robbery.—**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 highroad, shews 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 highroad. 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.

Sect. 391. See *post*, p. 491.

Sect. 392. *Punishment for Robbery.*—**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.**

Sect. 393. *Attempt to commit Robbery.* **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.**

Sect. 394. *Causing hurt in committing Robbery.*—**If any person, in committing or attempting to commit robbery 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.**

Note.

Section 75 provides for increased punishment for a second offence.

Act VI. of 1864, Sect. 4. For a second offence of robbery, as defined in Sect. 390, attempt to commit robbery, Sect. 393, or voluntarily causing hurt in committing robbery, Sect. 394, whipping may be added as a punishment.

Triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That you, on or about the day of , at did (*or* did attempt to) commit robbery; and that you have thereby committed an offence punishable under Sect. 392 (*or* 393) of the Indian Penal Code, and within, &c.

Evidence.

The definition of robbery in the second clause of Sect. 390 is rather wider than that of the English law, inasmuch as it includes violence or fear of violence after the robbery has been completed, provided it be caused for the purpose of enabling the thief to carry away, or attempt to carry away, the property obtained by the theft. The prosecutor must either prove that he was actually in bodily fear, or he must prove circumstances from which the court and jury may presume such a degree of apprehension of danger as would induce him to part with his property; *Fost.* 128; and in this latter case, if the circumstances thus proved be such as are calculated to create such a fear, the court will not pursue the inquiry further, and examine whether the fear actually existed. Therefore, if a man knocks another down, and steals from him his property whilst he is insensible on the ground, this is robbery; *Fost.* 128. It is not necessary that the injury and fear of injury should be in respect of the person robbed, for the Code says, "to any person"; therefore, if a man take another's child and threaten to destroy him unless the other give him money, this is robbery, if it be done in the actual presence of the prosecutor; *R.* v. *Reave*, 2 *East, P. C.* 735

Upon an indictment for robbery it appeared that a mob came to the house of the prosecutor, and with the mob the prisoners, who advised the prosecutor to give them something to get rid of them, and prevent mischief, by which means they obtained money from the prosecutor; and *Parke*, J. (after consulting *Vaughan*, B., and *Alderson*, J.), admitted evidence of the acts of the mob at other places before and after on the same day, to shew that the advice of the prisoners was not *bonâ fide*, but in reality a mere mode of robbing the prosecutor; *R.* v. *Winkworth*, 4 *C. and P.* 444. Where it appeared that the defendant attempted to commit a rape upon the prosecutrix, and she gave him money to desist, which he put in his pocket, and then continued his attempt until he was interrupted, this was holden by the judges to be robbery; *R.* v. *Blackham*, 2 *East, P. C.* 711. Where the defendant took goods from the prosecutrix of the value of eight shillings, and by force and threats compelled her to take one shilling, under pretence of

payment for them,—this was holden to be robbery; *R.* v. *Simons*, 2 *East, P. C.* 712. Several persons stopped a boat, saying it was required by the Magistrate of Rampore, and then plundered it without any opposition from the boatmen; it was held that they were guilty of robbery, as the theft was committed while the boatmen were under fear of restraint; *Reg.* v. *Dulcelooden*, 5 *W. R. Cr.* 19.

The use of violence, however, will not convert theft into robbery unless the violence is committed for one of the ends specified in Sect. 390, *ante*, p. 487; therefore, when a thief, finding himself observed, abandoned his booty, and ran away, throwing stones at the owner to prevent pursuit, the Madras High Court ruled that the offence was not robbery: *Weir's Crim. Rul.* 254; *Reg.* v. *Kalia Kavia*, *B. R.* 27*th June* 1872.

Dishonest intention is a main ingredient in the offence of robbery; therefore, a conviction for robbery with a finding that the property was not taken with any dishonest intention is bad; *Madras H. C. Ruling*, 28*th October* 1870; 5 *Mad. H. C. Rep. App.* 39; *Ex parte Karaka Nachiar*, 3 *Mad. H. C. Rep.* 254. On a trial for robbery, it is competent for the jury to disbelieve the evidence as to the assault, and bring in a verdict of theft; *Reg.* v. *Sakhaut Sheikh*, 2 *W. R. Cr.* 13. See, also, the notes on dacoity, *post*, p. 493.

DACOITY.

Sect. 391. *Dacoity.*—**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."**

Sect. 392-394. See *ante*, p. 489.

Sect. 395. *Punishment.*—**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.**

Sect. 396. *Dacoity with Murder.*—If any one of five or more persons, who are conjointly 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.

Sect. 397. *Robbery or Dacoity, with use of Weapon.*—If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt, 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.

Sect. 398. *Attempting to commit Robbery, &c., armed.*—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.

Sect. 399. *Preparing to commit Dacoity.*—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.

Sect. 400. *Belonging to a Gang of Dacoits.*—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.

Sect. 401. *Belonging to a Gang of Thieves.*—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 imprisonment for a term which may extend to seven years, and shall also be liable to fine.

Sect. 402. *Assembling to commit Dacoity.*—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.

Note.

Section 75 provides for increased punishment for a second offence.

By Act VI. of 1864, Sect. 4, whipping may be inflicted as a punishment in addition to any other for a second offence of dacoity as defined by Sect. 391, *ante*, p. 491.

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That you (with others to the number of five or more), on or about the day of , at , committed dacoity; and that you have thereby committed an offence punishable under Sect. 395 of the Indian Penal Code, and within, &c.

The proofs will be the same as in the case of robbery, *ante*, p. 490, with the exception that it must be proved that five persons at least were concerned in the act. A conviction under Sect. 397 is equally good, whether the number of thieves be five or under, as it applies equally to robbery and dacoity; *Reg.* v. *Dwarka Aheer*, 2 *W. R. Cr.* 19; but if the number of thieves be under five, the offence should be charged as robbery.

The words, "with others to the number of five or more," are said by the High Court in Bengal to be redundant in a charge as being included in the term "dacoity"; 2 *W. R. Cr. L.* 1; but the Madras High Court has ruled that they should be inserted, as being necessary to inform the prisoner of the charge against him; *Madras Rulings*, 1864, on Sect. 395.

Where a large body of Hindus (more than five), acting in concert, and apparently under the influence of religious feeling, attacked certain Mahomedans who were driving cattle along a public road, and forcibly deprived them of the possession of such cattle, under

circumstances which did not indicate any intention of restoring the cattle to their lawful owners ;—it was held that the offence of dacoity had been committed, and not merely that of riot; *Emp.* v. *Ram Baran*, *I. L. R.* 15 *All.* 299.

If accused persons attempt to commit dacoity, the charge should be laid under Sect. 395 only, and not under Sect. 511 ; *Reg.* v. *Koonee*, 7 *W. R. Cr.* 48.

A prisoner convicted of dacoity, under Sect. 395, cannot be convicted also of dishonestly receiving stolen property under Sect. 411 or property transferred by dacoity under Sect. 412, in respect of property obtained by the dacoity of which he has been convicted ; *Reg.* v. *Shahubut*, 13 *W. R. Cr.* 42 ; *Emp.* v. *Bahiru*, *B. R.* 8*th November* 1886.

Section 396.—In order to bring a person under the provisions of this section, it must be shewn that he was one of the persons who were conjointly committing dacoity, and was present at the time when the murder was committed ; *Emp.* v. *Umrao Singh*, *I. L. R.* 16 *All.* 437. If the murder be committed inside a house, it is not necessary that all the dacoits should be inside the house at the time the murder is committed, so long as all, whether inside or outside the house, were engaged in the dacoity in the course of which the murder was committed by one of them ; *Emp.* v. *Teja*, *I. L. R.* 16 *All.* 86.

If in the commission of robbery or dacoity any of those taking part in the commission of the offence are armed, those only who are so armed will be responsible for the use of the weapon ; see Sects. 397 and 398, *ante*, p. 492 ; *Emp.* v. *Bhaojya*, *B. R.* 7*th October* 1895 ; and those only who cause any grievous hurt, or attempt to cause death, will be responsible for such violence ; Sect. 397 ; *Reg.* v. *Deoji Keru*, *B. R.* 1st *August* 1872 ; unless death be actually caused, and then each one in the company will be guilty of murder if the offence be dacoity ; Sect. 396, *ante*, p. 492 ; but there is no provision for the case of murder committed by one of a party of robbers less than five in number. In this case, however, those present, but not actually striking a blow, if present as abettors, will, under Sect. 114, be deemed to have committed the principal offence, and should be charged as principals,

and may receive the same punishment as the principal. If hurt only, and not grievous hurt, be caused in robbery, then not only the person causing the hurt, but all assisting in the robbery, will be responsible for the hurt ; Sect. 394, *ante*, p. 489. If grievous hurt is actually caused, a magistrate is not justified in treating it as simple hurt, and disposing of the case himself, but must commit to the Sessions ; *Emp.* v. *Johania*, *B. R.* 18*th July* 1889.

In order to establish a charge of belonging to a gang of dacoits, it must be proved that there was a gang of persons associated together for the purpose of habitually committing dacoity, and that the accused was one of the persons so associated together ; *Reg.* v. *Mooktaram*, 23 *W. R. Cr.* 18.

Women cannot be convicted under Section 400 on the mere fact that they are living as wives or mistresses of dacoits, without proof that they are associated with their husbands and protectors for the purpose of themselves habitually committing dacoities. *Reg.* v. *Velli*, *B. R.* 18*th June* 1896.

The proof of belonging to a wandering gang of thieves, not being dacoits, will be the same in nature as that in respect of being a *thug* : *ante*, p. 401. In order to convict of this offence it is necessary that, on a trial by jury, the judge should, in his summing up, put clearly to the jury the necessity of proof of association between the accused and others, and that this association was for the purpose of habitual theft, and that habit must be proved by an aggregate of facts ; *Reg.* v. *Shriram Venkatasami*, 6 *Mad. H. C. Rep.* 120.

CRIMINAL MISAPPROPRIATION OF PROPERTY.

Sect. 403. *Dishonest Misappropriation of Property.*—**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.**

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 discover-

ing 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 favour 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.**

Sect. 404. *Dishonest Misappropriation of Property belonging to a Deceased Person.*—**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.**

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.

Note.

Section 75 provides for increased punishment for a second offence under Sect. 404.

Offences under Sect. 403 are triable by any Magistrate; those under Sect. 404 by the Court of Session, a Presidency Magistrate, or a Magistrate of the first or second class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Charge.

That you, the said A B, on or about the day of at , dishonestly did misappropriate (*or* convert to your own use) certain moveable property belonging to C D (deceased), to wit, a silver tankard (late in the possession of the said C D, deceased, you, the said A B, knowing that the said property was in the possession of the said C D, at his decease, and had not been since then in the possession of any person legally entitled to such possession); and that you, the said A B, have thereby committed an offence punishable under Sect. 403 (404) of the Indian Penal Code, and within, &c.

Evidence.

The term misappropriation is the larger of the two terms employed in Sect. 403, and includes any appropriation of property which is not justified by law, whether the appropriation be to the accused himself or to some other person; it would seem to be equivalent to the English term, "conversion," which is the wrong done by an unauthorized act which deprives another of his property permanently, or for an indefinite time; *per Bramwell*, B., in *Hiort* v. *Bott*, *L. R.* 9 *Ex.* 86, 89. "Conversion to his own use" is the act of the accused by which he appropriates an article to himself.

A person may commit the offence of dishonest misappropriation of money although he does not bring the money to his own use; *Reg.* v. *Enayet Hossein*, 11 *W. R. Cr.* 1; and *Reg.* v. *Nobin Chunder*, 12 *W. R. Cr.* 39.

To constitute the offence of criminal misappropriation, there must be first an innocent possession, and then a subsequent change of intention; or the knowledge of some new fact with which the accused was not previously acquainted, which causes the further retention to be wrongful; *Bhagiram* v. *Abar*, *I.L.R.* 15 *Cal.* at p. 400; and the misappropriation may be either permanent or only for a time, provided that the dishonest intention can be inferred from the circumstances of the case; *Emp.* v. *Ramakrishna*, *I. L. R.* 12 *Mad.*, p. 50. The *mere keeping* of a thing found without attempting to find the owner, but without any attempt on the part of

the finder to appropriate or convert the same to his own use, is not criminal misappropriation; *Reg.* v. *Abdool*, 10. *W R. Cr.* 23. The offence of criminal misappropriation differs from theft, in the fact that the property misappropriated comes into the defendant's hands honestly; and from criminal breach of trust, in that his possession does not arise from his being *entrusted* by some other person with property or the dominion over property, but from some casualty which does not by itself raise any legal duty.

Two notes were stolen from A, which B (not a *bonâ fide* holder for valuable consideration) tendered to C in payment for certain articles. C, not knowing B, refused to deal with him, whereupon B brought D, who was known to C, and the purchase was made by D, and paid for by him with the notes. It was held that the part which D performed in the transaction amounted to a conversion of the notes to his own use; *Kissorymohun* v. *Rajnarain*, 1 *Hyde*, 263. Where money is paid to a person by mistake, and such person, either at the time of receipt or at any time subsequently, discovers the mistake, and determines to appropriate the money, that person is guilty of criminal misappropriation; *Reg.* v. *Shamsoondur*, 2 *N. W.* 475. A servant was ordered to collect some money; he collected it, and gave a receipt of his own for the amount. The receipt given to him by his master he returned, saying that he had failed in collecting this particular debt. When charged with criminal misappropriation, he alleged that his master owed him as much as he had collected, and he had therefore taken his master's money in discharge of the debt due to himself; but it was held that he was guilty of criminal misappropriation; *Reg.* v. *Bissessur Roy*, 11 *W. R. Cr.* 51. Where an accused is interested in property jointly with others he is not necessarily guilty of a criminal act if he takes possession and disposes of it; *Reg.* v. *Parbutty Churn*, 14 *W. R. Cr.* 13.

The appropriation must be dishonest, that is, the appropriator must know, *at the time of appropriation*, that the property is not his, that it has an owner, and must intend to deprive the owner of his property. A person *bonâ fide* claiming and believing himself to be entitled to the contents of a box, as to which, however, there was a dispute, broke open the box which was in his house,

and removed the contents. He then made a hole in the wall of his house so as to make the removal appear to have been the work of thieves from outside, but he did not appear to have laid a charge against any one in respect of the removal of the contents of the box; it was held that he could not be convicted of criminal misappropriation; *Thewa Ram* v. *Emp.*, 10 *C. L. R.*, 187. Where the accused found a gold mohur on an open plain and sold it the next day, there being no evidence as to how or when it came to be there, and nothing to indicate that the owner could be found, it was held that the act of the accused did not amount to criminal misappropriation; *Emp.* v. *Sita*, *I. L. R.* 18 *Bom.* 212.

A prisoner, who received a certain quantity of hides on his agreeing to pay a certain sum for them, but subsequently failed to pay it, is not guilty of dishonest misappropriation; *Reg.* v. *Boystum Moochee*, 17 *W. R. Cr.* 11. Where the owner of a carpet washed it in the village tank, and hung it up to dry close by, the person who dishonestly took it away is guilty of theft and not of criminal misappropriation; *Emp.* v. *Mathi*, *B. R.*, *9th December* 1886.

Under Sect. 404, the same elements are required to constitute an offence as would be required to constitute the offence of criminal misappropriation in respect to a person who was alive; *Reg.* v. *Nobin Chunder*, 12 *W. R. Cr.* 39. The word property does not refer to immoveable, but only to moveable, property; *Reg.* v. *Girdhar Pharamdas*, 6 *Bom. H. C. Rep. C. C.* 33; and the charge should specify the name of the person to whom the property belonged; *Reg.* v. *Parbutty Churn*, 14 *W. R. Cr.* 13.

CRIMINAL BREACH OF TRUST.

Sect. 405. *Criminal Breach of Trust.*—**Whoever, being in any manner intrusted 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, intrusts 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 at 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 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 intrusted 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 intrusted by Z with property to be carried by land or by water. A dishonestly misappropriates the property. A has committed criminal breach of trust.

Sect. 406. *Punishment for Criminal Breach of Trust.* 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.

Sect. 407. *Criminal Breach of Trust by Carrier, &c.*—Whoever, being intrusted with property as 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

Sect. 408. *Criminal Breach of Trust by a Clerk or Servant.* —Whoever, being a clerk or servant, or employed as a clerk or servant, and being in any manner intrusted 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.

Sect. 409. *Criminal Breach of Trust by a Public Servant or by a Banker, Merchant, or Agent.*—Whoever, being in any manner intrusted 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.

Note.

Section 75 provides for increased punishment for a second offence.

Offences under Sects. 406 *and* 408 *are triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first or second class; those under Sects.* 407 *and* 409, *by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may arrest without a warrant except for offences under Sect.* 409. *Defendants are not bailable. Not compoundable.*

Charge.

That you, on or about the day of , at being intrusted with certain property, to wit, five chests of opium (as a wharfinger), did commit criminal breach of trust (in respect of such property); and that you have thereby committed an offence punishable under Sect. 406 (407) of the Indian Penal Code, and within, &c.

Evidence.

The defendant must be shewn to have received the property which must be moveable, and not immoveable, property; *Reg.* v. *Girdhar Dharamdas*, 6 *Bom. H. C. Rep. Cr.* 33; followed in *Jugdown* v. *Emp., I. L. R.* 23 *Cal.* 372; in respect of which he is alleged to have committed criminal breach of trust, under such circumstances as indicate that he was bound to apply it in a certain way. This may arise from express direction of law, by legal implication, from express or implied contract, or from the command of a master to a servant. It may also arise from the ordinary course of business in which the accused is employed, and his knowledge acquired therefrom of the purpose for which particular sums of money are entrusted to him; *Lolit Mohan* v. *Emp., I. L. R.* 22 *Cal.* 313. It must also be shewn by the prosecution that the defendant disposed of the property in some way other than that in which he was bound to apply it; and in

so disposing of it in breach of the trust, did so dishonestly; 6 *Mad. H. C. Rep. App.* 28; *Isser Chunder* v. *Peari Mohun*, 16 *W. R. Cr.* 39. The mere fact, that the defendant did not at once apply the money for the purpose for which it was intended, does not amount to criminal breach of trust, but there must be also evidence of some dishonest use of the money in the meantime; *Emp.* v. *Ardeshir Merwanji*, *B. R.* 21*st August* 1889. The appropriation of money by an accused under the impression that he was in law entitled to do so, although he was not so entitled, does not amount to criminal misappropriation; *Emp.* v. *Khanderao Narayen*, *B. R.* 30*th July* 1894. Where a master sends his servant with money to pay a bill which is an open one, the items of which have never been checked and agreed to by the master, and the tradesman makes the servant a present, so as to amount to a taxation of the bill and a reduction of the price, the servant obtains this reduction on account of his master, and the money in his hands always remains the master's property; and, if he appropriates it, he commits criminal breach of trust; but if the master has previously settled the amount with the tradesman, or agreed to the items, and the servant asks for a present and keeps it, it is not criminal breach of trust; *Emp.* v. *Imdad Khan*, *I. L. R.* 8 *All.* 120. Where silver was intrusted to the prisoner for the purpose of making ornaments, and he abstracted a portion of the silver and supplied its place with copper, it was held he had committed criminal breach of trust; *Reg.* v. *Balaji*, 4 *Bom. H. C. Rep. Cr.* 16. If the defendant is charged as holding a particular office under Sects. 407, 408, or 409, it must be proved, not only that he received the property, but that he received it in the capacity in which he is charged. Sect. 409 does not limit the way in which a trust shall arise, whether by specific order, or by reason of its being a part of the proper duty of a public functionary. Where, therefore, it was proved that the head clerk of an office intrusted the management of stamps, with the knowledge and sanction of his superiors, to one of his assistants, the latter was held to have been guilty of criminal breach of trust, as a public servant, when he made away with the stamps; *Reg.* v. *Ram Dhun*, 13 *W. R. Cr.* 77. But where a court inspector improperly

delegated to a constable the custody of Government moneys (taking from him private security to save himself from loss in case of defalcation), and the constable dishonestly converted the money to his own use, although he afterwards restored it, it was held that the constable was not a public servant, and therefore the offence was under Sect. 408 and not 409; *Reg.* v. *Banee Madhub*, 8 *W. R. Cr.* 1. Where the accused is a public servant, it is not necessary, in order to bring the case under Sect. 409, that the property should be that of Government; it is sufficient if it has been intrusted to a public servant in that capacity; *In re Ram Soonder*, 2 *C. L. R.* 515.

The misappropriation, or conversion, to the defendant's use, will be proved in various ways. If the defendant is a clerk or servant, and it is his duty to account for moneys received at stated times, or from time to time as he receives them, his not doing so wilfully will be evidence of misappropriation; *Reg.* v. *Jackson*, 1 *C. and K.* 384; *Emp.* v. *Ramkrishna*, *I. L. R.* 12 *Mad.*, p. 51; and even where no precise time can be fixed at which it was his duty to pay them over, his not accounting for them, if found as a fact to have been done dishonestly, is equally a misappropriation; *Reg.* v. *Welch*, 1 *Den. C. C.* 199; and where the accused has received various sums of money prior to the time of being called upon to account for them, and does not so account, he can be charged in respect of the *total deficiency* at the time of the accounting in one charge, and there is no necessity to put each sum misappropriated in a separate charge; *Reg.* v. *Balls*, *L. R.* 1 *C. C.* 328. In this case evidence had to be called to shew the separate amounts received by the prisoner which made up the total sum, but that was because he had not entered the amount received in his book, and the total amount could not otherwise be proved. If the amounts had been entered in the book, that, in England, would have been held to have been an accounting for them, and the offence of embezzlement would not have been committed, but probably that of theft as a servant. The offence of criminal breach of trust is, however, wider, and not so technical as that of embezzlement, and there is no reason why an accused in this country should not be convicted of criminal breach of trust, although he has entered the sums received in a book, if, when the time comes for him to hand

them over, it appears that he has misappropriated them; and the only evidence of misappropriation is that by the accounts in his own handwriting he ought to have a certain balance to hand over which he is unable to produce, or rightly to account for; *Emp.* v. *Kellie*, *I. L. R.* 17 *All.* 153; followed in *Buddhu* v. *Babu Lal*, *I. L. R.* 18 *All.* 116; where it was held that a man might be convicted on proof of a general deficiency in his accounts and that it was not necessary to prove the receipt and non-accounting of specific items: see, also, *Reg.* v. *Lambert*, 2 *Cox's Crim. Ca.* 309. Where the defendant received payment of a debt from one of his master's customers in Bank of England notes, but accounted with his master for £6 less than he received and afterwards delivered these very Bank of England notes to his master upon another account, it was ruled by *Bayley*, J., that these notes, to the amount of £6, must be deemed to have been embezzled (misappropriated) the moment the defendant accounted for £6 less than he received, and that his afterwards paying these identical notes to his master on another account made no difference; and this ruling was afterwards upheld by the judges; *R.* v. *Hall*, 3 *Stark*, 67; *R. and R.* 463. A servant who receives money for a specific purpose and does not use it for that purpose, but, on being called on to account for the money, falsely says that he employed it for the purpose for which it was given, is guilty of an offence under Sect. 408: *Watson* v. *Kholabkhan*, 10 *W. R. Crim.* 28. A village *shroff*, whose duty it was to assist in collecting the public revenue, received grain from the ryots, and gave receipts as for money received by virtue of a private arrangement between him and the villagers; it was held that he could not be convicted of criminal breach of trust as a public servant under Sect. 409, as he had no authority to receive the public revenue in kind, and the party who delivered the grain did not thereby discharge himself from liability for the revenue; 4 *Mad. H. C. Rep. App.* 32. The servant of a liquor contractor was instructed by his master with liquor to sell, and he was to receive a certain proportion for himself and account for the remainder to his master, with whom he made a legal contract not to adulterate it. In violation of that contract he mixed water with it, and sold the diluted liquor at the same rate as he would have sold the unadulterated liquor,

delegated to a constable the custody of Government moneys (taking from him private security to save himself from loss in case of defalcation), and the constable dishonestly converted the money to his own use, although he afterwards restored it, it was held that the constable was not a public servant, and therefore the offence was under Sect. 408 and not 409; *Reg.* v. *Banee Madhub*, 8 *W. R. Cr.* 1. Where the accused is a public servant, it is not necessary, in order to bring the case under Sect. 409, that the property should be that of Government; it is sufficient if it has been intrusted to a public servant in that capacity; *In re Ram Soonder*, 2 *C. L. R.* 515.

The misappropriation, or conversion, to the defendant's use, will be proved in various ways. If the defendant is a clerk or servant, and it is his duty to account for moneys received at stated times, or from time to time as he receives them, his not doing so wilfully will be evidence of misappropriation; *Reg.* v. *Jackson*, 1 *C. and K.* 384; *Emp.* v. *Ramkrishna*, *I. L. R.* 12 *Mad.*, p. 51; and even where no precise time can be fixed at which it was his duty to pay them over, his not accounting for them, if found as a fact to have been done dishonestly, is equally a misappropriation; *Reg.* v. *Welch*, 1 *Den. C. C.* 199; and where the accused has received various sums of money prior to the time of being called upon to account for them, and does not so account, he can be charged in respect of the *total deficiency* at the time of the accounting in one charge, and there is no necessity to put each sum misappropriated in a separate charge; *Reg.* v. *Balls*, *L. R.* 1 *C. C.* 328. In this case evidence had to be called to shew the separate amounts received by the prisoner which made up the total sum, but that was because he had not entered the amount received in his book, and the total amount could not otherwise be proved. If the amounts had been entered in the book, that, in England, would have been held to have been an accounting for them, and the offence of embezzlement would not have been committed, but probably that of theft as a servant. The offence of criminal breach of trust is, however, wider, and not so technical as that of embezzlement, and there is no reason why an accused in this country should not be convicted of criminal breach of trust, although he has entered the sums received in a book, if, when the time comes for him to hand

them over, it appears that he has misappropriated them; and the only evidence of misappropriation is that by the accounts in his own handwriting he ought to have a certain balance to hand over which he is unable to produce, or rightly to account for; *Emp.* v. *Kellie*, *I. L. R.* 17 *All.* 153; followed in *Buddhu* v. *Babu Lal*, *I. L. R.* 18 *All.* 116; where it was held that a man might be convicted on proof of a general deficiency in his accounts and that it was not necessary to prove the receipt and non-accounting of specific items: see, also, *Reg.* v. *Lambert*, 2 *Cox's Crim. Ca.* 309. Where the defendant received payment of a debt from one of his master's customers in Bank of England notes, but accounted with his master for £6 less than he received and afterwards delivered these very Bank of England notes to his master upon another account, it was ruled by *Bayley*, J., that these notes, to the amount of £6, must be deemed to have been embezzled (misappropriated) the moment the defendant accounted for £6 less than he received, and that his afterwards paying these identical notes to his master on another account made no difference; and this ruling was afterwards upheld by the judges; *R.* v. *Hall*, 3 *Stark.* 67; *R. and R.* 463. A servant who receives money for a specific purpose and does not use it for that purpose, but, on being called on to account for the money, falsely says that he employed it for the purpose for which it was given, is guilty of an offence under Sect. 408: *Watson* v. *Kholabkhan*, 10 *W. R. Crim.* 28. A village *shroff*, whose duty it was to assist in collecting the public revenue, received grain from the ryots, and gave receipts as for money received by virtue of a private arrangement between him and the villagers; it was held that he could not be convicted of criminal breach of trust as a public servant under Sect. 409, as he had no authority to receive the public revenue in kind, and the party who delivered the grain did not thereby discharge himself from liability for the revenue; 4 *Mad. H. C. Rep. App.* 32. The servant of a liquor contractor was instructed by his master with liquor to sell, and he was to receive a certain proportion for himself and account for the remainder to his master, with whom he made a legal contract not to adulterate it. In violation of that contract he mixed water with it, and sold the diluted liquor at the same rate as he would have sold the unadulterated liquor,

putting the profit in his own pocket; it was held that he had committed criminal breach of trust; *Emp.* v. *Jamsetji*, *B. R.* 18*th July* 1888.

Directors who are bound not to pay dividends, except out of profits, are guilty under Sect. 409 of criminal breach of trust, if they pay dividends out of deposits when there are no profits; *Emp.* v. *Moos*, *I. L. R.* 16 *All.* 88. Officers of a bank subordinate to, and obeying the orders of, the directors are not in such a case intrusted with property, or the dominion over property as bankers, but if they conspire with the directors in paying dividends out of deposits, when there are no profits, they can be convicted under Sects. 109 and 409; *ib.*

A partner intrusted with, or having dominion over, partnership property, and dishonestly misappropriating or converting to his own use such property, is guilty of criminal misappropriation under Sect. 403; *Nrigendro Lall* v. *Okhoy Coomar*, 21 *W. R. Cr.* 59 and 13 *Ben. L. R.* 307, overruling *In re Lall Chand*, 9 *W. R. Crim.* 37. And a married woman may be convicted under the first clause of the same section if she dishonestly misappropriates or converts to her own use property with which she has been intrusted; *Reg.* v. *Robson*, 31 *L. J. N. S. M. C.* 22. But she cannot commit a criminal breach of trust in respect of her husband's property; *Rulings of Madras H. C.* of 1864 on Sect. 406. It would be well, however, that the remarks contained in the portion referring to theft, with respect to the relation of husband and wife among Hindus and Mahomedans, should be considered in connection with this decision. See *ante*, p. 472.

The prisoner, a pledgee of a turban, without permission or authority, wore it; and it was held that the deterioration of the article by use was not such a loss of property to the owner, and the wrongful beneficial use of the property to the prisoner was not such a gain to him as to make his act a criminal breach of trust; *Madras H. C. Rulings*, 18*th September* 1866. A person who pledges what is pledged to him *may* be guilty of criminal breach of trust. There are two elements which must, however, be made out—(1) the disposal in violation of some direction of law or contract, express or implied, prescribing the mode in which

this trust ought to be discharged; (2) that such disposal was made dishonestly; but great caution ought to be observed in drawing the inference of dishonesty from a breach of a duty imposed by civil law. Where the law bearing upon a case is doubtful, it would be most indiscreet to raise the inference of dishonesty against a man who has mistaken it, and even where the rule of law is perfectly plain, a conviction ought by no means necessarily to follow; but the very violation of the law would be some evidence of the dishonest intent; 6 *Mad. H. C. Rep. App.* 28.

At common law a conversion might arise, either by a wrongful taking of a chattle, or by some other illegal assumption of ownership, or by illegally using or mis-using it, or by wrongful detention; but the wording of the sections of the Code which apply to this subject shew that an actual and substantial, rather than a technical, conversion is intended, and proof of such a conversion should be adduced at the trial if that be relied upon as evidence of the defendant's guilt.

If the defendant has appropriated or converted the property to his own use under a claim of right, he will be entitled to an acquittal, unless the claim is so shadowy and unsubstantial as to be brought forward without any *bonâ fides*. Where an alleged mortgagee denied the mortgage, it was held that he could not be convicted of criminal breach of trust in respect of the title-deeds; *Reg.* v. *Jaffir Naik*, 2 *Bom. H. C. Rep.* 127.

The misappropriation of each separate item of money with which a person is intrusted is a separate offence, and the facts connected with it should form the subject of a separate inquiry. In such a case the duty of the committing magistrate is to select certain distinct items and frame his charge upon them, and to adduce evidence specifically on those issues; *In re Chetter*, 15 *W. R. Cr.* 5; unless there has been a non-accounting at one time for an aggregate of various items, when the total deficiency at any one accounting may be put into one charge; *Reg.* v. *Balls*, *L. R.* 1 *C. C.* 328.

RECEIVING STOLEN PROPERTY.

Sect. 410. *Stolen Property.*—**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 criminal breach of trust has been committed, is designated as "stolen property"; whether the transfer has been made, or the misappropriation or breach of trust has been committed within or without British India.

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.

Sect. 411. *Receiving stolen Property.*—Whoever dishonestly receives or retains any 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.

Sect. 412. *Receiving Property acquired by Dacoity.*—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.

Sect. 413. *Habitually dealing in stolen Property.* 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.

Sect. 414. *Concealing stolen Property.*—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.

Note.

Section 75 provides for increased punishment for a second offence.

By Act VI. of 1864, Sects. 2 and 3, whipping may be substituted as a punishment for a first offence and either substituted or added for a second offence under Sects. 411 and 412; by Sect. 4, whipping may be added as a punishment for a second offence under Sect. 413.

Offences under Sects. 412 *and* 413 *are triable by the Court of Session; those under Sects.* 411 *and* 414 *by the Court of Session, a Presidency Magistrate, or a Magistrate of the first or second class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.*

Charge.

That you, on or about the day of , at , dishonestly did receive (*or* retain) stolen property, to wit, three gold watches and two gold chains, the property of one A B, knowing or having reason to believe the same to be stolen property (*or* that the possession of the same had been transferred by the commission of dacoity); and that you have thereby committed an offence punishable under Sect. 411 (412) of the Indian Penal Code, and within, &c.

Evidence.

A theft, &c., of the property alleged to have been received must be first proved; *Reg.* v. *Bubleo*, 2 *N. W. R.* 187; *Emp.* v. *Burke*, *I. L. R.* 6 *All.* 224; for which purpose the principal offender is a competent witness, as indeed to prove the whole case; *R.* v. *Haslam*, 1 *Leach*, 418. But a plea of guilty by the thief is no evidence of the theft as against the receiver; therefore, if two persons are jointly charged with theft and receiving, and the thief pleads guilty and the receiver demands a trial, the fact of theft must be proved by evidence. See *Emp.* v. *Bala Patel*, *I. L. R.* 5 *Bom.* 63. It is competent to the defendant to disprove the guilt of the principal; *Post.* 365. The fact that the

thief, a child, has been tried for the theft, and discharged on the ground of want of understanding within the meaning of Sect 83, *ante*, p. 79, is no bar to the conviction of the person who has received the stolen property; *Reg.* v. *Begarayi*, *I. L. R.* 6 *Mad.* 373. The fact that an article is missing from its usual place of deposit, and an imitation of it has been substituted for it, is evidence that the article has been stolen; *Ishan Chandra* v. *Emp.*, *I. L. R.* 21 *Cal.* 328. The property charged as having been received should be laid as the property of the owner; *Reg.* v. *Siddu*, 1 *Bom. H. C. Rep.* 95. That which is *nullius proprietas* cannot be the subject of theft or criminal misappropriation, and the receiving of it is not a dishonest receiving of stolen property. Therefore, it was held that an accused could not be convicted of receiving stolen property in respect of a bull which had been set at large by a Hindu at the time of performing funeral ceremonies, as the original owner had surrendered all his rights as proprietor, and it was not the subject of ownership by any person; *Emp.* v. *Bandhu*, *I. L. R.* 8 *All.* 51, followed in *Emp.* v. *Nihal*, *I. L. R.* 9 *All.* 348. If the property is in fact not stolen property, the receiver cannot be convicted, although, at the time of receipt, he believed it to be stolen property; *Emp.* v. *Issup*, *B. R.* 21*st June* 1888.

It is not necessary that the offence, by which the owner lost possession of the property, should have been committed in British India. The courts in India differed as to the necessity of this, and the question was settled by the Legislature by Act VIII. of 1882, Sect. 9: but the receipt or retention must have taken place in British India, unless the receiver or retainer is a British subject when he will come under the provisions of Sect. 188, Cr. P. C.; *Emp.* v. *Kirpal*, *I. L. R.* 9 *All.* 523.

The theft having been proved, the next step is to prove the receipt of the stolen property by the defendant; and the finding must be that the accused received the very property stolen, not property *like* it; *Emp.* v. *Bava Chela*, *B. R.* 8*th January* 1886; though, of course, the fact that property in the possession of the receiver is like that stolen is an element to be taken into consideration in determining whether it is the very property which

stolen. The receipt must also be dishonest, i. e., with intent to cause wrongful loss to the owner, or wrongful gain to the receiver, or thief; *Emp.* v. *Balya*, *I. L. R.* 15 *Bom.* 369.

Although 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; *Reg.* v. *Wiley*, 2 *Den. C. C.* 37. But a person having a *joint* possession with the thief may be convicted as a receiver: *Reg.* v. *Smith*, *Dears. C. C.* 494. Two prisoners were jointly charged with receiving stolen goods knowing them to have been stolen, and were convicted upon evidence which shewed that one had received the goods from the thief and afterwards disposed of them to the other, both having a guilty knowledge; it was held that the conviction was right; *Reg.* v. *Reardon*, 12 *Jur. N. S.* 476. Where A, knowing that goods had been stolen, directed B, his servant, to receive them into his premises, and B also knowing that they were stolen, in pursuance of that direction, afterwards received them in A's absence, they were held to be indictable jointly; *Reg.* v. *Parr*, 2 *M. and Rob.* 346. The actual manual possession or touch of the goods by the defendant is not necessary to the completion of the receiving; it is sufficient if they are in the actual possession of a person over whom the defendant has a control, so that they would be forthcoming if he ordered it; *Reg.* v. *Smith*, 24 *L. J. N. S. M. C.* 135. Stolen property was brought by the thief into A's shop; A, with guilty knowledge, called her servant and directed her to take the stolen goods to the pawn office, and "pawn them for the girl" (the thief). A's servant did so accordingly, and brought back the money, which she handed to the thief in her mistress's presence. A never had manual possession either of the goods or the money. It was held that this amounted to a receiving by A of the stolen property; *Reg.* v. *Miller*, 6 *Cox's C. C.* 353. But the defendant must have exercised some dominion over the stolen property to convict him of receiving; it is not sufficient that he should have been caught in the act of bargaining. Two men stole some fowls, which they put into a bag, and carried to the house of the father of one Wiley, for the purpose of

selling to Wiley. All three went together from the house to a stable, the bag being carried on the back of one of the thieves; and when the policeman went in, the sack was found lying on the floor, unopened, and the three men around it as if they were bargaining, but no sounds were heard. In this case, *Martin*, B., said:—"I am of opinion that Wiley, under those circumstances, never did receive those fowls. The two men had the stolen articles in their possession as vendors adversely to Wiley; and they never intended to part with the possession, unless some bargain was concluded for the purchase of them. Upon this ground, I am of opinion that Wiley did not 'receive' the goods in the ordinary and proper sense of the word." *Talfourd*, J., also said:—"The position of Wiley, as a person negotiating for the purchase, excludes the idea of his having any possession. There was still a *locus pœnitentiæ*; he might still have determined not to take the fowls; and the whole matter was inchoate and incomplete"; *Reg.* v. *Wiley*, 4 *Cox's C. C.* 417. In another case where some stolen wool was put by the thief into the defendant's scales, but the latter had not weighed or bargained for it, it was held to be no receiving.

On the trial of a charge of dishonest receipt of stolen property, the attention of the jury should be drawn to the necessity of satisfying themselves that the possession of the stolen property is clearly traced to the prisoner; and if it simply be found in his house, that it could not have been placed there without his knowledge or sanction by some other person residing in the same house; *Emp.* v. *Malhari*, *I. L. R.* 6 *Bom.* 731. This knowledge or sanction need not be proved to have been given directly by the prisoner or specially in respect of the articles forming the subject of the charge, but may be inferred from all the surrounding circumstances of the case. Where the only evidence against an accused is that he pointed out a place in the field of *another person* where stolen property was concealed, that is not sufficient to entitle the Court to find that the prisoner received or retained it knowing it to be stolen property; *Emp.* v. *Gobinda*, *I. L. R.* 17 *All.* 576.

A wife cannot receive from her husband, nor can she, under English law, be convicted of receiving *jointly* with him, because she is supposed to be under his marital influence and coercion, particularly if his house be a receptacle of stolen goods; but if she take an active and independent part in receiving stolen goods in the absence of, or apart from, her husband, and from a person other than him, she may be convicted of receiving; *Reg.* v. *Brooks*, 1 *Dears. and B.* 184; *Reg.* v. *Wardroper*, *Bell, C. C.* 249. A husband may, however, receive from his wife. A husband and wife were indicted jointly for receiving. The jury found both guilty, and found also that the wife received the goods without the control or knowledge of the husband and apart from him, and that "he afterwards adopted his wife's receipt." It was held that this finding did not warrant the conviction of the husband; *Reg.* v. *Dring*, 1 *Dears. and B.* 329; but the wife, under the Penal Code, might have been found guilty of receiving, and the husband of retaining, stolen goods. Stolen goods were delivered by a thief to the wife of the prisoner in his absence; she paid sixpence on account, but the amount to be paid was not then fixed. The prisoner, with the knowledge that the goods had been stolen, agreed upon the price, and paid the balance. It was held that the prisoner was properly convicted of receiving the goods, knowing them to have been stolen; *Reg.* v. *Woodward*, 31 *L. J. N. S. M. C.* 91. A husband and wife were jointly indicted for stealing and receiving. The jury found the wife guilty of stealing, and that she acted voluntarily, and without any constraint on the part of her husband; they also found the husband guilty of receiving the property from his wife, knowing it to be stolen. It was held that he was rightly convicted of receiving; *Reg.* v. *McAthy*, 32 *L. J. N. S. M. C.* 35; *L. and C.* 250.

The latter clause of Sect. 410 seems to be a legislative enactment of the principle laid down in the case of *Reg.* v. *Dolan*, 6 *Cox's C. C.* 449, where stolen goods were found in the pocket of the thief by the owner, who sent for a policeman; the three then went towards the prisoner's shop, where the thief had previously sold other stolen goods, and, when near the shop, the

goods were given again to the thief, who was sent by the owner into the shop to sell them, which he accordingly did to the prisoner, and then returned with the proceeds to the owner; and the Court of Criminal Appeal held that the prisoner was not guilty of receiving stolen goods. This case was also acted upon in that of *Reg.* v. *Schmidt*, *L. R.* 1 *C. C.* 15; 35 *L. J. N. S. M. C.* 94; and *Reg.* v. *Villensky* [1892], 2 *Q. B.* 597.

The last fact to be proved is, that the defendant knew, or had reason to believe, that the things were stolen, and it must be *clearly* proved that he received or retained the things with a guilty knowledge; *Reg.* v. *Meer Yar*, 13 *W. R. Crim.* 70; *Emp.* v. *Balya*, *I. L. R.* 15 *Bom.* 369. The word "believe" is much stronger than "suspect," and involves the necessity of shewing that the circumstances were such that a reasonable man must have felt convinced that the property with which he was dealing was stolen property. It is not sufficient to shew that the accused was careless, or that he had reason to suspect that the property was stolen, or that he did not make sufficient enquiries to ascertain whether it had been honestly acquired; *Emp.* v. *Rango Timaji*, *I. L. R.* 6 *Bom.* 402. It must, however, be remembered that the question to be decided is not, whether the accused *actually had any belief* in the matter, but whether he had *reason to believe* that the goods were stolen, which under English law would amount to *knowledge*. This is proved, either directly, by the evidence of the principal offender, or circumstantially, by proving that the defendant bought them much under their value; 1 *Hale*, 619; or denied their being in his possession, or the like. To shew a guilty knowledge, other instances of receiving the goods of the same prosecutor, from the same person, may, it seems, be given in evidence; *R.* v. *Dunn*, 1 *Mood. C. C.* 146; even though they be the subject of other charges, and antecedent to the receiving in question; *R.* v. *Davis*, 6 *C. and P.* 177. So, evidence that on various former occasions portions of the commodity stolen had been missed by the prosecutor, and that the defendants, the alleged thief and receiver, had after such occasions been found selling such a commodity, the portion which was sold on the last of these occasions being identified as part of that missed by the

prosecutor, was held admissible in proof of the guilty knowledge; *Reg.* v. *Nicholls*, 1 *F. and F.* 51. But under English law, evidence of the possession by the prisoner of other goods stolen at other times from other persons is not admissible; *Reg.* v. *Oddy*, 2 *Den. C. C.* 264; *Reg.* v. *Drage*, 14 *Cox's C. C.* 85; *Reg.* v. *Carter*, 12 *Q. B. D.* 522. Under the Indian Evidence Act, however, it would seem that such evidence would be admissible. Section 14, *Illustration* (*a*), provides that, where "A is accused of receiving stolen goods knowing them to be stolen, and it is proved that he was in possession of a particular stolen article, the fact, that, at the same time, he was in possession of many other stolen articles, is relevant as tending to shew that he knew each and all of the articles of which he was in possession to be stolen." It will be observed that the distinction drawn in the English cases as to the ownership of the other goods is not drawn in this illustration. The fact that stolen property was found concealed in the loft of a house occupied by the prisoner, if he knew of such concealment, is sufficient to raise a presumption that he knew the property was stolen, but not that it was acquired by dacoity; *Emp.* v. *Malhari*, *I. L. R.* 6 *Bom.* 731, see, also, *Emp.* v. *Vajiram*, *I. L. R.* 16 *Bom.* 414, and the cases cited in his judgment by *Telang*, J.

The offence of dishonest retention of stolen property under Sect. 411, may be complete without any guilty knowledge at the time of reception; *Mad. H. C. Ruling*, 4 *Mad. H. C. Rep. App.* 42; provided that it can be proved that, before the charge was laid, the accused became acquainted with the fact that the goods were stolen; but even then the *mere* retention, after such knowledge, would not amount to an offence, unless it was *for the purpose* of "causing wrongful gain to one person, or wrongful loss to another"; see Sect. 24, *ante*, p. 31.

The possession of stolen property *immediately* after it has been stolen affords a strong presumption that the person, in whose possession it is, is either the actual thief or a receiver with a guilty knowledge, and is a sufficient corroboration of an approver; 13 *W. R. Cr. L.* 2; *Reg.* v. *Shurruffoodeen*, 13 *W. R. Cr.* 26; and this presumption is, of course, strengthened if the person, in whose

possession the stolen property is, fails to give a satisfactory account of the manner in which he acquired such possession, or gives a false account, or gives contradictory accounts, or if the property is secreted, and the Legislature has so provided in Sect. 114, *Illustration* (*a*), of the Evidence Act, 1872, which is as follows:—"The court may presume that a man, who is in possession of stolen goods *soon after* the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession." It has, however, been recently ruled in Calcutta, on the authority of English cases, that the mere fact that stolen property is found in the possession of a person who cannot give any account of his possession of them, shortly after the theft, is not evidence of dishonest receipt of those goods, unless there is also evidence that some person other than the accused had possession of them before they came into his possession; but that, under such circumstances, the accused might have been convicted of criminally retaining the goods; *Ishan Mochi* v. *Emp.*, *I. L. R.* 15 *Cal.* 511. This case was, however, not argued, and the judges, who considered the matter, do not seem to have had present to their minds the provisions of the Evidence Act. In a case of possession of stolen property a long time after the theft, or if the property be such as passes readily from hand to hand, a comparatively short time after, the possession itself affords but a slight presumption against the accused, and he ought not to be called upon to explain how his possession was acquired; *Ina Shaik* v. *Emp.*, *I. L. R.* 11 *Cal.* 160; see, also, *Reg.* v. *Adams*, 3 *C. and P.* 600; *Reg.* v. *Cooper*, 3 *C. and K.* 318; *Reg.* v. *Partridge*, 7 *C. and P.* 551. The mere possession of stolen wearing apparel, not of an unusual character and such as might easily pass from hand to hand, six weeks after the theft, is no evidence of receipt with guilty knowledge; *Emp.* v. *Ravji*, *B. R.* 10*th March* 1892. Where the only evidence against a prisoner is the possession of stolen property under suspicious circumstances, he should not be convicted and sentenced both for theft and for the receiving, because the presumption is that he is guilty of one or other of the offences, and if he is presumed to be guilty of theft, he cannot be presumed to be guilty of receiving

which implies a receipt from another person; *Emp.* v. *Jahiru*, *B. R.* 18*th November* 1886.

On a charge of receiving or retaining stolen property, the fact, that the accused is in possession of goods belonging to different persons, and stolen at different times, does not in itself justify a separate charge and conviction for the property of each person found in his possession; as although the thefts may have been committed at different times, all the property may have been received at one time; *Ishan Muchi* v. *Emp.*, *I. L. R.* 15 *Calc.* 511; followed in *Emp.* v. *Makhan*, *I. L. R.* 15 *All.* 317.

The civil station of Rajkote is not a part of the British India; consequently, an accused person found in British India with property in his possession stolen in Rajkote, cannot be convicted of the theft, but he can be convicted of receiving stolen property; *Emp.* v. *Abdool Latib*, *I. L. R.* 10 *Bom.* 186. The civil station of Wudhwan is a part of British India; *Tricum Panachand* v. *B. B. & C. I. Railway Co.*, *I. L. R.* 9 *Bom.* 244. The civil and military station of Bangalore is not British territory; *In re Hayes*, *I. L. R.* 12 *Mad.* 39.

In charges of receiving property acquired by dacoity under Sect. 412, it must be clearly shewn that the accused knew or had reason to believe that dacoity had been committed, or that the persons from whom he obtained the goods were dacoits; *Reg.* v. *Jogeshur*, 7 *W. R. Cr.* 109; *Emp.* v. *Daji Mahadu*, *B. R.* 11*th May* 1895; this may be shewn by the fact, that the defendant was in the habit of meeting various members of the gang, of whom the seller was one, separately, or had attended their meetings, or from other facts which would lead to the inference that he must have known how the goods were obtained. Mere possession of stolen articles of trifling value does not warrant the presumption that the receiver knew them to be the proceeds of a dacoity; *Reg.* v. *Samiruldin*, 18 *W. R. Cr.* 25; nor does even such a possession as would be sufficient to raise a presumption that the accused knew that they were stolen goods; *Emp.* v. *Malhari*, *I. L. R.* 6 *Bom.* 731. But where stolen property is found in the possession of dacoits, the offence of knowingly having in their possession goods obtained by means of dacoity, is to be considered as

included in the original one of dacoity, unless there are circumstances which clearly separate the one crime from the other, such as length of time, or distance, for example; *Reg.* v. *Abool Hoosein*, 1 *W. R. Cr.* 48; *Reg.* v. *Cassy Mul*, 3 *W. R. Cr.* 10; *Reg.* v. *Motee Joluha*, 5 *W. R. Cr.* 66. Where A and B were committed for a trial, the former for dacoity, and the latter for receiving the stolen goods, and pleaded guilty, but B claimed to be tried, the confession of A, in which he stated that he handed over a portion of the proceeds of the dacoity to B, was held not to be evidence against B; *Emp.* v. *Bala Patel*, *I. L. R.* 5 *Bom.* 63.

Habitual dealing in stolen Property.—The ordinary way of proving this offence will be to prove repeated convictions for receiving stolen goods, because, although the habitual receipt of stolen goods may be proved otherwise, yet, if the accused was in the habit of receiving, it is almost certain that single instances of receiving would have been brought home to him and resulted in convictions, and if this be the case, and the convictions are proved, the accused could not traverse the truth of these convictions, whereas, if the habitual receiving were attempted to be proved by ordinary evidence, the accused would be at liberty to traverse all the facts given in evidence against him, and prove that he did not receive the goods, or, if he received them, that they were not stolen, or that he did not know they were stolen. It would, however, seem hardly to be right, when a man has been many times convicted of receiving, and has undergone his sentences, to try him for habitual receiving on the strength of those convictions alone; some fresh act of receiving subsequent to his last conviction ought first to be proved against him, before the previous convictions are put in evidence against him; *In re Raja Hussein*, *I. L. R.* 10 *Bom.* 174; *In re Haider Ali*, *I. L. R.* 12 *Cal.* 520. In these two cases the prisoners were called upon to give security for good behaviour, but the principles laid down apply equally to the present matter. It must also be shewn that the property was received on different occasions, and on different dates; it is not sufficient to prove that the prisoner received the proceeds of different thefts on the same day from different people; *Emp.* v.

Baburam, I. L. R. 19 *Cal.* 190. A prisoner should not be tried at the same time for dishonestly receiving stolen property and habitually receiving or dealing in it. The proper course is to try the accused first for receiving, and then, if he is convicted, to try him under Sect. 413, putting the conviction under Sect. 411 in evidence against him, and proving other receipts; *Emp.* v. *Uttom Koondoo, I. L. R.* 8 *Cal.* 364.

Concealing or disposing of Stolen Property.—This offence is committed by those who are neither thieves nor receivers, but who, knowing of the theft, try to prevent the property being traced and recovered. There must be a concealment of the property, or a disposing of it, or a making away with it. These must be voluntary acts on the part of the accused, and he must do them knowing, or having reason to believe, that the property with which he is dealing is stolen. When prisoners are charged with the offence of assisting in concealing or disposing of property which they know, or have reason to believe, to have been stolen, in such a way as not to amount to receiving, the nature of the property, as well as the circumstances under which it was being made away with, must be taken into consideration in determining whether they had reason to believe that it was stolen. The mere fact, that no particular prisoner can be fixed with the offence of stealing, will not exonerate them; *Reg.* v. *Harishankar*, 2 *Bom. H. C. Rep.* 130.

As to the concealment of goods stolen at different times, see *Ishan Muchi* v. *Emp.*, *ante*, p. 512.

Where a prisoner has been convicted under Sects. 411 and 414, separate sentences should not be passed for each of these offences; *Emp.* v. *Sakharam, B. R. 7th March* 1889.

CHEATING.

Sect. 415. *Cheating.*—**Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to 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 anything 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 dishonoured, 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.

Sect. 416. *Cheating by Personation.*—A person is said to "cheat by personation," if he cheats by pretending to be some other person, or by knowingly substituting 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.

Sect. 417. *Punishment for cheating.*—**Whoever cheats shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.**

Sect. 418. *Cheating by a Person bound to protect the Interest of Party cheated.*—**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 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.**

Sect. 419. *Punishment for cheating by Personation.*—**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.**

Sect. 420. *Cheating, and dishonestly inducing a delivery of Property.*—**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.**

Note.

Section 75 provides for increased punishment for a second offence, except under Sect. 417.

Offences under Sect. 417 *are triable by a Presidency Magistrate, or a Magistrate of the first or second class; those under Sects.* 418 *and* 419, *by the Court of Session, a Presidency Magistrate, or a Magistrate of the first or second class; those under Sects.* 420, *by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.*

Charge.

That you, the said A B, on or about the day of , at , did cheat (by personation), to wit, by falsely pretending to one C D that you the said A B were in the Civil Service of Her Majesty the Queen-Empress in India, and thereby deceived the said C D, and dishonestly induced him to deliver to you, the said A B, certain goods, the property of the said C D, to wit, ; and that you, the said A B, have thereby committed an offence punishable under Sect. 420 of the Indian Penal Code, and within, &c.

Evidence.

The first thing to be proved is that representations were made by the accused, then that they were in fact false, and false to the knowledge of the accused. Some representations may be held to be false to the knowledge of the person making them without actual proof of their falsity. Thus, in England, it has been held that, where a man holds himself forth as able to predict the fortune of another by knowing the hour and place of his birth, and the aspect of the stars at the time, it is absurd to suppose that the man could have believed in the truth of his assertions; *Penny* v. *Hanson*, 18 *Q. B. D.* 478. It would be dangerous, however, to apply this particular case too generally in India, although the principle laid down is sound.

Under the English law, the false pretence must be as to an existing fact, but under the Indian Penal Code it may be as to a future state of affairs. Cases founded upon this extension of the law will require to be treated very cautiously, and the law must be administered within very strict limits. If a man buys goods saying that he has money to pay for them, and that statement is false, evidence that, at the time he ordered the goods, he was living in wretched lodgings, or was largely indebted to persons who were unable to get their money from him, or was greatly in debt for his rent, &c., will conclusively shew that his statement is false. But if a man say that he will pay for goods in three months, the fact, that, at the time he makes such promise, he is in poverty, will be no conclusive proof of dishonesty, as it would be quite possible that he was expecting a sum of money to come to hand at

the time he promised payment. In cases, therefore, of a false pretence as to a future state of circumstances, the proof of deceit must be very much more carefully prepared than in the case of a false pretence as to an existing fact. It has accordingly been held that a mere breach of contract is not even *primâ facie* evidence of an original intention to defraud; *Madras H. C. Cr. P.* 90 of 1863; *Reg.* v. *Hurgovandas*, 9 *Bom. H. C. Rep.* 448; *Reg.* v. *Kadir Bux*, 3 *N. W. P.* 16; and *Reg.* v. *Sheodurshun*, *ib.* 17. In order to convict of cheating by making a representation of a future fact, it must be shewn, not merely that the fact did not turn out according to the representation, but also that the accused knew, or expected, or intended that it would not so turn out, and made the representation, with intention, *at the time he made it*, of cheating; *Reg.* v. *Heeramun*, 5 *W. R. Cr.* 5. The accused purchased some wool, with delivery of possession, from a firm, and agreed to pay the price the next day. Default was made in payment, and, in the meantime, the accused pledged the wool to another person. It was held that a fraudulent purpose could not be inferred merely from the accused not paying, or from his inability to pay the next day, but that there must be evidence to prove that, when the wool was bought, the prisoner did not intend to pay for it; *Emp.* v. *Fazul Dhanjee*, *B. R.* 24*th November* 1886. C was charged with obtaining potatoes from the prosecutor by falsely pretending that he was in a large way of business, that he was in a position to do a good trade in potatoes and was able to pay for large quantities thereof, as and when they might be delivered to him, and was convicted. The evidence of the pretence was contained in the following letter written by the prisoner to the prosecutor:—"Sir,—Please send me one truck of regents and one truck of rocks as samples, at your prices named in your letter; let them be of good quality, then I am sure a good trade will be done for both of us. I will remit you cash on arrival of goods and invoice. Yours, &c., P. S.—I may say if you will use me well I shall be a good customer." It was held that the conviction was right, as, leaving out the words, "I will remit," &c., there was a false representation as to his present position; *Reg.* v. *Cooper*, 2 *Q. B. D.* 510; see, also, *Reg.* v. *Kadir Bux*, 3 *N. W. P.* 16.

A person who obtains from a pawnbroker, as in *Illustration* (e), upon an article which he falsely represents to be silver, a greater advance than would otherwise have been made, is guilty of a false pretence; although the pawnbroker have the opportunity of testing the article at the time; *Reg.* v. *Ball, C. and Mar.* 249. But if the person pledging simply asked a certain sum which would be lent only in the event of the article being silver, and made no false statement as to its composition, and the pawnbroker, after testing it, advanced the money, it would be a question of fact for the jury to determine, from the proportion the sum asked for bore to the value of the article, and from other surrounding circumstances, whether the defendant was intentionally deceiving the pawnbroker as to the material of which the article was made, or whether he was only endeavouring to get as much as possible advanced upon it.

A false representation merely as to the *quality* of goods sold or pledged is not indictable in England. The defendant was convicted on an indictment for obtaining money by false pretences, the pretences charged being that certain spoons were of the best quality; that they were equal to Elkington's A (meaning spoons made by Messrs. Elkington, and stamped by them with the letter A), that the foundations were of the best material; and that they had as much silver on them as Elkington's A. The representations were made to a pawnbroker for the purpose of obtaining, and the defendant did thereby obtain, advances of money on the spoons, which were in fact of inferior quality, and were of less value than the money advanced upon them; and the pawnbroker stated that he was induced by the defendant's misrepresentations alone to advance the money, and that if he had known the real quality of the spoons, he would have advanced no money on them. The jury found the defendant guilty of fraudulently and falsely representing that the spoons had as much silver on them as Elkington's A, and that the foundations were of the best material, &c., and that he thereby obtained the money. It was, nevertheless, held by a large majority of the judges, that the conviction could not be sustained; *Reg.* v. *Bryan*, 26 *L. J. N. S. M. C.*, p. 85; *S. C.* 7 *Cox's C. C.* 313; *Dears. and B.* 265.

In that case *Lord Campbell*, C. J., said:—"The statement made by the prisoner resolves itself into a mere representation of the quality of the articles 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 these spoons, though quality was not what it was represented to be. Now it seems to me that it never could be 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 to depreciate their quality, and to say that they were not equal to what they really were, and so to induce the seller to part with goods at a lower price. To make either act indictable would be an alarming extension of the criminal law." Acting on this decision, the following state of facts was held to constitute no false pretence: L and W induced the prosecutor to buy certain plated goods at an auction, at which S was acting as auctioneer, for £7, on the representation that they were the best silver plate, lined with gold, and worth £20. The foundation of the goods was Britannia metal, instead of nickel as in the best goods, covered with a transparent film of silver, and they were worth only about 30*s.*; *Reg.* v. *Levine*, 10 *Cox's C. C.* 374, in which case, at p. 376, the *Common Serjeant*, after consulting with the Recorder of London, said:—"It is most important not to bring within the criminal law the ordinary enhancing of value and quality by the seller of goods. There is always a conflict of knowledge and skill between a buyer and seller, the one wishing to buy, and the other to sell, as advantageously as he possibly can, and it would be very dangerous to extend the criminal law to such cases." On the other hand, where the prisoner falsely represented that a certain piece of jewellery was 15-carat gold, whereas he knew that it was only 6-carat gold, this was held to be a false representation of a fact, and not an opinion; *Reg.* v. *Ardley*, *L. R.* 1 *C. C.* 301; and where the prisoner represented a packet to contain good tea, whereas three-fourths of the contents were not tea at all, this also was held to be a false representation of an existing fact; *Reg.* v. *Foster*, 2 *Q. B. D.* 301. There is doubtless much refinement in the English decisions, and

it is difficult perhaps to see how the distinction between the two classes of cases arose, except from the desire not to bring the criminal law to press upon traders who were crying up the quality of their goods. It is not easy to suggest what the decisions of the Indian courts will be on this point which does not seem to have arisen yet in this country, though it may be remarked that it is as possible to deceive another in a matter of opinion as in a matter of fact. The difference between these cases of false representation of the quality of goods and that put in *Illustration* (*c*) seems to be that there the pretence is that a certain sample is portion of a large bulk of which it represents the quality, while here the pretence is merely that the articles to be sold are equal to a certain standard. The distinction is fine, but it is possible to suppose cases in which it might be necessary to maintain it. This was the opinion of those who originally drafted the Penal Code as will appear from p. 81 of the notes to the original draft.

Directors, &c., of a public company who publish false balance sheets with the intention of inducing persons to make or retain deposits in their Company are guilty of an offence under Sect. 418; *Emp.* v. *Moss, I. L. R.* 16 *All.* 88.

Wherever the prosecutor himself knows the falsehood of the pretence, but parts with his money or goods notwithstanding, the defendant cannot be convicted of cheating, because he deceives no one; *Reg.* v. *Mills*, 1 *Dears. and B.* 205. An accused person may, however, be guilty of an attempt to cheat, although the prosecutor knows the falsity of his representations, and never intends to act upon them, for the attempt is complete as soon as the false pretence is made by the accused; *Reg.* v. *Hensler*, 11 *Cox's C. C.* 570, followed in *Government of Bengal* v. *Umesh Chunder, I. L. R.* 16 *Cal.* 310. The fact of the prosecutor having the means of knowledge will not of itself excuse the defendant; for example, where the defendant falsely represented a £1 Irish bank-note to be a £5 note, and thereby obtained the full value of a £5 note, although the prosecutor could read, and the note on the face of it furnished the means of detecting the fraud, the defendant was held to be properly convicted; *Reg.* v. *Jessop*, 1 *Dears. and B.* 442.

Where the defendant, by false and fraudulent representations as to the value and profits of his business, induced the prosecutor to enter into partnership with him, and to advance £500 as part of the capital of the concern, and the prosecutor, after such advance, recognised and acted in the partnership, it was held that this was not obtaining money by false pretences, for the prosecutor, as partner, continued to be interested in the money. And whatever damage might come, would be through subsequent acts of the defendant at a time when the prosecutor had still a control over the application of the money; *Reg.* v. *Watson*, 1 *Dars. and B.* 348. It is no bar to a conviction, that the prosecutor intended to cheat the defendant if he could; *Reg.* v. *Hudson*, 1 *Bell, C. C.* 263.

The representation need not be made in words. The giving of a cheque signed by the accused upon a bank with which he has no account, is a false representation that he has an account there; and the giving of a cheque upon a bank with which he has an account is a representation that he has authority to draw for the amount mentioned therein; *Reg.* v. *Hazelton, L. R.* 2 *C. C.* 134. So, too, where a person at Oxford, who was not a member of the University, went into a shop wearing a commoner's cap and gown for the purpose of obtaining credit, this was held to be a false pretence; *R.* v. *Barnard*, 7 *C. and P.* 784. This under section 416 would amount to cheating by personation. A represented himself to be B, at a University Examination, got a hall ticket in B's name, and headed and signed papers in answers to questions in B's name; it was held that A had not only committed the offence of cheating by personation, but also that of forgery; *Emp.* v. *Appasami, I. L. R.* 12 *Mad.* 151. If A advertises a book as written by B (a non-existent person) and gets subscriptions from the public in the form of money orders payable to B, and receives the amount of such orders on a request purporting to be signed by B, A is guilty of cheating the Postmaster who pays him the money; *Emp.* v. *Pera Raju, I. L. R.* 18 *Mad.* 27.

Further, the false representation must have been made fraudulently or dishonestly. In ordinary cases the mere fact of the representation being false to the knowledge of the accused will be sufficient proof that it is made fraudulently, or dishonestly; but

if he acted under a mistake in making the false representation, the representation is not false to his knowledge, nor can it be said to have been made fraudulently or dishonestly, but if he is shewn to have been making similar false representations to different persons that would tend to shew that he was not acting under a mistake. Thus, where a man was charged with attempting to obtain a loan on a ring by falsely pretending that it was a diamond ring, evidence was admitted that a few days before he had obtained a loan on a chain which he falsely represented as a gold chain, and had attempted to obtain a loan from several persons on a ring which, in their opinion, he falsely represented to be a diamond ring; *Reg.* v. *Francis*, *L. R.* 2 *C. C.* 128. Cases have, however, arisen, and may still arise, in which further evidence than the mere facts of the falsity of the representation will be required in order to complete the proof of the offence. Thus, where A owed B a debt, of which he could not get payment, and C, B's servant, went to A's wife, and obtained from her two sacks of malt, saying that B had bought them of A, and C knew this to be false, but took the malt to B, his master, to enable him to pay himself the debt; it was held that C could not be convicted of obtaining the malt by false pretences; *R.* v. *Williams*, 7 *C and P.* 354.

The definition of cheating contained in Sect. 415 requires not only a statement false to the knowledge of the maker, made dishonestly, but also that the effect of such statement should be to induce the person deceived—

(1) to deliver property to some one; or

(2) to consent that some one should retain property; or

(3) to do or omit to do something which he would not have done or omitted to do if he had not been deceived, provided that the act or omission causes, or is likely to cause, damage or harm to that person in body, mind, reputation, or property.

Consequently, the offence of cheating, as defined in Sect. 415, actually includes the offences punishable under Sect. 420, and all the illustrations to Sect. 415 are of acts which are offences under Sect. 420; and wherever cheating is accompanied by delivery of property it should be dealt with under Sect. 420, and not under

Sect. 417; *Reg.* v. *Bawaji Kalidas, B. R. 25th September* 1875. To what cases then do Sects. 417 and 419 specially refer? It would seem only to those in which the person cheated consents to some one retaining property, and to those in which the act or omission causes, or is likely to cause, damage or harm to the person deceived in body, mind, or reputation, or in property, provided the harm is not of the nature of the acts enumerated in Sect. 420. The damage or harm must be the necessary consequence of the act done by reason of the deceit, or must be necessarily likely to follow therefrom. Therefore, where the accused falsely pretended that he was a certain man and appeared before the Marriage Registrar, and registered a fictitious deed of divorce between that man and his wife, the chance of the reputation of the Registrar being diminished, and his losing fees in consequence of his having registered a fictitious divorce, is not damage or harm so as to make the acts of the accused cheating; *Mojey* v. *Emp.*, *I. L. R.* 17 *Cal.* 606.

The expression used in Sect. 415, "damage or harm in body, mind, or reputation," is peculiar. It makes the offence of cheating a much wider one than *obtaining property* by false pretences. Much involved in it would be more serious than cheating, and would fall under other sections. If a person induces another to believe that a certain article was a harmless sweetmeat, and in that belief to eat it, whereas it contained arsenic, that would amount to cheating, but it would also amount to an offence under Sect. 328, *ante*, p. 416, if not to murder or attempt to murder. But if a man was induced to drink a liquid under the belief that it was good wine, whilst it was in reality a sour concoction little better than vinegar, and in consequence he had a pain in his stomach, would that be punishable under Sect. 417? A prostitute, who, while suffering from syphilis, induces a man to have connection with her on the representation that she is healthy, and communicates the disease to him, is guilty of cheating; *Emp.* v. *Rahma*, *I. L. R.* 11 *Bom.* 59. These are cases of damage or harm in body, but what is meant by damage or harm in mind? Damage to reputation might arise if a man of high caste was induced to marry a woman of a low caste, believing

she was of his own caste, irrespective of the question whether he paid money for her or not, though, in most cases, the person cheating would do it in order to obtain money or property from the person deceived, and thus the case would at once come within the provisions of Sect. 420; *Emp.* v. *Bhaiji Bechar*, *B. R. 16th August* 1886. To induce a high caste man to marry a low caste woman, by pretending that she was of higher caste, is cheating by personation within the meaning of Sect. 416; *Reg.* v. *Dalee Singh*, 7 *W. R. Cr.* 55. See, also, *Reg.* v. *Mohim Chunder*, 16 *W. R. Cr.* 42, where the accused, who had represented to the prosecutor that a girl was a Brahminee, and thereby induced him to part with his money on consideration of the marriage of the girl to his brother when the girl was really of the Sudra caste, was held to have committed the offence of cheating by personation. See, also, *Reg.* v. *Puddomonee*, 5 *W. R. Cr.* 98; *Reg.* v. *Dhunput Ojhah*, 7 *W. R. Cr.* 51; and the remarks of *Stuart*, C. J., in *Emp.* v. *Sri Lal*, *I. L. R.* 2. *All.* 697.

Travelling in a railway carriage of a higher class than paid for is not cheating under Sect. 417, but is indictable under the Railway Act XVIII of 1854; *Reg.* v. *Dayalhoy*, 1 *Bom. H. C. Rep.* 140. Nor is secretly entering an exhibition building without having purchased an admission ticket; *Reg.* v. *Mehervanji*, 6 *Bom. H. C. Rep. C. C.* 6. Falsely deposing in the name of another is not cheating by personation, but giving false evidence; *Reg.* v. *Prema Bhicka*, 1 *ib.* 89. A man named Yesu, gave the accused four annas with which to purchase for him (Yesu) a stamp. When the stampcollector asked the accused for his name, he said, "Yesu," instead of giving his own name. It was held that this was furnishing false information, and not cheating by personation; *Reg.* v. *Rayhoji*, 3 *Bom. H. C. Rep. C. C.* 42. Where a vendor was proceeding with three other persons to Dacca to register a deed of sale, and falling ill on the way, the three companions went to the registrar's office, and one of them, having personated the vendor, got registration of the deed, it was held that the prisoner was not guilty of cheating by false representation, as there was no intention of injuring or defrauding any one; but that the conviction should have been under Sects. 93 and 94 of Act XX of 1866; *Reg.*

v. *Luthi Bewa*, 2 *Ben. L. R. A. Cr. J.* 25, *and* 11 *W. R. Cr.* 24. A person who attempted to obtain admission to the police by making statements which he knows to be false, does not thereby commit the offence of attempting to cheat ; *Emp.* v. *Dwarka Prasad*, *I. L. R.* 6 *All.* 97 ; but see *Emp.* v. *Appasami*, *I. L. R.* 12 *Mad.* 151.

In a charge under Sect. 418, the cheating must be proved as under the previous section, and in addition, it must be shewn that the person cheating was bound by law, or by special contract, to take care of the interest of the party cheated. Such a person would be a clerk, servant, or agent employed generally in the prosecutor's business, or a broker or auctioneer employed on one or more occasions in transacting his business. It is also necessary to prove that wrongful loss, as defined by Sect. 23, *ante*, *p.* 30, has accrued or is likely to accrue to the prosecutor ; and if the wrongful loss arises through any of the acts set forth in Sect. 420, then the charge should be brought under that section.

A person whose duty it was to ascertain and report the current rates in the bazar, by arrangement with persons in the bazar, reported rates higher than those really current, in consequence of which higher rates would be paid to sellers than they were entitled to ; it was held that he had committed an offence under Sect. 420 ; *Emp.* v. *Parmeshar*, *I. L. R.* 8. *All.* 201. Where a charge is brought under Sect. 420, it should be stated in the charge that the property obtained was the property of the person cheated ; *Reg.* v. *Willans*, 1 *Mad. H. C. R.* 31 ; and evidence must be adduced to shew that some property has been actually delivered in consequence of the cheating, or some document capable of being a valuable security made, altered, or destroyed. It was, doubtlessly, intended that the whole of the acts, mentioned in this section should be regarded as offences graver in nature than any referred to in Sect. 415, but it is difficult to see in what way the expression, "induces the person deceived to deliver any property to any person," is larger, or constitutes a graver offence, than "induces the person so deceived to do or omit to do anything 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 . . . . . .

property," as the latter words would most certainly include a delivery of property. The other offences are of a more serious nature than those referred to in Sect. 415, inasmuch as they involve such an amount of art or persistence on the part of the deceiver, as to induce the deceived to do such a deliberate act as sign a document which thereby becomes the evidence of title to property of some description.

The Ceylon Penal Code in the last line of the definition of cheating in Sect. 415, after "property," inserts "or damage or loss to the Government of Ceylon."

FRAUDULENT DEEDS AND DISPOSITIONS OF PROPERTY.

Sect. 421. *Dishonest Removal of Property to prevent Distribution among Creditors.*—**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.**

Sect. 422. *Dishonestly preventing being made available for his Creditors a Debt, &c., due to the Offender.*—**Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being 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.**

Sect. 423. *Dishonest Execution of a Deed of Transfer containing a False Statement of Consideration.*—**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.

Sect. 424. *Dishonest Removal, &c., of Property.*—**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.**

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Charge under Sect. 421.

That you, the said A B, on or about the day of , at , dishonestly and fraudulently did transfer to a certain person, to wit, C D, without adequate consideration, certain property, to wit, ten bales of cotton, intending thereby to prevent the distribution of that property according to law among the creditors of you, the said A B; and that you have thereby committed an offence punishable under Sect. 421 of the Indian Penal Code, and within, &c.

Evidence.

Prove the removal, concealment, or transfer of property by the accused, and shew that it was on inadequate consideration. This, in itself, is no offence, as an individual is at liberty to part with his property at any price he pleases, provided he injures no one else but himself by such transfer; therefore, to constitute an offence, it will be necessary to shew that such transfer or removal was dishonest and fraudulent. This will have to be shewn from the mode of removal or transfer, and also from the fact that the

accused had taken the benefit of some law relating to insolvents, or was at the time actually in an insolvent state. "*Primâ facie* a trader who, on the eve of bankruptcy, hands over to a creditor assets which ought to be rateably distributed among all his creditors, must be taken to have acted in fraud of the law. But if circumstances exist which tend to explain and give a different character to the transaction, and to shew that the debtor acted from a different motive, the circumstances must be left to the jury"; *per Cockburn*, C. J., in *Bills* v. *Smith*, 34 *L. J. Q. B.* 68. In the case of concealment of property, the very act of concealment goes a great way to shew that it is dishonest and fraudulent, because a man does not, under ordinary circumstances, conceal property. The mere fact that a conveyance is in the name of a person not really interested in the property, will not of itself constitute an offence under Sect. 423, for there is nothing necessarily fraudulent in a *benamee* transaction; *Gopee Krist* v. *Gunga Persad*, 6 *Moore I. A.* 53; but the false statement must have been made with a dishonest intention. Under Sect. 424, one partner may be convicted of dishonestly removing partnership books in fraud of his co-partner; *Reg.* v. *Gour Benode*, 13 *B. L. R.* 308, *note*; and 21 W. *R. Cr.* 10. Care must, however, be taken that purely civil rights are not made the basis of a criminal prosecution; *Reg.* v. *Brojo Kishore*, 8 *W. R. Cr.* 17.

The law relating to Insolvent Debtors in India (11 Vict. c. 21, ss. 50, 70) contains provisions for the punishment of an insolvent who fraudulently makes away with, or conceals his property with, the intention of diminishing the fund to be divided amongst his creditors, or of giving undue preference to any of his creditors, and also punishes the fraudulent destruction or falsification of books and papers. This statute, which applies only within the jurisdiction of the High Courts, is not affected by the Penal Code. Act XIV of 1882 also contains provisions by which a judgment-debtor may obtain his discharge on surrendering the whole of his property for the benefit of his creditors, and punishes fraudulent concealment or transfer of property. The fraudulent falsifying of books, &c., may also come within the sections relating to the fabricating of false evidence, *ante*, p. 227, and the withholding

and destroying of books may be reached by the provisions of Sects. 175 and 204, *ante*, pp. 196 and 260, respectively. Some of the offences created by these sections may also be reached by Sects. 206-210, *ante*, pp. 262-264. The distinction between the two classes of sections is, that in Sects. 206-210 the acts prohibited are regarded as frauds upon the courts of justice, while in these they are punished as frauds upon the defendant's creditors.

With respect to what is a fraudulent conveyance, the following resolutions of the judges are given as the signs of fraud in *Twyne's Case*, 1 *Smith's L. C.*, p. 2 :—

1. That this gift had the signs and marks of fraud, because the gift is general, without any exception of his apparel, or of anything of necessity; for it is commonly said, *quod dolosus versatur in generalibus.*

2. The donor continued in possession, and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

3. It was made in secret, *et dona clandestina sunt semper suspiciosa.*

4. It was made pending the writ.

5. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and trust is the cover of fraud.

6. The deed contains, that the gift was made honestly, truly, and *bona fide*; *et clausulæ inconsuet, semper inducunt suspicionem.*

For cases in which certain transfers and conveyances have been held to be fraudulent, the reader is referred to the notes on *Twyne's Case*, in the first volume of *Smith's Leading Cases* (10*th Ed.*), p. 10.

Offences involving Injury and Trespass to Property.

Mischief.

Sect. 425. *Mischief.* **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 pro-**

perty or in the situation thereof as destroys or diminishes its value or utility or affects it injuriously, commits 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 any 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 away 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.

Sect. 426. *Punishment for Mischief.*—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.

Sect. 427. *Mischief causing Damage to the Amount of Fifty Rupees.*—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.

Sect. 428. *Mischief by killing, &c., any Animal of the Value of Ten Rupees.*—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.

Sect. 429. *Mischief by killing, &c., certain Cattle or any Animal of the Value of Fifty Rupees.*—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 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.

Sect. 430. *Mischief by Injury to Works of Irrigation, &c.*—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.

Sect. 431. *Mischief by Injury to Public Road, &c.*—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.

Sect. 432. *Mischief by causing Inundation, &c.*—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, attend 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.

Sect. 433. *Mischief by destroying, &c., a Lighthouse, &c.*—Whoever commits mischief by destroying or moving any lighthouse, 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 lighthouse, 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.

Sect. 434. *Mischief by destroying, &c., a Land-mark fixed by Public Authority.*—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 landmark 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.

Sect. 435. *Mischief by Fire, &c., with intent to cause Damage to the Amount of One Hundred Rupees.*—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, or (where the property is agricultural produce) ten 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.

Sect. 436. *Mischief by Fire, &c., with Intent to destroy a House, &c.*—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 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.

Sect. 437. *Mischief with Intent to destroy, &c., a Decked Vessel, &c.*—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, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Sect. 438. *Punishment for the Mischief described in the last Section when committed by Fire, &c.*—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.

Sect. 439. *Punishment for intentionally running Vessel aground with intent to commit Theft.*—**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.**

Sect. 440. *Mischief committed after Preparation made for causing death or Hurt.*—**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.**

Note.

Section 75 provides for increased punishment for a second offence, except under Sects. 426, 427, 428, and 434.

Offences under Sect. 426 are triable by any Magistrate; those under Sects. 427, 428 and 434, by a Presidency Magistrate, or a Magistrate of the first or second class; those under Sects. 429-432 by the Court of Session, a Presidency Magistrate or a Magistrate of the first or second class; those under Sects. 433 and 435-440, by the Court of Session. A summons should issue under Sect. 426, and a warrant in all other cases. Police officers may not arrest without a warrant under Sects. 426-427 and 434; but they may under the other sections. Defendants are bailable under Sects. 426-435, but not under Sects. 436-440. Offences under Sects. 426 and 427 are compoundable when the only loss or damage occasioned is loss or damage to a private person. Offences under the other sections are not compoundable.

Charge.

That you, A B, on or about the day of , at , did commit mischief (by fire, intending thereby to cause or knowing it to be likely that you would cause the destruction of a building ordinarily used as a human dwelling, to wit, the house of one C D); and that you have thereby committed an offence punishable under Sect. 426 (436) of the Indian Penal Code, and within, &c.

Evidence.

The defendant must be proved to have destroyed some property, or caused such a change in the property or in its situation as destroys or diminishes its value or utility, or affects it injuriously. What is affected by the act of the accused must be the property of some person; a bull set at liberty on the performance of a *sradha* is not property within the meaning of Sect. 425; *Romesh* v. *Hiru*, *I. L. R.* 17 *Cal.* 852. The damage need not be of a destructive character to bring a case under Sect. 425; thus, where the complainant had for the purpose of removal placed certain goods upon a cart and accused came and unyoked the bullocks and turned the goods off the cart, on to the road, it was held that this amounted to mischief as defined by Sect. 425; *Juggeshwar Dass* v. *Koylash Chunder*, *I. L. R.* 12 *Cal.* 55. But, according to a ruling in Madras, it is not sufficient to shew that the destruction or change caused, was a *probable* result of the act proved; such destruction or change must be shown to have been the direct result of the act of the defendant; 7 *Mad. H. C. Rep. App.* 39. A false report circulated about a public company, &c., by which the shares become of less value, does not cause "a change in property or in the situation thereof which diminishes its value or affects it injuriously"; the property itself remains in exactly the same state and in the same situation; its value only is changed. The change referred to in these sections must be a physical change in internal composition or external form; such, for instance, as mixing vinegar with wine, or painting a marble statue some absurd colour; or a change in position. The taking of fish out of a flowing river in which the prosecutor has a right of fishing does not diminish the value of the fishery, even supposing that a fishery is

property within the meaning of Sect. 425; *Bhagiram* v. *Abar*, *I. L. R.* 15 *Cal.* p. 400.

The intent of the defendant in doing the act must also be shewn. If the act be done wilfully, and it be one that destroys property, or so changes it or its situation as to destroy or diminish its value or utility, or to affect it injuriously, the mere doing of it will ordinarily be a sufficient ground from which to infer the intent; but mere negligence will not support a charge of mischief; *Emp.* v. *Bai Baya*, *I. L. R.* 7 *Bom.* 125; and if a person deals injuriously with property in the *bonâ fide* belief that it is his own, he cannot be convicted of committing mischief; *Emp.* v. *Budh Singh*, *I. L. R.* 2 *All.* 101; but the mere assertion of the right is not a sufficient answer to the charge; *Ramakrishna* v. *Palaniyandi*, *I. L. R.* 1 *Mad.* 262; *Emp.* v. *Juggonath Bhikaji*, *B. R.* 30*th October* 1885. If the wilfulness or wantonness be not apparent on the face of the act, it must be shewn that it was done with the intention of causing loss or damage; *In re Araz Sircar*, 10 *W. R. Cr.* 29. Thus, to shew the intent with which the act was done, upon an indictment for administering sulphuric acid to a horse, evidence may be given of other acts of administering: *R.* v. *Mogg*, 4 *C. and P.* 364.

Where a person levelled, filled up, and cultivated a water-course over his own lands, which conveyed water to the land of the prosecutor, it was held that this act was mischief within the meaning of Sect. 425, if the defendant knew that the prosecutor was entitled to the water, and that by this act his right would be obstructed; 2 *R. C. C. Cr.* 47. But where the right to a fishery was in dispute between the Zemindar of Bally and the Zemindar of Moharajpore, and the former had obtained a decree in the civil court declaring the fishery to be his, in proceedings to which the latter was not a party, and the servants of the Zemindar of Bally thereupon removed a bamboo bar which the Moharajpore people had erected to prevent the passage of fish, and for this they were convicted of mischief and punished by fine; it was held, on reference to the High Court, that the conviction could not stand, as the Moharajpore Zemindar had not shewn that he was legally entitled to the fishery in dispute, and it did not appear that the defendants were acting otherwise than under a *bonâ fide* belief

that the Moharajpore people were encroaching on their master's rights, and, in so removing a bar which interfered with those rights, it could not be said that they acted with intent to cause, or knowing it to be likely that they would cause, wrongful loss to the opposing party; *Bakar Halsana* v. *Dinobandhu*, 3 *Ben. L. R. A. Cr. J.* 17, and 12 *W. R. Crim.* 1, *sub nom. Reg.* v. *Denoo Bundhoo.* This decision was principally based upon the passage in *Blackstone's 'Commentaries,' book* 3, *chap.* I, p. 5, where it is said:—"Whatsoever unlawfully annoys or doth damage to another is a nuisance, and such nuisance may be abated, that is, taken away by the party aggrieved thereby, so that he commits no riot (or breach of the peace) in doing it. If a new gate be erected across a public highway, which is a common nuisance, any of the king's subjects, passing that way may cut it down and destroy it." The pulling down of a building which a civil court has declared ought not to have been erected is not mischief, as there has been no causing of wrongful loss; *Emp.* v. *Rajcomar Singh*, *I. L. R.* 3 *Cal.* 573. So the owner of an animal which dies is not guilty of mischief if he buries it, although he does so with the express object of preventing the Mahars of the Village from taking its skin according to the customs of the country; *Emp.* v. *Govinda Punja*, *I. L. R.* 8 *Bom.* 295. But the destruction of a document, evidencing an agreement void for immorality, and therefore not a valuable security, but which is valuable for collateral purposes, may constitute the offence of mischief; *Reg.* v. *Vyapuri*, *I. L. R.* 5 *Mad.* 401.

Many acts of pure fun, coming strictly within the definition of mischief, will be excused by Sect. 95, *ante*, p. 103. Cases of mere carelessness do not come within Sect. 425; *In re Araz Sircar*, *ubi sup.*; *Reg.* v. *Iangu*, *B. R.* 11*th January* 1872, except in the case of owners of pigs, which are specially provided for by Act I of 1871, Sect. 26. Mere neglect on the part of an owner of cattle to keep them from straying into fields is not causing cattle to enter into a compound within the meaning of Sect. 425; the section requires that, before the owner is convicted, it must be proved that he *acutally caused* the cattle to enter, knowing that by so doing he was likely to cause damage; *Forbes* v. *Grish Chunder*, 6 *Ben. L. R. App.* 3 and 14 *W. R. Cr.* 31; see, also, 6 *Mad. H. C.*

Rep. App. 36; *Emp.* v. *Bai Baya*, *I. L. R.* 7 *Bom.* 126; *Emp.* v. *Shaik Raju*, *I. L. R.* 9 *Bom.* 173. So, too, where the accused were floating timber through a bridge, and some of the logs had struck against the arch of the bridge, committing injury, and the accused had been convicted of causing mischief, the High Court quashed the conviction; 5 *Mad. H. C. Rep. App.* 40. But if a man driving bullocks along a road allows them to destroy trees without taking any care to restrain them, he may be held to have caused mischief; *Emp.* v. *Vithu*, *B. R.* 20*th January* 1887.

Explanation 2, *Sect.* 425. It is not necessary that the legal title to the property should have actually passed out of the defendant to the prosecutor. If it be in the process of passing, and the act done by the defendant will cause the property to be of less value when it comes into the hands of the prosecutor, that act will amount to mischief. Thus, where land belonging to A was sold to B for arrears of Government revenue, and the sale would not become final and conclusive for sixty days, and in the meantime A cut down certain fruit trees which were growing on the land, and thereby diminished its value, it was held that this amounted to mischief; *Dharma Das* v. *Nusseruddin*, *I. L. R.* 12 *Cal.* 660.

Animals.—A calf does not come within the term "bull, cow, or ox," and therefore, if not worth fifty Rupees, its destruction must be dealt with under Sect. 426 or Sect 428, according to its value; *Reg.* v. *Cholay*, *per Scotland*, C. J., *4th Madras Sess.* 1864; dissented from, and the contrary ruled in *Hari Mandle* v. *Jafar*, *I. L. R.* 22 *Cal* 457; "any other animal" refers to an animal of different genus altogether, such as a dog or a goat; *ib.* Under Sect. 428 it is not necessary that the damage to each animal should amount to ten Rupees, it is sufficient that the total damage to any number of animals should equal that amount, while under Sect. 429 the damage to each animal, other than those specially enumerated, must amount to fifty Rupees at least.

To constitute a *maiming*, *a permanent* injury must be proved; *Reg.* v. *Jeans*, 1 *C. and K.* 539. Looking to this decision, it would seem that a mere administering of poison would not amount to poisoning, but that there must be some serious results, some constitutional disturbance in consequence of the administering. So,

too, in respect, of rendering useless, it would seem that also must be permanent. To support a conviction for wounding, it is not necessary to shew that any instrument or weapon was used, it is sufficient if there be a wound inflicted by the hand; *Rex* v. *Bullock*, *L. R.* 1 *C. C.* 115, and 37 *L. J. N. S. M. C.* 47. The definition of a wound, in criminal cases, is an injury to the person by which the skin is broken; *Moriarty* v. *Brooks*, 6 *C. and P.* 684; *Rex* v. *Beckett*, 1 *M. and Rob.* 526. It is necessary that there should be a separation of the whole skin; and a separation of the cuticle or upper skin only is not sufficient; *Reg.* v. *M'Loughlin*, 8 *C. and P.* 635.

Where the prisoner set fire to a cow-house, in which was a cow, *Taunton*, J., held the prisoner could be convicted upon an indictment charging him with killing the cow; *R.* v. *Haughton*, 5 *C. and P.* 55.

Section 430. To bring a case under this section, the act of the accused need not be a mere wanton act of waste; the physical requisites are the doing of an act which causes, or to the doer's knowledge is likely to cause, a diminution of supply; the mental requisites are also fulfilled when he does it with intent to cause wrongful loss, and that intention is properly inferred when he does it without any sort of right; *Ramakrishna* v. *Palaniyadi*, *I. L. R.* 1 *Mad.* 262. It must, however, be shewn, not merely that the *general* utility of a water-course is lessened, but also that the supply of water has been, or is likely to be, diminished by the act of the accused; *Emp.* v. *Kallya bin Kallapa*, *B. R.* 30*th October* 1885. If the former only be proved, the act comes under Sect. 426 and not under Sect. 430; *ib.*

Section 434. A District Municipality having acquired, under Act X of 1870, a certain piece of land belonging to the father of the accused, subsequently came to the conclusion that the road, for the widening of which the land was acquired, was wide enough, and accordingly resolved to sell it. They then barricaded it with posts and rafters, thereby practically barring all reasonable access to the premises of the accused from the public road, and the accused removed the barricade. It was held that, as no mischievous intent, as described in Sect. 425, was found by the Magistrate and

could none be inferred from the evidence and as the accused appeared to have thought he was simply abating a nuisance, he could not be convicted under this section; *Emp.* v. *Abdul Aziz*, *B. R.* 21*st February* 1895.

If the mischief be done by fire, or any explosive substance, and injury be done to any person, or if human life be destroyed thereby, the offence will be punishable under the sections relating to injuries to the person. In a case of mischief by fire, with intent to cause the destruction of a dwelling-house, the charge should lay the intent as an intent to cause the destruction, not of a house simply, but of a house used as a human dwelling; *Reg.* v. *Durburro Polie*, 8 *W. R. Cr.* 30.

It is not illegal to convict prisoners first of mischief for cutting down Government trees without leave, and then of theft for subsequently stealing the trees so cut down; *Reg.* v. *Narayan Krishna* 2 *Bom. H. C. Rep.* 392; *Emp.* v. *Krishna*, *B. R.* 10*th January* 1889. The High Court at Calcutta has, however, ruled that a prisoner cannot be convicted first of mischief for killing a buffalo, and then of theft on taking away the dead carcass; *Reg.* v. *Sahrae*, 8 *W. R. Cr.* 31. This case was decided under the old criminal Procedure Code. But the decision would virtually hold now if it were found as fact that the theft of the buffalo was the substantive criminal act, the intention of committing which led to the previous act of killing the buffalo. In such case the prisoners could now be tried and convicted of *both* offences, but punished for only the greater. See Sect. 235, Criminal Procedure Code, 1882.

CRIMINAL TRESPASS.

Sect. 441. *Criminal Trespass.*—**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 person or with intent to commit an offence, is said to commit "criminal trespass."**

Sect. 442. *House-Trespass.*—**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."**

Explanation.—**The introduction of any part of the criminal trespasser's body is an entering sufficient to constitute house-trespass.**

Sect. 443. *Lurking House-Trespass.*—**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."**

Sect. 444. *Lurking House-Trespass by Night.*—**Whoever commits lurking house-trespass after sunset and before sunrise, is said to commit "lurking house-trespass by night."**

Sect. 445. *House-breaking.*—**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 any part of it, in any of such six ways, that is to say:**

Firstly, **If he enters or quits through a passage made by himself, or by any abettor 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 abettor 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 abettor 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.

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 doorway. A forces a passage by knocking Z down, and commits house-trespass by entering the house. This is house breaking.**

(*h*) **Z, the doorkeeper of Y, is standing in Y's doorway. A commits house-trespass by entering the house, having deterred Z from opposing him by threatening to beat him. This is house-breaking.**

Sect. 446. *House-breaking by Night.*—**Whoever commits house-breaking after sunset and before sunrise, is said to commit "house-breaking by night."**

Evidence.

All the other offences are modifications of criminal trespass.

Criminal Trespass.—In order to constitute the offence of criminal trespass, there must be an entry into, or upon, or a remaining upon property in the possession of another: the Ceylon Penal Code adds "or occupation" of another. The word property must necessarily mean corporeal property, as land and houses, or vessels. The property, too, must be in the possession of some one, and that possession must be actual, not constructive, as the act intended to be done, which makes the trespass, criminal, must be done to the person in possession and on the property. There is no definition of the word possession. The owner of property, or his wife, clerk, servant, or agent, being on or in the property, is in possession of it, but to make an entry criminal trespass, it must be with the intention of intimidating, &c., the person in *actual*, not constructive, possession; *In re Seetul Das*, 17 *W. R. Cr.* 47; *s. c. sub nom. Iswar Chundra* v. *Situl Das*, 8 *Ben. L. R. App.* 62. Is, however, a trespasser or a mere licencee upon or in property so in possession of it as to cause the offence of criminal trespass to arise, as against another party? The omission of the definition

of the word "possession" leaves this an open question. A trespasser cannot, by the very act of trespass, immediately, and without acquiescence on the part of the owner, become possessed of the land or house upon which he has trespassed, and which he tortiously holds. But if he is allowed to continue on the land, or in the house, and the owner of the same sleeps upon his rights, and makes no effort to remove him, he will gain a possession, wrongful though it be, and cannot be forcibly ejected. The rightful owner cannot, in any case, when he has a right of entry, be made responsible in damages for a trespass upon his own land, for he is not a trespasser if he has a right to go upon it. But if he assaults and expels persons who, having originally come into possession lawfully, continue to hold unlawfully after their title to occupy has been determined, he may be made responsible for the assault, and indicted for the forcible entry; *Brown* v. *Dawson*, 12 *A. and E.*, p. 629, referred to in *Sreehury Roy* v. *Hills*, 6 *W. R. Civ. Ref.* 21. A public river is not in the exclusive possession of any one, and a right of fishing therein is not property of such a nature as that a man, who unlawfully infringes that right, can be said to enter into property in the possession of another; *Emp.* v. *Charu Nayiah*, *I. L. R.* 2 *Cal.* 354; *Bhagiram* v. *Ahar*, *I. L. R.* 15 *Cal.* p. 401. A person who plies a ferry-boat at a distance of three miles from a public ferry cannot be said to enter into or upon that ferry; *Muthra* v. *Jawahir*, *I. L. R.* 1 *All.* 527; unless, of course, Ben. Act I of 1866 is in force in the place where the act is committed. If one person enters forcibly upon property in the possession of another, and there does an act with intent to intimidate, insult, or annoy the person in possession, he is guilty of criminal trespass, without reference to the question as to whom the *title* to the land may ultimately be found to be in; *Reg.* v. *Ram Dyal*, 7 *W. R. Cr.* 28; and a magistrate ought not to decline to go into a charge of criminal trespass, merely because the complainant does not make out his *title* to the land, he being in actual possession; *Reg.* v. *Surwan Singh*, 11 *W. R. Cr.* 11. The entrance of a member of a joint Hindu family into the family dwelling-place cannot be criminal trespass, nor is the entry of a

stranger with the permission and licence of one of the members; *In re Prankrishna Chandra*, 6 *Ben. L. R. App.* 80, and 15 *W. R. Cr.* 6. A person going into cavalry lines with a sowar of the regiment, but without the permission of the commanding officer, is not guilty of house-trespass; *Emp.* v. *Kushi*, *B. R. 5th May* 1887. The High Court at Calcutta has ruled that the property must be in the possession of a *complainant* who could compound the offence under Sect. 345, *Cr. P. C.*; *Chandi* v. *Evans*, *I. L. R.* 22 *Calc.* 123. The High Court at Bombay has, however, ruled that the complaint may, as in the case of other criminal acts, be made by a person other than the one in actual possession; thus a man who sees an act of criminal trespass on the field of one of his tenants may lay a complaint against the trespasser; *Emp.* v. *Keshavlal*, *B. R. 20th January* 1896.

To constitute the offence of criminal trespass the entry into or remaining upon the property must be with the intent of doing some act punishable under the Penal Code, or under any special or local law when the act is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine, Sect. 40, *ante*, p. 38, and this act (or offence) need not be done to or in respect of the person in possession, but to or in respect of any person; or else the entry must be for the purpose, or with the intention, of intimidating, insulting, or annoying the person in possession; *In re Shib Nath*, 24 *W. R. Cr.* 58; *Shumbhu Nath* v. *Ram Komal*, 13 *C. L. R.* 212. The intention with which the accused went on the property must be proved directly or by necessary inference from the evidence given; *Balmakund* v. *Ghansamram*, *I. L. R.* 22 *Calc.* 391; *Premanundo* v. *Brindaban*, *ib*, 994. Mere knowledge that such entering or remaining would be likely to cause annoyance to the person in possession is not sufficient; *In re Panjab Singh*, *I. L. R.* 6 *Cal.* 579. So in *Emp.* v. *Rayapadachi*, *I. L. R.*, 19 Mad. 240; there the accused entered the house with the intention of having sexual intercourse with the complainant's unmarried sister, and the court held that under the wording of section 441 he could not be convicted of criminal trespass as, though he might have known that, if discovered, his act would be likely to cause annoyance to the com-

plainant, he could not be said to have intended either actually or constructively to cause such annoyance. The meaning of intimidation and insult is not difficult to understand; but in what consists annoyance? The mere presence of a particular person may be annoying, but, unless, he is present with the intent to annoy, he has not committed criminal trespass. A creditor calling on his debtor may constitute an annoyance, and the creditor, knowing it, may call simply for the purpose of annoyance, and not really to get payment of the debt; would the creditor be a criminal trespasser? It would be difficult to convict him, as he would always have a lawful excuse for entering; but if, after having demanded his debt, and received his answer, he remained to annoy, he would undoubtedly be a criminal trespasser. Where a person goes into property for a perfectly legitimate purpose, even though he may have no right to go into that property, this does not amount to criminal trespass: *Chandi* v. *Evans*, *I. L. R.* 22 *Calc.* 123. An intention to obtain improper gain, *e. g.*, by obtaining land unlawfully, is not necessarily an intention to annoy, which must be made out by some independent evidence; *Emp.* v. *Gunput*, *B. R.* 25*th June* 1888. This section, especially in this particular, must be read in the light of Sect. 95. Where the defendant had ploughed up part of a burial-ground, and had been by the magistrate convicted of criminal trespass, the Madras High Court held that "the person (a corporate body) in possession of the burial-ground is the portion of the public entitled to use it, and the High Court are of opinion that there is evidence of an intent to annoy such person; for the intent of the defendant must be inferred from the nature of his acts; and it is scarcely possible to conceive an act more calculated to cause annoyance, especially to a superstitious people attaching sanctity to the relics of mortality, than the act of ploughing up a burial-ground"; 6 *Mad. H. C. Rep. App.* p. 26. But where the defendant had been convicted of criminal trespass in cultivating a portion of the public footpath, it was held that "the public generally are entitled to the use of the footpath, and it is impossible to say that there has been an illegal entry into property in the possession of another, with intent to annoy the person in possession. The defendant might,

however, have been convicted of a nuisance; 6 *Mad. H. C. R.* p. 27. Where a stranger, uninvited, and without any right to be there, effects an entry in the middle of the night into the sleeping apartment of two women, members of a respectable household, and when an attempt is made to capture him, uses great violence in the effort to make good his escape, the court ought to presume that the entry was effected with one of the intents set out in Sect. 441; *Koilash Chunder* v. *Emp. I. L. R.* 16. *Cal.* 657; *Balmakand* v. *Ghansamram, I. L. R.* 22 *Calc.* 391.

If a person enters on land in the possession of another in the exercise of a *bonâ fide* claim of right, and without any intention to intimidate, insult, or annoy such person, or to commit an offence, then, although he may have no right to the land, he cannot be convicted of criminal trespass; *Emp.* v. *Budh Singh, I. L. R.* 2 *All.* 101; *In re Gobind Prasad, ib.* 465; 6 *Mad. H. C. Rep. App.* 19; *Reg.* v. *Ram Dyal*, 7 *W. R. Cr.* 28; *Reg.* v. *Kalinauth*, 9 *ib.* 1; *Reg.* v. *Chooramoni*, 14 *ib.* 25; *Reg.* v. *Seith Roshun*, 2 *N. W.* 82; *Shumbhu Nath* v. *Ram Komul*, 13 *C. L. R.* 212. Where A and B were accused by C of criminal trespass under this section for fishing in a lake belonging to C, over which, however, A and B asserted a prescriptive right of fishery, C, too, having failed to establish between himself and A and B the relationship of landlord and tenant in a suit against A and B for rent, it was held that A and B were not by their conduct brought within the purview of this section, and that C's remedy was by civil suit; *Sristeedhur Paroee* v. *Indrobhoosun Chuckerbutty*, 18 *W. R. Cr.* 25, and *sub nom. In re Shistidur Parui*, 9 *B. L. R. App.* 19. See *Reg.* v. *Kalinauth*, 9 *W. R. Cr.* 1. Where the accused persons, execution-creditors, accompanied by an authorized bailiff, broke open the complainant's door before sunrise, with the intention of seizing his property, it was held that they had not been guilty of criminal trespass, much less of lurking house-trespass by night, or house-breaking by night; *In re Jotharam I. L. R.* 2 *Mad.* 30. During the pendency of a civil suit, certain persons, on behalf of the plaintiff, went on to premises belonging to the defendant, in his absence, and without his permission for the purpose of making a survey and getting materials for a hostile application

against him. Some of them were armed, and when the defendant's servants objected to their action, they persisted in their trespass, and endeavoured to prevent opposition by making false statements as to the authority under which they were acting: held that their action amounted to criminal trespass; *Golap Pandey* v. *Baldam*, *I. L. R.* 16 *Cal.* 715.

Where the accused secretly entered an exhibition building without having purchased a ticket, and was there apprehended, it was held that such entry, unaccompanied by any of the intents specified in Sect. 441, did not amount to the offence of criminal trespass, or in fact to any offence; *Reg.* v. *Maherwanji Bejanji*, 6 *Bom. H. C. Rep. C. C.* 6. Entry into a local fund market, merely with intent to avoid payment of the market dues, is not criminal trespass; *Reg.* v. *Varthappa*, *I. L. R.* 5 *Mad.* 382. A, who had been warned off the land of B, subsequently, having shot a deer near the boundary of B's land, and the deer having run on to B's land, followed it for the purpose of killing it, and it was held that he had not committed the offence of criminal trespass; *Chunder Narain* v. *Farquharson*, *I. L. R.* 4 *Cal.* 837.

House-trespass.—If the entry be into a building, tent, or vessel used as a human dwelling, or into a building used for worship, or for the safe custody of property, the offence becomes that of *house-trespass*. The entry may, however, be of a different kind from that which constitutes criminal trespass. It would seem that the entry in criminal trespass must be with the whole body, but in house-trespass an entry of any part of the body will be sufficient. The following cases, decided in England, on what constitutes an entry in burglary, will illustrate entry in the case of house-trespass. After breaking the door or window, &c., to step over the threshold, to put in a hand or a finger; *R.* v. *Davis*, *R. and R.* 499, is an entry. So if the defendant introduce his hand through a pane of glass, broken by him, between the outer window and the inner shutter, for the purpose of undoing the window-latch, it is a sufficient entry; *R.* v. *Bailey*, *R. and R.* 341. But if the instrument with which the house is being broken happen to enter the house, but without any intention on the part of the burglar to effect thereby his felonious intent (as, for instance, to draw out the goods) with it,

this will not be a sufficient entry to constitute a burglary; *R.* v. *Hughes*, 1 *Leach*, 406. Entering a house with a forged warrant of arrest, and by virtue thereof taking away one of the inmates, amounts to house-trespass; *Reg.* v. *Nund Mohun*, 12 *W. R. Cr.* 33. Where a person entered into a *havalat* with the intention of conveying food to a prisoner under trial detained there, it was held that such act did not amount to house-trespass; *Emp.* v. *Lalai*, *I. L. R.* 2 *All.* 301. Where the premises in question had been occupied as chambers, but at the time of the offence, and for some time previously, were unoccupied, it was held that they were properly described as a "human dwelling"; *Reg.* v. *Abboyee*, *per Scotland*, C. J., *4th Madras Session*, 1882.

Lurking House-trespass.—The concealment necessary to constitute *lurking house-trespass* would be a concealment in a pantry, under a bed, behind a box, or such like.

House-breaking.—The provisions of Sect. 445 do away with the necessity of quoting the cases deciding what is a *breaking*, as they confirm in some instances, and alter in others, the English law, and point out what kinds of entry constitute *house-breaking*. The illustrations sufficiently point out the meaning of the section. If the prisoner be caught inside a house at night, and the evidence shews that he could only have effected an entrance by scaling a wall, it is house-breaking; 4 *R. J. and P.* 566. In this section the word "offence" denotes a thing punishable under the Penal Code, or under any special or local law; Sect. 40, *ante*, p. 38.

The offences of lurking house-trespass and house-breaking are both rendered more serious, by the fact that they are committed between sunset and sunrise.

In cases under these sections, it is always advisable to state, under a *videlicet*, the intention with which the trespass is committed, but where the trespass is criminal and punishable if committed with one of a number of intentions, the charge will not be bad after conviction if the intent be not stated therein. Where, however, a particular punishment is provided for a trespass committed with a particular intent, *e. g.*, as in Sects. 449 to 452 or 457, then the particular intent must be stated; *Reg.* v.

Meher Dowalia, 16 W. R. Cr. 63; *Balmakund* v. *Ghanamram*, I. L. R. 22 *Calc.* 391.

CRIMINAL TRESPASS.

Sect. 447. *Punishment for Criminal Trespass.*—**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.**

Triable by any Magistrate. A summons should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

Prove the trespass, and the intent with which it was committed. If it were with the intention of committing an offence, it will, in many cases, amount to an attempt to commit that offence, and, if punishable more severely as such attempt, should be so laid in the charge; and in this case, the intent will not be difficult to prove. The difficulty will arise where the intent to be proved is to intimidate, insult, or annoy, and there it must be gathered from the surrounding circumstances. If the defendant do actually intimidate, insult, or annoy, he will be punishable under the 503rd and following sections. Where the accused were convicted of criminal trespass in driving their carts across an open green in violation of an order issued by the municipal commissioners, and there was nothing in the case to show that the municipal commissioners had authority to issue an order prohibiting wheeled vehicles from driving on the green, and as their general powers as public conservators did not give them authority to issue any order, the breach of which would be criminally punishable, the High Court quashed the conviction; 5 *Mad. H. C. Rep. App.* 38.

Though criminal trespass is not one of the offences detailed in Sect. 489 of the Criminal Procedure Code, yet to a conviction under this section may be added an order that those convicted shall give recognisances to keep the peace if their conduct clearly point to an intention to commit a breach; *Reg.* v. *Jhapoo*, 20 *W. R. Cr.* 37.

An unauthorised distress for rent is punishable under this

section; Act X of 1859, Sect. 143; Ben. Act VIII of 1869, Sect. 99.

Plying a private ferry within a certain distance of a public ferry is also punishable under this section; Ben. Act I of 1866, Sect. 5.

HOUSE-TRESPASS.

Sect. 448. *Punishment for House-trespass.*—**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.**

Triable by any Magistrate. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Compoundable.

Charge.

That you (the said C D) on or about the day of , at , did commit house-trespass (to wit, by entering the dwelling-house of C D, with intent to insult the said C D); and that you have thereby committed an offence punishable under Sect. 448 of the Indian Penal Code, and within, &c.

Evidence.

All that is necessary on this point will be found *ante*, pp. 552-557.

HOUSE-TRESPASS WITH INTENT, &c.

Sect. 449. *House-trespass to commit a Capital Offence.*—**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.**

Sect. 450. *House-trespass to commit Offence punishable with Transportation for Life.*—**Whoever commits house-trespas 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.**

Sect. 451. *House-trespass to commit Offence punishable with Imprisonment.*—**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.

Sect. 452. *House-trespass after Preparation.*- **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 of putting any person in fear of hurt, or of assault, or of wrongful confinement, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.**

Note.

Section 75 provides for increased punishment for a second offence, except under the first portion of Sect. 451.

Offences under Sect. 451 are triable by any Magistrate, unless the offence intended to be committed is theft, then by the Court of Session, a Presidency Magistrate or a Magistrate of the first or second class; those under Sect. 452, by the Court of Session, a Presidency Magistrate, or a Magistrate of the first or second class; those under Sects. 449 and 450, by the Court of Session. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable under Sect. 451 if the intended offence be not theft, but not otherwise, but not under the other sections. Not compoundable.

Charge.

That you (the said A B) on or about the day of at , did commit house-trespass (to wit, &c.), in order to the commission of an offence punishable with death, to wit, murder (*or* having made preparation to assault a certain person, to wit, C D), and that you have thereby committed an offence punishable under Sect. 449 (452) of the Indian Penal Code, and within, &c.

Charge.

That you, on or about the day of , at , did commit lurking house-trespass (*or* house-breaking) (to wit, by, &c.) in order to the committing of an offence punishable with imprisonment, to wit, adultery *or* theft (*or* having made preparation for causing hurt to some person): and that you have thereby committed an offence punishable under Sect. 454 (455) of the Indian Penal Code, and within, &c.

Evidence.

Prove the house-breaking, &c., as *ante*, p. 558. The intent with which it is committed must be shewn by the contemporaneous acts of the defendant.

HOUSE-BREAKING, &c., BY NIGHT.

Sect. 456. *Punishment for Lurking House-trespass, &c., by Night.*—**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.**

Note.

Section 75 provides for increased punishment for a second offence.

Act VI of 1864, Sects. 2, 3, and 4, provide whipping as a punishment in certain cases; see *ante*, p. 563.

Triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first or second class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That you (the said A B) on or about the day of at , did commit lurking house-trespass (*or* house-breaking) by night (to wit, by, &c., after the hour of sunset and before the hour of sunrise); and that you have thereby committed an offence punishable under Sect. 456 of the Indian Penal Code, and within, &c.

Evidence.

Prove the lurking house-trespass or house-breaking, and that it was committed after the hour of sunset, and before that of sunrise.

HOUSE-BREAKING BY NIGHT, &c., TO COMMIT OFFENCE, &c.

Sect. 457. *Lurking House-trespass, &c., by Night, to commit an Offence punishable with Imprisonment.* **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.**

Sect. 458. *Lurking House-trespass, &c., by Night, after Preparation for causing Hurt.*—**Whoever commits lurking house-trespass by 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.**

Note.

Section 75 provides for increased punishment for a second offence.

Act VI of 1864, Sects. 2, 3, and 4, provide whipping as a punishment in certain cases; see *ante*, p. 563.

Offences under Sect. 457 are triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first or second class; those under Sect. 458, by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Evidence.

The charge and evidence in this case will be similar to those under Sects. 454 and 455, *ante*, p. 563, except that the offence must be laid and proved to have been committed at night.

It is not necessary to divide the charge into two counts when the facts prove a house-breaking by night with intent to commit theft, and theft in a building. The actual commission of the theft is conclusive evidence of the intent, and it is sufficient to convict for the major offence under Sect. 457; *Mad. H. C. 20th January* 1868; 2 *Mad. Jur.* 77; see, also, *Reg.* v. *Sahrae*, 8. *W. R. Cr.* 31. See, also, the notes to Sect. 71, *ante*, p. 50.

Where the house-breaking is with intent to commit adultery, the fact that the husband of the woman with whom the adultery was to have been committed is not the prosecutor does not absolve the accused from punishment under Sect. 457; *Emp.* v. *Bandu*, *B. R. 15th February* 1894; but see 5 *Mad. H. C. Rep. App.* 5. If the husband does not choose to prosecute, that is some evidence that he was a consenting party, and if so, the offence of adultery could not have been committed, and the trespass could not have been committed with intent to commit adultery, *Balmakand* v. *Ghanumram*, *I. L. R.* 22 *Calc.*, p. 405.

Attempting to commit house-breaking by night, with intent to steal, is not punishable with whipping; *Reg.* v. *Yella*, 3 *Bom. H. C. Rep. C. C.* 37.

HOUSE-BREAKING, &c., ACCOMPANIED BY GRIEVOUS HURT, &c.

Sect. 459. *Grievous Hurt, &c., accompanying House-breaking.* **Whoever, whilst committing lurking house-trespass, or house-breaking, causes grievous hurt to any person, or attempts 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.**

Sect. 460. *Joint Liability to Punishment for Death, &c., caused in House-breaking.*—**If, at the time of the committing of lurking house-trespass by night, or house-breaking by**

night, any person guilty 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.

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That you, the said A B, on or about the day of at , together with certain others, to wit, C D and E F, jointly did commit house-breaking (*or* lurking house-trespass) by night (to wit, by, &c.), and that one of the said person so committing such offence, to wit, C D, at the time of so committing such offence, did voluntarily cause (*or* attempt to cause) death (*or* grievous hurt) to a certain person, to wit, G H, and that you, the said A B, have thereby committed an offence punishable under Sect. 460 of the Indian Penal Code, and within, &c.

Evidence

Under Sect. 459 prove the lurking house-trespass or house-breaking, as *ante*, p. 558; and that, whilst committing such offence, the offender caused grievous hurt, or attempted to cause death or grievous hurt to some person. Under Sect. 460, a lurking house-trespass, or house-breaking by night, by two or more persons, must be proved. It is not necessary that all should assist in the actual breaking and entering, but they must either do that, or else be so near together, while the breaking, &c., is going on, and the death or grievous hurt is being caused, or attempted to be caused, as to be able to give immediate assistance; so that the presence of his companions may be said to give aid and encouragement to the one who is actually committing the more serious offence. The sections do not define accurately the point at which the acts constituting, or

going to constitute, the principal offence, *i.e.*, house-breaking, &c., must have arrived in order that they may apply to the subsidiary offence, but *Straight*, Acting C. J., has held that sufficient must have been done to make the principal offence legally complete, and that they would not apply where the acts done only amounted in law to an attempt to commit the principal offence; *Emp.* v. *Ismail Khan*, *I. L. R.* 8 *All*, 649, where certain persons were detected in the act of making a hole in the wall of a house, and on being arrested, one fired off a pistol, and others attempted with *lathis* to rescue them.

Under neither of these sections is it necessary to shew that the accused went out with the intention of causing death, &c. It is sufficient to shew that while the house-breaking, &c., was being committed, death, &c., was caused or attempted to be caused; *Reg.* v. *Sabed Ali*, 11 *Ben. L. R.* 347; 20 *W. R. Cr.* 5.

The punishment of whipping cannot be inflicted under these sections, unless the accused is also charged with, and found guilty of, committing the principal offence with the intention of, at the same time, or thereby, committing an offence punishable with whipping, under Sect. 2 or 4 of the Whipping Act.

OPENING CLOSED RECEPTACLE FOR PROPERTY.

Sect. 461. *Breaking open Closed Receptacle containing Property.*—**Whoever dishonestly, or with intent to commit mischief, breaks open or unfastens 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.**

Sect. 462. *Breaking open by Person intrusted with Custody.*—**Whoever, being intrusted with any closed 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.**

Note.

Section 75 provides for increased punishment for a second offence under Sect. 462.

Offences under Sect. 461 *are triable by a Presidency Magistrate, or a Magistrate of the first or second class; those under Sect.* 462 *by the Court of Session, a Presidency Magistrate, or a Magistrate of the first or second class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are bailable. Not compoundable.*

Charge.

That you, on or about the day of , at , dishonestly (*or* with intent to commit mischief) did break open (*or*, unfasten) a certain closed receptacle, to wit, an iron chest, which contained (*or* which you supposed to contain) property, to wit, four bills of exchange for £100 each (which said closed receptacle had been intrusted to you without any authority to open the same); and that you have thereby committed an offence punishable under Sect. 461 (462) of the Indian Penal Code, and within, &c.

Evidence.

The evidence to support these charges will be exactly the same as if the charge had been one of attempting to steal the contents of the closed receptacle. In fact, these two offences amount to attempts to commit theft, criminal breach of trust, and mischief respectively, according to the definition of attempts and the illustration of an attempt to steal given in Sect. 511, *post*.

A large circular receptacle for grain, constructed of straw with an opening in the top, and situated in a back-yard, was held not to be "a place for the custody of property" within the meaning of Sect. 442, *ante* p. 550, and therefore, it was held that the offence of house-breaking could not be committed in respect of it; but that the offence really committed was, the dishonestly breaking open a closed receptacle containing property; *Rulings of Mad. H. C.* 1865, on Sect. 457.

CHAPTER XVIII.

OFFENCES RELATING TO DOCUMENTS, AND TRADE AND PROPERTY MARKS.

OFFENCES RELATING TO DOCUMENTS.

FORGERY OF DOCUMENTS.

Sect. 463. *Forgery.*—**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.**

Sect. 464. *Making a False Document.*—**A person is said to make a false document—**

Firstly, **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 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**

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**

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 cipher 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 authorises 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, 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.

( ) 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.

(c) A, a trader, in anticipation of insolvency, lodges effects with B for A's benefit, and with intent to defraud his creditors, in order to give a colour 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.

Sect. 465. *Punishment for Forgery.*—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.

Sect. 466. *Forgery of a Record of a Court of Justice, &c.*—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 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.

Sect. 467. *Forgery of a valuable Security or a Will.*—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 a 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

Sect 468 *Forgery for the purpose of Cheating.*—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.

Sect 469. *Forgery to harm Reputation.* 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 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.

Note.

By Act VI of 1864, Sect. 4, whipping may be inflicted in addition to the above punishment for a second offence of forgery, as defined by Sects. 463, 466, 467, 468 and 469.

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant,

except when the valuable security forged is a promissory note of the Government of India. Defendants are bailable under Sects. 465 *and* 469, *but not under the other sections. Not compoundable. Where the offence described in Sect.* 463 *is committed by a party to a proceeding in any Court, in respect of any document given in evidence in that proceeding, the sanction of that Court, or of one to which it is subordinate, is required by Sect.* 195 *of the Cr. P. C.*, 1882.

Charge under Sect. 465.

That you, the said A B, on or about the , day of , at , forged a certain document, to wit, a letter of recommendation in favour of you, the said A B, purporting to be signed by one C D, with intent to cause a certain person, to wit, E F, to enter into a contract with you, the said A B, to wit, that the said E F should employ you as a clerk; and that you have thereby committed an offence punishable under Sect. 465 of the Indian Penal Code, and within, &c.

Charge under Sect. 467.

That you, the said A B, on or about the day of , at , did forge a certain document purporting to be a valuable security, to wit, a bill of exchange for one thousand Rupees, dated the day of , and payable three months after the date thereof, purporting to be drawn by one John Smith upon and accepted by one Thomas Brown; and that you have thereby committed an offence punishable under Sect. 467 of the Indian Penal Code, and within, &c.

Add in every case a count for using as genuine the forged document, for which see p. 589.

Evidence.

The thing which is forged must be shewn to be a document, *i. e.*, "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*"; and it is immaterial whether the evidence is intended for, or may be used in, a court of justice or not. It must also be a false document. A false document is not merely a writing con-

taining a number of words which may be innocent, as the body of a power of attorney without any signature to it, but that writing *plus* something else, a signature or seal, which enables it to be used as evidence of the matter written. In other words, the *falsity* consists in a document, or part of a document being signed or sealed with the name or seal of a person who did not in fact sign or seal it; *In re Riasat Ali, I. L. R. 7 Cal.* p. 355. There may, however, be documents complete in themselves without a signature or seal, *e. g.*, a *chit* addressed to a cashier by his master, directing him to pay the bearer some small sum, say five rupees; and such a document, if forged, would be a false document, although unsigned; for the falsity of a document really consists in its being made with the intention of inducing the belief that it was made by the authority of some one by whose authority it was not made. Where the prisoner was requested to make an entry in an account book belonging to the complainant to the effect that he was indebted to the complainant in a certain sum, and instead of so doing made an entry in a language unknown to the complainant, that he had paid to the latter that sum, it was held that this was no forgery as the entry did not purpose to be made by the authority of the complainant, but was only an attempt to cheat; *Emp.* v. *Kunju, I. L. R.* 12 *Mad.* 114, which was followed in *Emp.* v. *Balwant, B. R. 24th March* 1892, where it was alleged that the accused had made false statements of fact in certain receipts and counterfoils with intent to defraud by misappropriation. The accused had, however, been acquitted of misappropriation, or intent to misappropriate.

Under the English law, the painting an artist's name in the corner of a picture, in order falsely to pass it off as an original picture by that artist, is not a forgery; *Reg.* v. *Closs*, 1 *Dears. and B.* 460. And where B, the prosecutor, made powders called B's Baking Powders, which he sold in packets wrapped up in printed papers, and the defendant caused a great number of wrappers to be printed, so nearly resembling B's as to deceive persons of ordinary observation, and make them believe they were B's, in which the defendant enclosed powders of his own, which he fraudulently sold as B's powder; this was held not to be forgery, but obtain-

ing money by false pretences; *Reg.* v. *Smith*, 1 *Dears. and B.* 566. These acts, however, would most likely be held to be forgery under the Indian Penal Code. The latter case would certainly come within the limits of the sections respecting false trade-marks; and it seems very probable that, in both cases, the false matter forming the substance of the charge would be held to be a document within the meaning of Sect. 29, especially when reference is made to the *Indian Evidence Act*, 1872, where a document is defined to be "any matter expressed or described, &c., *for the purpose of recording that matter.*" The artist's name was certainly inserted with the intention of being evidence of the artist himself having put it, and of recording that fact; so, too, in the second case, the papers were intended to operate as evidence of the baking powders being made by B. The offence of forgery may be committed by a person who fabricates a false document purporting to be a copy of another document for the purpose of the same being used in evidence; *Essan Chunder Dutt* v. *Baboo Prannauth Chowdry*, *Marshall's Bengal App. Cr.* 270, *and W. R. F. B.* 71. The forgery of a document which purports on the face of it to be a copy only and which, even if a genuine copy, would not authorise the delivery of moveable property, is not punishable under Sect. 467; *Reg.* v. *Naro Gopal*, 5 *Bom. H. C. Rep. C. C.* 56.

The alleged false document, under English law, must appear upon the face of it to have been intended to resemble a true document of the description mentioned in the charge, so as to be likely to deceive persons of ordinary capacities; *R.* v. *Collicott*, 2 *Leach*, 1048; *R.* v. *Jones*, 1 *Leach*, 204; although not perhaps those who might be scientifically acquainted with such documents; *R.* v. *Hoost*, 2 *East*, *P. C.* 950. Even 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 defendant being convicted, the judges held that the conviction was right; *R.* v. *Elliott*, 1 *Leach*, 175. If, however, on the other hand, the document is not such as might be passed off as a true document of the description which it purports to be, the defendant ought to be acquitted. A bill of exchange for three guineas, not attested as required by 17 Geo. III. c. 30, s. 1,

was holden by the judges not to be the subject of an indictment for forgery; because, if it were a genuine instrument, it would be absolutely void for want of the attestation; *R.* v. *Moffatt*, 1 *Leach*, 431. So a bill of exchange or country bank-note, which, for want of signature, is incomplete, or a navy bill payable to or order; *R.* v. *Richards*, *R. and R.* 193; *R.* v. *Randall*, *ib.* 195; *R.* v. *Pateman*, *ib.* 455; *R.* v. *Butterwich*, 2 *M. and Rob.* 196; is not the subject of an indictment for forgery. In these cases the omission absolutely vitiates the document; if, however, the omission do not vitiate it, forgery may be committed. It has, however, been decided in Calcutta, that although the document may be entirely worthless, legally, as evidence of the matter expressed therein, yet it is sufficient if the accused believed it to be, and intended that it should be, used as evidence of such matter; *Reg.* v. *Shafait Ali*, 2 *Ben. L. Rep. A. Cr.* 12, 10, *W. R. Cr.* 61. Forgery may be committed of a promissory note on unstamped paper, even although the law prohibits the affixing of the stamp afterwards, *Morton's case*, 2 *East, P. C* 955; *Emp.* v. *Ramasami*, *I. L. R.* 12 *Mad.* 148. A man may be convicted of forging a will, although it appears in evidence that the pretended testator is alive, *R* v. *Sterling*, 1 *Leach*, 99; *R* v. *Coogan*, *ib.* 449. So a man may be indicted for forgery and uttering a bill of exchange, although the name of the payee was not endorsed on it; *R.* v. *Wicks*, *R. and R* 149. A man, too, may be indicted for forging an instrument, which, if genuine, could not be made available, by reason of some circumstance not appearing on the face of it, but to be made out by extrinsic evidence, *R* v. *M'Intosh*, 2 *Leach*, 883. Thus, a man may be indicted for forging a deed, though not made in pursuance of the provisions of a particular statute, requiring it to be in a certain form, *R.* v. *Lyon*, *R. and R.* 255; *R.* v. *Froud*, *ib.* 389; or for forging a cheque, although it be post-dated; *Reg.* v. *Taylor*, 1 *C. and K.* 213.

The antedating of a document is forgery; *Reg.* v. *Soohmoy Ghose*, 10 *W. R Cr.* 23. See, also, *Reg.* v. *Ritson*, *L. R.* 1 *C. C.* 200, in which a man, having executed a conveyance in fee simple, afterwards, intending to deceive, executed a lease of the same property for 999 years, and antedated it in order to cheat the purchaser

of the fee simple. *Illustration* (*h*) to Sect. 463, and *ill.* (*d*) to *Explanation*], seem to be founded on a similar state of circumstances.

It must further be proved that the signature, or other part of the document alleged to be false, is not of the handwriting of the party whose it purports to be, by any person acquainted with his handwriting, either from having seen him write, or from being in the habit of corresponding with him. It is sufficient, *primâ facie*, to disprove his handwriting, and he need not be called to disprove an authority to others to use his name; circumstances shewing guilty knowledge are enough; *Reg.* v. *Harley*, 2 *M. and Rob.* 473. The testimony of the person whose handwriting is forged is not deemed the best evidence, and that of other persons only secondary; *R.* v. *Hughes*, 2 *East, P. C.* 1002; *R.* v. *Maguire*, *R. and R.* 378. The forgery can be proved by the examination of experts, as to the handwriting being genuine or an imitation from its appearance; *Sect.* 45, *Indian Evidence Act I. of* 1872. On an indictment for uttering a forged will, which, it was alleged, had been written over pencil-marks that had been rubbed out, it was held that the evidence of engravers who had examined the paper with a mirror, and traced the pencil-marks, was admissible for the prosecution; *Reg.* v. *Williams*, 8 *C. and P.* 434.

It must also be proved expressly, or from surrounding circumstances, that the alleged forgery was intended to represent the handwriting of the person whose handwriting it is proved not to be; or that it was attempted to be uttered as the handwriting of a person who never existed; *R.* v. *Sponsonby*, 2 *East. P. C.* 996. 997; *R.* v. *Dournes*, *ib.* 997; *Reg.* v. *Shifait Ali*, 2 *Ben. L. R. A. Cr.* 12, and 10 *W. R. Cr.* 61; *Emp.* v. *Pera Raju*, *I. L. R.* 18 *Mad.* 27; or as having been made by the authority of a person by whose authority it was not made; *Reg.* v. *Ramgopal Dhur*, 10 *W. R. Cr.* 7. Where the defendant uttered a forged note, and said that it was drawn by W H, of the Bull's Head, it was holden to be sufficient to prove that it was not of the handwriting of that W H, although it appeared that there was another W H living in the neighbourhood; *R.* v. *Hampton*, 1 *Mood. C. C.* 255. Where the prisoner obtained money from B for a cheque

on Jones, Lloyd & Co., purporting to be drawn by G. Andrews in favour of——Newman, Esq., or bearer, telling him that it was for Mr. Newman, of Soho Square, in whose service he was for three months, and that Mr. Newman had put his name on the back; and it appeared that no person of the name of G. Andrews kept an account with Jones, Lloyd & Co., and that Mr. Newman did not write his name upon the back of the cheque, and that the prisoner never was in his service; *Parke*, J. (after consulting *Gaselee*, J.), held this to be sufficient *primâ facie* evidence that G. Andrews was a fictitious person, and told the jury that if G. Andrews really drew the cheque, the prisoner might produce him, or give some evidence on the subject; *R.* v. *Backler*, 5 *C. and P.* 118. Where the prisoner was indicted for forging and uttering a cheque on Greenwood & Co., Army Agents and Bankers, purporting to be drawn by J. Weston, and a clerk in the army department was called to prove that J. Weston kept no account with his employers; he also admitted that he did not know the names of all the customers, but added that he knew of no customer named J. Weston, and that, upon inquiry of other clerks, he found that there was no such person; *Parke*, J., with the concurrence of *Patteson*, J., and *Gurney*, B., held this to be *prima facie* evidence sufficient to call upon the prisoner to shew who J. Weston was: *R.* v. *Brannan* 6 *C. and P.* 326. If, however, the prisoner give a note entirely as his own, his subscribing to it in a fictitious name will not make it a forgery, the credit there being given wholly to himself without any regard to the name, or any relation to a third person; *Dunn's Case*, 1 *Lea, C. C.* 59; *Reg.* v. *Martin*, 5 *Q. B. D.* 34.

It must also be shewn, either expressly or circumstantially, that the defendant made the false document. Making a document or part of a document does not mean merely writing or printing the body of the document, but signing or otherwise executing it, where execution is necessary, so as to make it complete, as we speak of "making an indenture," or "making a promissory note," by which is meant not the writing out of the body or form of the instrument, but the signing it as a deed or note; *In re Bissal Ali*, *I. L. R.* 7 *Cal.*, p. 355. If the forgery consists in

an alteration, this must be proved to have been done by the prisoner. If the document or alteration be in the prisoner's handwriting this may be proved by some person who has a knowledge of it, from having seen him write; *Garrells* v. *Alexander*, 4 *Esp.* 37; even once only; *William* v. *Worrall*, 8 *C. and P.* 380; *Warren* v. *Anderson*, 8 *Scott*, 384, or his surname only; *Lewis* v. *Sapio*, *M. and M.* 39: or from having been in the habit of corresponding with him; *Gould* v. *Jones*, 1 *W. Bl.* 384; *Harrington.* v. *Fry*, *Ry. and M.* 90; or acting upon his correspondence with others; *R.* v. *Slaney*, 5 *C. and P.* 213. A conviction for forgery cannot be had unless it be proved that the accused *himself* made a document or part of a document with the intention of causing it to be believed that such document or part of a document was made by the authority of a person, by whose authority it was not made. It is not sufficient that he should instruct another person to do it in his presence; *Reg.* v. *Ramgopal Dhur*, 10 *W. R. Cr.* 7; but see *Reg.* v. *Mazeau*, 9 *C. and P.* 676, *secus*. The possession by a prisoner of a number of other documents supposed to be forged is no evidence to prove that he forged a particular document, the subject-matter of the charge under trial; *Reg.* v. *Parbhudas Ambaram*, 11 *Bom. H. C. Rep.* 90. A person who consents to act under a *Mooktearnamah*, and attaches his name in token of such consent, does not thereby become a forger, if the *Mooktearnamah* turns out to be a forgery; *Reg.* v. *Burjo Barick*, *W. R. Cr.* 70.

If several combine to forge an instrument, and each executes by himself a distinct portion of the forgery, and they are not all together when the instrument is completed, they are all, nevertheless, guilty as principals; *R.* v. *Bingley*, *R. and R.* 446; as if B makes the paper, C engraves the plate, and D fills up the instrument, each without knowing that the others are employed, they are all principals; *R.* v. *Dade*, 1 *Mood. C. C.* 307; *R.* v. *Kirkwood*, *ib.* 304, So, if several concur in employing another to make a forged instrument, knowing its nature, they are all guilty of the forgery; *Reg.* v. *Mazeau*, 9 *C. and P.* 676.

Under the third clause of Sect. 464, a person may, also, make a false document under certain circumstances by the hands of another

party, although that party be the person who legally was authorized to execute or alter the document. If the charge be brought under the last part of that clause, it must be proved that the accused actually practised deception so as to prevent the person signing from knowing the nature of the document, and the mere belief, that a paper was placed by the prisoner among a number of others for signature by the prosecutor, is not sufficient; *Reg.* v. *Nujeebutoollah*, 9 *W. R. Cr.* 20. This third clause of Sect. 464 alters the English law, for by that, however fraudulently a signature may have been obtained, it is not a forgery, if it was really made by the person whose signature it purports to be.

The false document must be made "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 any property, or to enter into any express or implied contract, or with intent to commit fraud, or that fraud may be committed;" it is not sufficient that the accused merely knew that the document *might* do injury; *Fida Hossein* v. *Emp.* 10 *C. L. R.* 184. Where a person, at the request of another who was sent to entrap him, forged a document purporting to be made by a public servant under the belief that it was to be used in a pending suit, no suit, however, being in existence, it was held that forgery had been committed; *Haradhan* v. *Emp.*, *I. L. R.* 14 *Cal.* 513. It is, however, not necessary to prove that any person was actually defrauded by the forgery; *R.* v. *Crooke*, 2 *Str.* 901; *R.* v. *Goate*, 1 *Ld. Raym*, 737; if from the evidence the intention to defraud can be inferred, even although, from circumstances of which he was not aware, it was impossible for the defendant to have defrauded the prosecutor; *R.* v. *Holden*, *R. and R.* 154; *Reg.* v. *Marcus*, 2 *C. and K.* 356; *Reg.* v. *Hoatson*, *ib.* 777; or though the party to whom the document is uttered believes that the accused did not intend to defraud him; *R.* v. *Sheppard*, *R. and R.* 169; see *R.* v. *Harvey*, 2 *B. and C.* 261, and *Rex* v. *Mazagora*, there quoted; nay, even, as it seems, though in fact no person could have been defrauded by the forged instrument; see the *dictum* of *Maule*, J., in *Reg.* v. *Nash*, 2 *Den. C. C.* 499, 503. Where a forged bill of exchange, payable to the order of the defendant, was given as a

pledge only, but to obtain credit, it was held to have been given with a fraudulent intent; *R.* v. *Birkett, R. and R.* 86. A forged cheque drawn on the Worcester Old Bank was presented by the defendant to Ruffurd's Bank at Stourbridge, and refused, and upon an indictment for forging and uttering the cheque with intent to defraud the Messrs. Ruffurd, it was objected, that, as it was not drawn upon them, it could not defraud them; but *Bosanquet*, J., held that, as it was presented at their bank for payment, it was evidence of an intent to defraud them; *R.* v. *Crowther*, 5 *C. and P.* 316. The fact, that the prisoner has given guarantees to his bankers, to whom he paid a forged note, to a larger amount than the note, does not so completely negative an intent to defraud them as to withdraw the case from the consideration of the jury; *R.* v. *James*, 7 *C. and P.* 553; see *Reg.* v. *Cooke*, 8 *C. and P.* 582. On an indictment for forging and uttering a bill, it appeared that the person whose name was used was informed of the existence of the bill at the time it passed into the prosecutor's hands, but did not repudiate it. The jury were directed by *Byles*, J., to acquit the prisoner, although the person whose name had been used was called as a witness, and denied having given any previous authority for the use of his name; *Reg.* v. *Smith*, 3 *F. and F.* 504. Where the vendor of a plot of land altered the number by which it was described in the deed of sale, after it was registered, doing so because such number was not the right one, and afterwards used this deed of sale in a suit, it was held that the alteration did not amount to forgery, and that the altered deed did not constitute a forged document, as the intention to cause wrongful loss or wrongful gain was absent; *Emp.* v. *Futeh*, *I. L. R.* 5 *All.* 217; so, too; where the date of a document was altered in order to enable it to be presented for registration, it was held that it was not forgery, as it was not done dishonestly or fraudulently, although it amounted to fabricating false evidence under Sect. 192; *In re Mir Ekrar Ali*, *I. L. R.* 6 *Cal.* 482. Where A signed B's name to petitions to the Mamlutdar requesting his assistance under Reg. XVII of 1827 for the recovery of rent from B's tenants, it was held that, even if A had no authority from B to sign his name, and if A wished

the Mamlutdar to believe that B had signed the petitions, no forgery had been committed, because there was no intention to cause wrongful loss or gain to any one; *Reg.* v. *Bhavanishankar*, 11 *Bom. H. C. Rep.* 3; the loss to Government of fees on the suits which would have had to be filed, if these petitions had not been presented, is not a wrongful loss; *ib.* The fabrication of a *sunnud* granting a title of honour does not amount to forgery; *Jan Mahomed* v. *Emp.*, *I. L. R.* 10 *Cal.* 584. The unauthorized affixing of the signature of the head master of a school to a certificate in order to enable the person named therein to get permission to present himself at a University Examination is not forgery; *Emp.* v. *Haradhan*, *I. L. R.* 19 *Cal.* 380; but the making of a false certificate purporting to be signed by the principal of a college, the possession of which would enable the person named therein to attend lecture at another college on paying a portion only of the usual fees is forgery; *Emp.* v. *Soshi*, *I. L. R.* 15 *All.* 210.

The falsification of a record in order to conceal a previous act of negligence, not amounting to fraud, is not forgery; *Emp.* v. *Shankar*, *I. L. R.* 4 *Bom.* 657, which was decided on the absence of fraud only, and not on the question whether or not the act of the prisoners amounted to fabricating a false document; see, also, *Emp.* v. *Ma har Hussain*, *I. L. R.* 5 *All.* 553, where the papers were admittedly fabricated, but, as was held, not fraudulently. Where a clerk, who had committed criminal breach of trust, subsequently made false entries in an account book with the intention only of concealing such offence, it was held that his act did not constitute the offence of forgery; *Emp.* v. *Jwanand*, *I. L. R.* 5 *All.* 221, in which case a man's signature had been forged to an entry purporting to shew that that man had received certain money, but *Mahmood*, J., without discussing the questions whether the signed entry was a document, decided the case on the point of there being no fraud; see, also, *Reg.* v. *Jageshur Pershad*, 6 *N.-W. P. Rep.* 56; and *Reg.* v. *Lal Gyumul*, 2 *N.-W. P. Rep.* 11. The principle on which the above cases of *Emp.* v. *Mazhar Hussain* and *Emp.* v. *Jiwanand* were decided has been widely and dangerously extended by *Edge*, C. J., in the case of *Emp.* v. *Girdharilal*, *I. L. R.* 8 *All.* 653, the facts of which were as

follows:—A forgery had been committed by which a sum of money was drawn out of the Treasury and paid to the wrong persons. The Civil Court afterwards, not being aware of the forgery, ordered that sum to be transferred to its own custody to the credit of the rightful owner, and an order to that effect was drawn up. A Treasury clerk, in order to conceal the previous forgery, altered the order so as to cause the amount to be transferred to itself from the account of a third person. On these facts it was held, that, as the accountant probably had no intention of causing loss to the last named individual, the alteration did not amount to forgery. It is difficult to understand how this decision can be upheld, for the Court did not take into account the loss which might accrue to the Treasurer through the altered order being acted on, nor did it allude to the intention to commit fraud which was clearly present in the mind of the accountant, nor to the fact that the altered order caused, or might have caused, the Treasurer to part with property which he would otherwise not have parted with, any of which considerations would be sufficient, it would seem, under these sections to have made the act actually committed amount to forgery. Some of the foregoing decisions may, perhaps, be upheld on the ground that there was not a fabrication of a document, but it would be well if they could all be considered and reviewed by a strong Full Bench on the question of what constitutes fraud.

The cases of *Emp.* v. *Jivanand* and *Emp.* v. *Girdharilal* were dissented from in *Lolit Mohan* v. *Emp*, *I. L. R.* 22 *Cal.* 313.

In Madras it has been held, that where money was misappropriated, and a receipt made purporting to shew that the money was paid to a particular person to whom it was not paid, the fabrication of the receipt amounted to forgery; *Emp.* v. *Sabapati*, *I. L. R.* 11 *Mad.* 411; followed in *Lolit Mohan* v. *Emp.*, 22 *Cal.* 313. The fabrication of a certificate of character to enable an applicant to get a vacant post, and of a letter purporting to appoint him to the post, amounts to forgery; *Abdul Hamid* v. *Emp.*, *I. L. R.* 13 *Cal.* 349.

The fabrication of receipts for the payment of rent in lieu of genuine receipts, previously given, which had been lost, does not amount to forgery; *Emp.* v. *Sheo Dayal*, *I. L. R.* 7 *All.* 459. It

is, also, doubtful whether a forgery committed for the purpose of preventing the carrying out of illegal act, *e. g.*, an officer unauthorizedly stopping a portion of a subordinate's pay, in order to liquidate his debts, is done dishonestly or fraudulently; *Emp.* v. *Syed Husain*, *ib.* 403.

The intent to defraud a society is sufficient, although the accused may be a member of that society; *Reg.* v. *Moody*, 31 *L. J. N. S. M. C.* 156, and *L. and C.* 173.

Under the English law, if a man forges a document, such as a diploma of the College of Surgeons, with intent only to induce the public generally, or particular persons, to believe that he is a member of that college, but has no intent of committing any particular fraud, or doing any specific wrong to any individual, he is not guilty of the offence of forgery; *R.* v. *Hodgson*, 1 *Dears and B. C. C.* 3. But he might be under the Penal Code, because he would do it with the intention of causing persons to enter into contracts with him. A falsely represented himself to be B at a University Examination, got a hall ticket in B's name, and headed and signed papers in answer to questions in B's name; it was held that A had committed forgery; *Emp.* v. *Appasami*, *I. L. R.* 12 *Mad.* 151; approved of in *Emp.* v. *Soshi*, *I. L. R.* 15 *All.* 210.

Claim.—The word claim is not limited to a claim to property, but is applicable to anything to which a claimant may consider himself entitled, *Emp.* v. *Soshi*, *I. L. R.* 15 *All.* 210; dissenting from a remark of *Norris*, J., in *Emp.* v. *Haradhan*, *I. L. R.* 19 *Cal.*, at p. 386.

Property.—A written certificate is property within the meaning of Sect. 463; *Emp.* v. *Soshi*, *I. L. R.* 15 *All.* 210. It is not necessary in order to constitute forgery, that the property to be parted with on the strength of the forged document should be in existence at the time of the forgery; *Emp.* v. *Soshi*, *ubi supra*.

Forgery of a record.—The false alteration of a police diary by a head constable is a forgery of a document made by a public servant in his public capacity: *Reg.* v. *Rughoo*, 11 *W. R. Cr.* 36. It has, however, since been decided that Sect. 166 is not intended to apply to cases where a public officer, or a person acting for a public officer, whose duty it is to make entries in a public book,

knowingly makes a false entry, but to cases where a certificate on the document is forged by some unauthorised person with a view to make it appear that it was duly issued by a public officer. Therefore, where the accused, a servant of a public officer who paid him, with a view to save an estate from forfeiture, made a false entry in a book kept by him for the purpose of informing the Collector as to the rents paid into the collectorate, and of what estates the rent was in arrear, so that he might take steps to enforce payment, it was held that the accused had not committed an offence under this section, but that defined by Sect. 192, *ante*, p. 227; *In re Juggun Lall*, 7 *C. L. R.* 356.

Any person making, signing, or attesting, a false certificate of a Parsi marriage is punishable under Sect. 466; Act XV of 1865, Sect. 12.

Forging a valuable Security, &c.—The forgery and intent with which the false document is made must be proved as before. It must also be shewn that the document comes within the provisions of Sect. 467.

The term "valuable security" is defined by Sect. 30, *ante*, p. 35; and under that section it has been held that a settlement of an account in writing, although not signed by any person, is a valuable security; *Reg.* v. *Kapalavaya Sarasya*, 2 *Mad. H. C. Rep.* 247. A deed of divorce is a valuable security; *Reg.* v. *Azimooddeen*, 11 *W. R. Cr.* 15.

"Will" is defined in Sect. 31, *ante*, p. 36. Forgery may be committed by the false making of the will of a living person; *R.* v. *Murphy*, 2 *East, P. C.* 949; *R.* v. *Sterling*, 1 *Leach*, 99; *R.* v. *Coogan*, *ib.* 449, or of a non-existing person; *Reg.* v. *Avery*, 8 *C. and P.* 596. So, though it be signed by the wrong Christian name of the person whose will it purports to be; *R.* v. *Fitzgerald*, 1 *Leach*, 20.

A turnpike ticket is a receipt; *Reg.* v. *Fitch*, and *Reg.* v. *Howley*, 9 *Cox's Cr. C.* 160. So is a fictitious pass-book of a bank; *Reg.* v. *Smith*, 31 *L. J. N. S. M. C.* 154.

The forgery of a collectorate *chellaun* is a forgery of a document coming under the provisions of this section; *Reg.* v. *Hurish Chunder Bose*, *W. R* 1864, *Cr.* 22.

Forgery with intent to injure Reputation.—A person who forged a draft petition, with the intention of using it as evidence, and which contained false statements calculated to injure the reputation of a person, has been held to be guilty of this offence; *Reg.* v. *Shifait Ali*, 2 *Ben. L. Rep. A. Cr.* 12, and 10 *W. R. Cr.* 61.

The fact that a person was acquitted of a charge of forging *pottah* A is no bar to his being tried for forging *pottah* B, although the two *pottahs* were, save as regards the land to which they related, identical, and notwithstanding that both were in evidence on the trial for forging *pottah* A; *Reg.* v. *Dwarkanath Dutt*, 2 *Mad. Jur.* 134; 7 *W. R. Cr.* 15.

To prepare in conjunction with others a copy of an intended false document, and to buy a stamped paper for the purpose of writing it, and to ask for information as to a fact to be inserted in such false document, do not amount to an attempt to commit forgery, but to an abetment of forgery, these all being acts done to facilitate the commission of the principal offence; *Reg.* v. *Padala Venkataswami*, *I. L. R.* 3 *Mad.* 4.

A charge of forgery should distinctly set out the particular papers alleged to have been forged, by their proper description according to the term used in the section under which the charge is drawn; and, if the charge be one of uttering or possessing forged documents, the nature of the documents uttered by, or found in the possession of the accused should be stated with a like particularity, and the intent with which the documents were uttered or possessed should also be stated; *Emp.* v. *Abaji*, *I. L. R.* 15 *Bom.* 189.

In the definition of forgery in Sect. 463 the Ceylon Penal Code, after "with intent to cause damage or injury to the public or to any person," adds "or to the Government of Ceylon."

USING A FORGED DOCUMENT.

Sect. 470. *A Forged Document.*—**A false document made wholly or in part by forgery is designated "a forged document."**

Sect. 471. *Using a forged Document.*—**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.

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant unless the forged document be a promissory note of the Government of India. Defendants are bailable, unless the forged document be a promissory note of the Government of India. Not compoundable. Sanction is required in the same cases as in forgery, quod vide.

Charge.

That you, the said A B, on or about the , day of , at , fraudulently and dishonestly did use as genuine a certain forged document purporting to be a valuable security, to wit, a forged bill of exchange, &c., you, the said A B, well knowing or having reason to believe, at the time you so used it, that the said document was forged; and that you have thereby committed an offence punishable under Sects. 467 and 471 of the Indian Penal Code, and within, &c.

Evidence.

The forgery must first be proved. Section 470 defines what is a forged document. Then it must be shewn that the defendant used the forged document as a genuine one. The words used in the English statute for this offence are "offer, utter, dispose of, and put off." On these words *Archbold* says, p. 649, 20th edition:—"To *offer* and to *utter* mean nothing more than that the party tendered, or attempted to pass, or make use of, the forged instrument, with the intent mentioned in the indictment; these words do not import that the person to whom the forged instrument was tendered actually accepted it with the intention to retain it, or was defrauded by it. Accordingly, we find that the Legislature, wherever they intended that the offence should not be complete without an acceptance on the one part and a relinquishment on the other, have described the offence in words of a different appropriate meaning, such as 'pay and put off' (see 1 *East, P. C.* 179), or the like. The offence of uttering, which

is described by the words 'offer, utter dispose of, and put off,' includes attempts to make use of a forged instrument, as well as cases where the defendant has actually succeeded in making use of it." The word "use" is rather more extensive, if anything, in its meaning, than those employed in the English statute. The shewing of a forged receipt to a person with whom the defendant is claiming credit for it, which was held to be an offering or uttering, although he refused to part with the possession of it, would be a using of it; *Reg.* v. *Radford*, 1 *Den. C. C.* 59, 1 *C. and K.* 707. So, where a pawnbroker, upon the hearing of an application to compel him to deliver up goods which had been pledged with him (the money advanced, with interest, having been repaid) produced and delivered to the magistrates, through the hand of his attorney, a forged duplicate as the genuine one, which he had given when the goods were pledged, and which he had received back when the money was repaid, this was held to amount to an uttering by the pawnbroker; *Reg.* v. *Fitchie*, 1 *Dears. and B. C. C.* 175. Where the defendant placed a forged receipt for poor-rates in the hands of the prosecutor, for the purpose of inspection only, in order, by representing himself as a person who had paid his poor-rates, fraudulently to induce the prosecutor to advance money to a third person, for whom the defendant proposed to be a surety for its repayment: this was held to be an offering; *Reg.* v. *Ion*, 2 *Den. C. C.* 475. The presentation of a forged document for registration, and obtaining registration, is a using of that document; *Reg.* v. *Azimoodeen*, 11 *W. R. Cr.* 15. A conditional uttering is as much an uttering as any other. A person presented a forged acceptance to the manager of a bank at which he kept an account, saying he hoped that the bill would satisfy the bank as a security for the money he owed them, and the manager replied that that would depend on the result of inquiries, which they would have to make as to the acceptors: this was held to amount to a guilty uttering; *Reg.* v. *Cooke*, 8 *C. and P.* 582.

The fraudulent intent must be proved as in the case of forgery; *Reg.* v. *Jaha Buæ*, 8 *W. R. Cr.* 81; a general intention to defraud without the intention of causing wrongful gain to one person, or wrongful loss to another would, if proved, be sufficient; *Emp.* v.

Dhanum Kazee, *I. L. R.* 9 *Cal.* 53, and 11 *C. L. R.* 169; an intention to defraud the party against whom the document is used is a necessary inference to be drawn when a forged document is used with a guilty knowledge; *ib.* Where a person, in the course of an action brought against him to gain possession of a property, uses a forged document for the purpose of supporting his title, although there may be no necessity for the use of it, such a use is clearly fraudulent; *ib.*

It is not necessary to prove that the defendant made the false document, but it must be shewn that it was false to his knowledge or that he had reason to believe that it was false; *Reg.* v. *Hemoruldi*, 9 *W. R. Cr.* 22; *Reg.* v. *Bholay*, 17 *W. R. Cr.* 32 The knowledge that the document is forged is not ordinarily capable of direct proof. It must, in all cases, be presumed by the court or jury from the circumstances adduced in evidence. Proof that the defendant has passed other forged documents of the same description, if proved by legitimate evidence; *R.* v. *Millard*, *R. and R.* 245; raises a probable presumption that he knew the note for the passing of which he is now indicted to be forged; *R.* v. *Wylie*, 1 *N. R.* 92; *R.* v. *Tattersall*, *ib.* 93; *R.* v. *Ball*, *R. and R.* 132; or that he had other forged notes of the same description in his possession; *R.* v. *Hough*, *R. and R.* 120; or, as it would seem, even of a different kind; *Bayley on Bills*, 450; and if, in addition to this, it be proved that the defendant, when he passed the notes, gave a false name or address, or passed by different names while uttering different forged bills; *Bayley on Bills*, 449; it amounts to a violent presumption of his guilty knowledge. Where a prisoner, who could neither read nor write, borrowed money and executed a bond, and afterwards repaid the money, receiving back what he believed to be that bond, which he afterwards filed in the Small Causes Court, in a suit in which he was defendant, and this bond was alleged to have been forged, it was held that there was no evidence of the prisoner's guilty knowledge; *Reg.* v. *Bholay*, 17 *W. R. Cr.* 32. In the cases of *R.* v. *Smith*, 2 *C. and P.* 633, and *R.* v. *Smith*, 4 *C. and P.* 411, it was ruled that if another uttering be made the subject of a separate indictment, it cannot be given in evidence to shew a guilty knowledge. *Arch-*

bold, however, p. 651, 20th edition, says:—"In the case of *Reg.* v. *Cadwallader Lewis, Carnarvon Sum. Ass.* 1840, *Lord Denman*, C. J., said, that he could not conceive how the relevancy of the fact to this charge could be effected by its being the subject of another charge; and offered to admit the evidence, although the above cases were cited." In a subsequent case; *Reg.* v. *Acton*, 1 *Russ.* 407; *Alderson*, B., admitted such evidence; and in June 1867, in the case of *Reg.* v. *Zeigert*, 10 *Cox's Cr. C.* 555. *Willes*, J., again admitted it. See, also, the *Evidence Act*, 1872, *Sects.* 14 *and* 15; and *Emp.* v. *Vajiram*, *I. L. R.* 16 *Bom.* 414, and the cases cited in the judgment of *Telang*, J.; *Makin* v. *A. G. for N. S. Wales*, [1894] *A. C.* 57.

A person was charged under this section with fraudulently using as genuine a forged document, and having been tried by a jury and convicted was sentenced by the Sessions Judge to ten years' transportation, in consequence of the judge considering that the document was of the nature of those specified in Sect. 467, but on appeal to the High Court, it was held that the charge should have distinctly set forth the offence as that of using a document of the nature of those specified in Sect. 467; otherwise under the orders of Government, there was no jurisdiction to try the case by a jury, or having tried it, there was no jurisdiction to pass a sentence for using such a document; *Reg.* v. *Gangaram Malji*, 6 *Bom. H. C. Rep. C. C.* 13.

Where an accused uses as genuine, in a civil suit, a forged document, he should be charged under Sect. 171, and not under Sect. 196; *Emp.* v. *Kherode Chunder Mogumdar*, *I. L. R.* 5 *Cal.* 717.

MAKING, &c., COUNTERFEIT SEALS, &c., FOR THE PURPOSE OF FORGERY.

Sect. 472. *Making, &c., Counterfeit Seal, &c., to commit Forgery under Sect.* 467.—**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 Sect. 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.

Sect. 473. *Making, &c., a Counterfeit Seal, &c., to commit a Forgery punishable otherwise.*—**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 Sect. 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.**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable.

Evidence.

The evidence under these sections will be similar to that required in charges for making dies for coining, except that the intent with which they are made is different. Counterfeit seals and forged documents were found in the prisoner's possession, and, as he could give no satisfactory explanation as to how he became possessed of them, it was held that it was rightly inferred that he intended to use them fraudulently; *Reg.* v. *Kisto Soonder*, 2 *W. R. Cr.* 5.

Where several seals of different descriptions were found in the possession of the accused with intent to commit forgery, it was held that there was a complete and separate offence under Sect. 473 committed in respect of every seal found, and that the accused could be legally convicted of a separate offence in respect of each seal, unless it appeared that several of such seals in their possession were for the purpose of committing one forgery; *Reg.* v. *Goluck Chunder*, 13 *W. R. Cr.* 16.

POSSESSION OF FORGED DOCUMENT.

Sect. 474. *Having possession of a Forged Document, &c., with intent to use it.*—**Whoever has in his possession any document, 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 Sect. 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 Sect. 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.**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable.

Evidence.

The charge, remarks, and evidence relative to the possession of counterfeit coin, p. 311, are applicable to this offence. Reference should also be made to the foregoing remarks on forgery on Sect 463, and the use of forged documents.

To support a charge under this section the prosecution must prove (1) that the documents, in respect of which the charge is brought, are forged; (2) that the accused knew them to be forged; (3) that he was in possession of them; (4) that he intended that they should be fraudulently or dishonestly used as genuine; (5) that each of the documents is of the description mentioned in Sect. 466, *ante*, p. 574, or Sect. 467, *ante*, p. 575, *Emp.* v. *Abaji*, *I. L. R.* 16 *Bomb.* 165.

Where a person took a forged document into court in connection with a case, but did not actually use it, although he intended to do so if necessary, he was held to have been rightly convicted under this section; *Reg.* v. *Hatim Moonshee*, 8 *W. R. Cr.* 11. Where counterfeit seal and forged documents were found in the prisoner's possession and he could give no satisfactory account of how he came into possession of them, it was held that the proper

inference was that he had them in his possession with a fraudulent intent; *Reg.* v. *Kisto Soonder*, 2 *W. R. Cr.* 5.

COUNTERFEITING DEVICE FOR AUTHENTICATION.

Sect. 475. *Counterfeiting a Device used for authenticating Documents described in Sect.* 467.—**Whoever counterfeits upon or in the substance of any material any device or mark used for the purpose of authenticating any document described in Sect. 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 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.**

Sect. 476. *Counterfeiting a Device for authenticating Documents other than the foregoing.*—**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 Sect. 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.**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable. Sanction is required in the same cases as forgery, quod vide.

Evidence.

The evidence under these two sections will be similar to that required under charges of forgery. The cases which these two sections are intended to meet are those of forging water-marks in paper intended to be used as currency notes, and such like.

In order to bring a case under Sect. 475, the document the accused has in his possession must have some counterfeit mark or device upon it, and it must be proved that the accused has the document in his possession for the purpose of using such device or mark for the purpose of giving the appearance of authenticity to the document and the document must be one of those mentioned in Sect. 467; *Reg.* v. *Rughoonundun*, 15 *W. R. Cr.* 19; *Emp.* v. *Abaji*, *I. L. R.* 16 *Bom.* 165.

DESTROYING A WILL, &c.

Sect. 477. *Fraudulent Destruction, &c., of a Will, &c.*—**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.**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Evidence.

A government promissory note is a valuable security under this section; *In re Madurai*, *I. L. R.* 12 *Mad.* 54. A document is a valuable security, although not stamped, and so not receivable in evidence in a civil suit; 7 *Mad. H. C. Rep. App.* 26; *Emp.* v. *Ramasami*, *I. L. R.* 12 *Mad.* 148. The tearing up of a *pottah* is a destruction of a valuable security within the meaning of this section; *Reg.* v. *Nittar Mundle*, 8 *W. R. Cr.* 38.

The Ceylon Penal Code omits in this section the words "or an authority to adopt a son;" and after the words "valuable security" inserts "or any record, register book, or document kept by any public servant in his capacity as such, or by any person in pursuance of any ordinance or statute;" and between "such" and "document" inserts the words "record, register or."

FALSIFICATION OF ACCOUNTS.

Sect. 477A. *Falsification of Accounts.*—**Whoever, being a clerk, officer or servant, or employed or acting in the capacity of a clerk, officer or servant, wilfully, and with intent to defraud, destroys, alters, mutilates or falsifies any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or wilfully, and with intent to defraud, makes or abets the making of any false entry in, or omits or alters or abets the omission or alteration of any material particular from or in, any such book, paper, writing, valuable security or account, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.**

"*Explanation.*—**It shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded or specifying any particular sum of money intended to be the subject of the fraud, or any particular day on which the offence was committed.**"

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That on or about the day of A B, then being clerk to C D, did then and whilst he was such clerk as aforesaid, unlawfully, wilfully and with intent to defraud, destroy, to wit, by burning the same, a certain book, to wit, a cash-book which said book then belonged to [*or* was in the possession of] the said

C D, his employer, and thereby committed an offence punishable under Sect. 477A of the Indian Penal Code, and within, &c.

Other charges may be added if necessary varying the mode of charging the offence, or charging other separate acts, provided the whole number of separate acts, be not more than three.

Evidence.

Prove that the accused at the time he committed the alleged offence was clerk to C. D., or a servant or officer as alleged in the charge. The proof of this fact will be the same as in cases of criminal breach of trust by a servant. Prove the destruction of the book by the accused, or else that he made a false entry, fraudulently altered one, or omitted to make one, as laid in the charge. It must also be proved that the entry, or alteration was false to the knowledge of the accused, if either of these acts be charged, or that the omission was intentional and a breach of duty. The intent to defraud would probably be inferred if the court or jury were satisfied of the wilful destruction of the book in the one case, or of the wilful false entry, or alteration, or omission in the other. The proof of other facts, however, might render such an inference irresistible, as that shortly before the alleged acts of the accused, he had been questioned by his master about his accounts, and that the book destroyed contained or ought to have contained entries of such accounts, or that the false entry or alteration was made to conceal some unauthorized act of the accused. A person may be guilty of making a false entry under this section, although he does not make such entry with his own hands, but fraudulently and wilfully procures it to be made by a third person acting innocently and without any knowledge that the entry is otherwise than true; *Reg.* v. *Butt*, 15 *Cox. Cr. Ca.* 564.

This section is a reproduction in slightly varied phraseology of 38 and 39 Vict. C. 24, s. 1.

TRADE AND PROPERTY MARKS.

USING FALSE TRADE OR PROPERTY MARK.

Sect. 478. *Trade Mark.*—**A mark used for denoting that goods are the manufacture or merchandise of a particular**

person is called a trade mark, and for the purposes of this Code the expression 'trade mark' includes any trade mark which is registered in the register of trade marks kept under the Patents, Designs and Trade Marks Act, 1883 [46 and 47 Vict. c. 57], and any trade mark which, either with or without registration, is protected by law in any British possession or foreign State to which the provisions of the one hundred and third section of the Patents, Designs and Trade Marks Act, 1883, are, under Order in Council, for the time being applicable.

Sect. 479. *Property Marks.*—A mark used for denoting that moveable property belongs to a particular person is called a property mark.

Sect. 480. *Using a false Trade Mark.*—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, in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked, are the manufacture or merchandise of a person whose manufacture or merchandise they are not, is said to use a false trade mark.

Sect. 481. *Using a false Property Mark.*—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, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark.

Sect. 482. *Punishment for using a false Trade Mark or Property Mark.*—Whoever uses any false trade mark or any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprison-

ment of either description for a term which may extend to one year, or with fine, or with both.

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Charge.

That you, the said A B, on or about the day of , at , did use a certain false trade-mark, to wit, a mark purporting to denote that certain goods were the manufacture of Bass & Son, whose manufacture they were not, in a manner reasonably calculated to cause it to be believed that such goods were the manufacture of Bass and Son; and that you have thereby committed an offence punishable under Sect. 482 of the Indian Penal Code, and within, &c.

Evidence.

These sections have been altered from the form in which they were originally passed, by the Indian Merchandize Marks Act, 1889, Act IV of 1889. The definition of trade mark was formerly "a mark used for denoting that certain 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.*" It will be observed that the words in italics do not now form part of the definition of a trade mark, but they will be found included in the definition of "trade description." Further, it will be observed that the words "are the manufacture or merchandize of" are substituted for "have been made or manufactured by;" consequently, a trade mark does not now necessarily indicate that the goods to which it is affixed are manufactured by a particular person, but may also mean that the goods are the merchandize of a particular person, *i. e.*, goods which he ordinarily buys or sells; but on the sale by a *manufacturer* of such goods, *who is not otherwise a dealer in them*, there is in the absence of any usage in the particular trade or as regards the particular goods to supply goods of other makers, an implied contract that the goods shall be those of the manufacturer's own make; *Johnson* v. *Raylton*, 7 *Q. B. D.* 438.

The clause by which the word "trade mark" includes trade marks registered under 46 and 47 Vict. c. 57 and trade marks protected under Sect. 103 of that statute, is also new, and is in the same terms in which "trade mark" is defined in 50 and 51, Vict. c. 28, s. 3. The statute, 46 and 47 Vict. c. 57, contained no definition of a trade mark, but that seems to have been left, as far as the interpretation of that statute is concerned, to be gathered from decided cases. The Merchandize Marks Act, 1862, provided that the expression "trade mark" should include any name, signature, word, letter, device, number, figure, sign, seal, stamp, diagram, label, ticket or other mark of any other description lawfully used by any person to denote any chattel, or (in Scotland) any article of trade, manufacture or merchandize, to be an article or thing of the manufacture, workmanship, production, or merchandize of such person, or to be an article or thing of any peculiar or particular description made or sold by such person; and should also include any name, signature, word, letter, number, figure, mark, or sign which in pursuance of any statute or statutes for the time being in force relating to registered designs is to be put or placed upon or attached to any chattel or article during the existence of any copyright, or other sole right acquired under the provisions of any such statutes; but the whole of this Act is repealed by the Merchandize Marks Act, 1887. It will thus be seen that the Indian definition of trade mark includes trade marks as defined by common law as well as those to which the Merchandize Marks Act, 1887, applies, and that the term "trade description" includes a portion of the things which in the Merchandize Marks Act, 1862, came under the description of trade marks.

The most important alteration, however, is the change in Sects. 480 and 481, of the words "*with the intent* of causing it to be believed" to "in a manner reasonably calculated to cause it to be believed" that the goods are the manufacture, merchandize or property of some person whose manufacture, merchandize, or property they are not. The result is that fraudulent intention is not necessary to be proved by the prosecution; but by the alteration introduced into Sect. 482 the *onus* of proving that

there was no fraudulent intention is thrown upon the accused person; the mere use of a false trade or property mark being punishable as an offence unless the accused proves that he used it without any fraudulent intent. The only facts for the prosecution to prove under Sect. 482 are that the trade or property mark is false and that it was affixed by the accused, or that he used a case, &c., with the trade or property mark affixed to it in such a manner as was reasonably calculated to cause it to be believed that the goods so marked or which were in the case, &c., were the manufacture, merchandize, or property of a person whose manufacture, merchandize, or property they were not. In his defence, the accused must prove that in so doing he acted without any intent to defraud. Of course, the absence of the fraudulent intent may be proved by any facts which would negative that intent, but Sect. 8 of the Act, which is in the following words, specifies certain fact which, if proved, will entitle the accused to an acquittal:—

Where a person is accused under Section 482 *of the Indian Penal Code of using a false trade mark or property mark or by reason of his having applied a mark to any goods, property or receptacle in the manner mentioned in Section* 480 *or Section* 481 *of that Code, as the case may be, or under Section* 6 *of this Act of applying to goods any false trade description, or under Section* 485 *of the Indian Penal Code of making any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, and proves—*

(*a*) *that in the ordinary course of his business he is employed, on behalf of other persons, to apply trade marks or property marks, or trade descriptions, or, as the case may be, to make dies, plates or other instruments for making, or being used in making, trade marks or property marks, and that in the case which is the subject of the charge he was so employed and was not interested in the goods or other thing by way of profit or commission dependent on the sale thereof, and*

(*b*) *that he took reasonable precautions against committing the offence charged, and*

(*c*) *that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark or description, and*

(*d*) *that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons on whose behalf the mark or description was applied,*

he shall be acquitted.

This section, however, does not seem to provide that no other facts shall be sufficient to negative the intent to defraud. In England it has been held that, where a defendant had, in obedience to express directions, put up his silk in imitation of the plaintiff's bundles, his execution of the order was not conclusive against him; *Woollam* v. *Ratcliff*, 1 *H. and M.* 259; but in India the mere fact of his putting the silk in such bundles would be sufficient for the prosecution to prove, and the defendant would then have to prove his innocence under Sect. 8. So, too, in England, where defendant packed inferior brandy in the plaintiff's cases at the request of an agent of the plaintiff, who was seeking to entrap him, *Malins*, V. C., refused the injunction with costs; *Hennessey* v. *Kennett.*, *Sebastian Dig.* 556. Unless, however, the defendant knew he was dealing with the plaintiff's agent, it would be difficult for him to allege that he had no intention to defraud; and he would have some difficulty in claiming the protection of clauses (*b*) and (*c*) of Sect. 8. In *Orr-Ewing* v. *Choonelall, Coryton*, 150, the defendant was restrained, though there was no evidence of his having sold the spurious goods (which he had bought ready marked) to any but the plaintiff's agent.

The Indian Merchandize Marks Act, 1889, Sect. 9, which will be found in the Appendix, further provides for the forfeiture of goods to which it has been proved that a false trade or property mark has been applied.

Under the Customs Act, 1878, Sect. 18, cl. (*d*), as amended by the Indian Merchandise Marks Act, 1889, goods having ap lied thereto a counterfeit trade mark or a false trade description cannot be imported into British India.

A trade or property mark is a mark used, that is, already in use, not one that is intended to be used, and one that is used in respect of some particular goods or person. "The word 'trade mark' is the designation of marks or symbols applied to a vendible commodity;" *The Leather Cloth Company (Limited)* v. *The American Leather Cloth Company (Limited)*, 33 *L. J. N. S. Ch.*, p. 201; *Singer Manufacturing Co.* v. *Loog*, 8 *App. Ca.* 15, 32, *Goodfellow* v. *Prince*, 35 *Ch. D.* 9. In the Leather Cloth case it is also said by *Westbury*, L. C., (p. 201) "Property in a trade mark is that right to exclusive use of some mark, name, or symbol in connection with a particular manufacture, or vendible commodity; consequently, the use of the same mark in connection with a different article is not an infringement of such right of property. If, therefore, the trade mark contains in itself a clear and distinct description of the commodity to which it is affixed, it is not pirated by the use of a mark which, although in other respects similar, does not contain or give the same description, and which is impressed upon an article which is not of the nature or quality so described." See, also, *Hall* v. *Barrow*, 33 *L. J. Ch. N. S.* 207, where it is said that "the property in the trade mark consists in the exclusive right to the use of that mark as applied to some particular manufacture." This doctrine was acted on in the case of *Maxwell* v. *Hogg*, 36 *L. J. N. S. Ch.* 433, where it was decided that the mere registration of the title of a magazine, and the announcement by advertisement that such a magazine was about to appear, but not followed by the actual issue thereof, was not sufficient to create a property in the title; and in this case the judgment of *Willes*, J., in *Lawson* v. *The Bank of London*, 25 *L. J. N. S. C. P.* 188, 18 *C. B.* 84, was referred to, and the following passage quoted with approval:—"No action could, I apprehend, be maintained for the sale of goods branded or stamped with another manufacturer's mark, which mark had never been put forward to the world by the party complaining of the misuser of it." To entitle a trader to relief against an illegal use of his trade mark in the Court of Chancery, it is not necessary that the imitation should be so close as to deceive persons seeing the two marks side by side; but the degree of resemblance must be such that ordinary purchasers,

proceeding with ordinary caution, are likely to be misled; *Seixo* v. *Provezende*, *L. R.* 1 *Ch.* 192; and the actual physical resemblance of the two marks is not the sole question for the Court; for if the plaintiff's goods have, from his trade mark, become known in the market by a particular name, the adoption by the defendant of a mark or name which will cause his goods to bear the same name in the market is as much a violation of the plaintiff's rights as actual copying of his mark; *ib.*; see also the explanation to Sect. 28 of the Penal Code, as amended by Act I of 1889. Although the defendant may have *some* title to the use of a name or mark, he will not be justified in adopting it if the probable effect of his so doing is to lead the public to suppose that in purchasing his goods they are purchasing those of the plaintiff; *Seixo* v. *Provezende*, *ubi sup.*; but where a person is selling an article in his own name, fraud must be shewn to constitute a case for restraining him from so doing, on the ground that the name is one under which another has been selling a similar article; therefore, where a father had for many years exclusively sold a sauce under the title of "Burgess's" sauce, a court of equity refused to restrain his son from selling a similar article under that name, no fraud being proved; *Burgess* v. *Burgess*, 3 *De G. M. and G.* 896; and 22 *L. J. N. S. Ch.* 675.

In the English Merchandize Marks Act, 1862, it was provided that, in order to constitute a trade mark, the mark claimed must be lawfully used, and a question may possibly be raised whether trade marks which contain false statements of a gross character are "lawfully used." A court of equity will not protect persons who have been in the habit of using such trade marks by granting an injunction to restrain their piracy, on the ground that the plaintiff, to entitle himself to claim the intervention of a court of equity, must come into court with clean hands. In *Flavel* v. *Harrison*, 10 *Hare*, 467, the court refused to protect the use of the name "Flavel's Patent Kitchener," because it was shewn to the court that no such article had ever been patented; and 46 and 47 Vict., c. 51, s. 105, prohibits the selling of an article as "patent" which has not been patented. So in *Pidding* v. *Howe*, 8 *Sim.*, 477, the court refused an injunction, because false statements were

made as to the preparation of tea called "Howqua's Mixture." In *Edelsten* v. *Vick*, 11 *Hare*, 78, and *Holloway* v. *Holloway*, 13 *Beav*, 209, however, statements, though not strictly true, were held, under particular circumstances, not to disentitle the plaintiff to be protected by an injunction. In the Indian Penal Code, the words "lawfully used" do not occur; but the Indian Merchandize Marks Act, 1889, includes any statement as to goods being the subject of a patent in the definition of the term "trade description." Consequently, the adding of the word "patent" to the trade mark of an unpatented article would not amount to using a false trade mark but to using a false trade description.

These sections do not include false statements as to quantity, quality or material, which fall under the provisions of the Act relating to false trade descriptions.

That the false mark is used in a manner reasonably calculated to cause it to be believed that the articles to which it is affixed are the manufacture, merchandize, or property of a particular person must be inferred from the circumstances of the case.

If the words "Mappin, Sheffield," are stamped on the blade o a knife, no doubt can possibly exist that they are used in a manner reasonably calculated to cause it to be believed that the knife was manufactured by Messrs. Mappin of Sheffield. In every case, however, in which the manner is not evident at first sight, evidence must be given to shew that the use of the mark was such as to cause that to be believed which was not the truth.

The offence of using a false property mark must apply to cases where the moveable property to which it is affixed is enhanced in value by the mere fact of its belonging to a particular person, in consequence of which the mark of ownership partakes somewhat of the nature of a trade mark.

COUNTERFEITING TRADE MARK.

Sect. 483. *Counterfeiting a Trade Mark.*—**Whoever 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.**

Sect. 484. *Counterfeiting a Property Mark used by a Public Servant.*—**Whoever 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 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.**

Offences under Sect. 483 *are triable by a Presidency Magistrate, or a Magistrate of the first or second class; those under Sect.* 484, *by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class. A summons should issue in the first instance under Sect.* 484; *and a warrant under Sect.* 483. *Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.*

Evidence.

The evidence under these sections will be similar to that under the sections relating to forgery, and using of forged documents, except that the fraudulent intent in the counterfeiting need not be proved as the Indian Merchandize Marks Act, 1889, has struck out the words "with intent to cause damage or injury to the public or any person, knowingly" which formerly appeared in these sections between the words "whoever" and "counterfeits."

See the definition of counterfeiting, Sect. 28 *ante*, p. 33, and *Explanation* 2, added by Act I of 1889, Sect. 9.

MAKING DIE, &c.

Sect. 485. *Making, &c., any Die for counterfeiting any Trade Mark.*—**Whoever makes or has in his possession any die, plate, or other instrument for the purpose of counterfeiting a trade mark or property mark, or has in his possession a trade mark or property mark for the purpose**

of denoting that any goods are the manufacture or merchandize of a person whose manufacture or merchandize 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.

Triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

This section originally stood as follows:—"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 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," &c. The parts in italics are expressed in the new section in other words, but without making any alteration in the meaning of those parts.

The words within brackets have been omitted altogether, and the result of such omission is (1) that the making or possessing a die, plate, or other instrument for the purpose of counterfeiting a trade or property mark, or the possession of a trade or property mark for the purpose mentioned in the section is an offence irrespective of the intention to use it; and (2), the provisions as to locality and quality marks is omitted and provided for by that portion of the Act which relates to trade descriptions. It might be argued that the words "for the purpose of" mean "with intent to," but the way in which they were used in the original section in connection with "intent" would shew that they are equivalent to "suitable for," otherwise the spirit of the section would be

different from that of all the other sections of the Indian Merchandize Marks Act, which, in the first instance, do not regard the intention of the person accused, but leave it to him to prove that his intention is innocent.

The charge and evidence under this section will be similar to those under the section relating to the making of a die for counterfeiting coin, see p. 303, *ante*; and the charge should not contain any allegation as to the intention or knowledge of the accused. The defendant may claim an acquittal if he proves the facts set forth in Sect. 8 of the Indian Merchandize Marks Act, 1889, *ante*, p. 603.

SELLING GOODS WITH FALSE TRADE MARK.

Sect. 486. *Selling Goods marked with a Counterfeit Trade Mark or Property Mark.*—**Whoever sells, or exposes or has in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade mark or property mark affixed to or impressed upon the same or to or upon any case, package, or other receptacle in which such goods are contained, shall, unless he proves—**

(*a*) **that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and**

(*b*) **that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or**

(*c*) **that otherwise he had acted innocently,**

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

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Charge.

That you, the said A B, on or about the , day of , at , did sell certain goods, to wit, twelve reels of cotton, with a counterfeit trade mark affixed to the wrapper in which such goods were contained, to wit, a mark purporting to indicate that the said goods were made by Taylor and Co., of Derby, and that you have thereby committed an offence punishable under Sect. 486 of the Indian Penal Code, and within, &c.

Evidence.

This section has been altered by omitting the provisions as to trade descriptions, and also by leaving out all the provisions which required that the selling, &c., should be with the knowledge that the mark on the goods sold, &c., was counterfeit. The present section also goes further, and makes the selling, &c., an offence unless the defendant proves the facts set forth in clauses (*a*), (*b*), and (*c*). Consequently, all that has to be proved by the prosecution is that the mark is counterfeit, and that the defendant sold, &c., the goods on which it was placed. See, also, the remarks on the use of a false trade mark, *ante*, p. 601. Any goods, &c., having a false trade description may be forfeited under Sect. 9 of the Indian Merchandize Marks Act, 1889.

MAKING AND USING A FALSE MARK.

Sect. 487. *Making a False Mark upon any Receptacle containing Goods.*—**Whoever makes any false mark upon any case, package or other receptacle containing goods, in a manner reasonably calculated to cause any public servant or any other person to believe that such 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 receptacle are of a nature or quality different from the real nature or quality thereof shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.**

Sect. 488. *Punishment for making Use of any such False Mark.* **—Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud, be punished as if he had committed an offence against that section.**

Triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

The offences under these sections are the same as those of counterfeiting a trade mark and using a false trade mark, with this exception, that the mark used is neither a trade nor a property mark, but one which is used simply for the purpose of conveying official intimation of certain facts respecting goods.

These two sections are altered in a similar manner to all the preceding ones, by not requiring the prosecution to prove that the act of the defendant was fraudulent, and by throwing upon him the burden of proving that his act was not done fraudulently.

See, also, the remarks under the use of false trade mark, *ante*, p. 601. As to forfeiture of goods, see Sect. 9 of the Indian Merchandize Marks Act, 1889.

TAMPERING WITH PROPERTY MARKS.

Sect. 489. *Tampering with Property Mark.*—**Whoever removes, destroys, defaces or adds to 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.**

Triable by a Presidency Magistrate or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

Prove the removal, destruction, or defacing of the property mark by the defendant. Shew, also, that it was done with the intent to injure some person. If the mark was affixed to property which belonged to the defendant, the presumption in most cases would be that he had a right to do what he liked with his own, but if the property was not his own, but only in his power for a short time, then the presumption would be, on the contrary, that he had a fraudulent intention in what he was doing.

The words "adds to" are new.

TRADE DESCRIPTIONS.

Act IV of 1889, *Sect.* 2.—*Definition.*

Cl. (2) "*Trade description*" *means any description, statement or other indication, direct or indirect,—*

(*a*) *as to the number, quantity, measure, gauge or weight of any goods, or*

(*b*) *as to the place or country in which, or the time at which, any goods were made or produced, or*

(*c*) *as to the mode of manufacturing or producing any goods, or*

(*d*) *as to the material of which any goods are composed, or*

(*e*) *as to any goods being the subject of an existing patent, privilege or copyright;*

and the use of any numeral, word or mark which according to the custom of the trade is commonly taken to be an indication of any of the above matters shall be deemed to be a trade description within the meaning of this Act:

(3) "*false trade description*" *means a trade description which is untrue in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement or otherwise, where that alteration makes the description untrue in a material respect, and the fact that a trade description is a trade mark or part of a trade mark shall not prevent such trade description being a false trade description within the meaning of this Act;*

(4) *"goods" means anything which is the subject of trade or manufacture: and*

(5) *"name" includes any abbreviation of a name.*

Section 4. Provisions supplemental to the definition of false trade description.—The provisions of this Act respecting the application of a false trade description to goods or respecting goods to which a false trade description is applied, shall extend to the application to goods of any such numerals, words or marks, or arrangement or combination hereof, whether including a trade mark or not, as are or is reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandize they really are, and to goods having such numerals, words or marks, or arrangement or combination, applied thereto.

(2) *The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression false name or initials means as applied to any goods any name or initials—*

(a) not being a trade mark, or part of a trade mark, and

(b) being identical with or a colourable imitation of, the name or initials of a person carrying on business in connection with goods of the same description, and not having authorized the use of such name or initials.

(3) *A trade description which denotes or implies that there are contained in any goods to which it is applied more yards, feet or inches than there are contained therein standard yards, standard feet or standard inches is a false trade description.*

Section 5. Application of trade descriptions.—(1) A person shall be deemed to apply a trade description to goods who—

(a) applies it to the goods themselves, or

(b) applies it to any covering label, reel or other thing in or with which the goods are sold, or are exposed, or had in possession for sale, or any purpose of trade or manufacture, or

(*c*) *places, encloses or annexes any goods which are sold, or are exposed or had in possession for sale or any purpose of trade or manufacture, in, with or to any covering, label, reel or other thing to which a trade description has been applied, or*

(*d*) *uses a trade description in any manner reasonably calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade description.*

(2) *A trade description shall be deemed to be applied whether it is woven, impressed or otherwise worked into or annexed or affixed to the goods or any covering, label, reel or other thing.*

(3) *The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame or wrapper, and the expression "label" includes any band or ticket.*

Note.

Section 2, cl. 2, is a copy of Sect. 3, cl. 1, part 2, of 50 and 51 Viot. c. 28, except that in the definition of "goods" the words "or merchandize" is omitted in the present Act after the word "manufacture." The reason of the omission is not apparent, unless the framers of this Act considered that the word "trade" included "merchandize" which doubtless it does. Clauses (*a*), (*c*), (*d*) and (*e*) will probably give but little trouble in their interpretation, but clause (*b*) has already given rise to many difficulties. The question to be determined is what is a statement as to the place or country in which goods were made or produced.

The question as to time may be left out as it ought to give no difficulty. The term trade mark includes a mark indicating that goods are the merchandize of a particular person; consequently, it would seem that a trader in Bombay, having had goods made for him in England, would be entitled to mark those goods as his merchandize with his trade mark. Suppose that he choose to have no other mark on them than, say, "Smith Bombay." Under ordinary circumstances, that would indicate, at any rate, that they had been supplied by Smith of Bombay and would be per-

fectly legal, unless it should be held that the mark indicated that the goods were made by Smith in Bombay, which would certainly not be the *necessary* inference according to well known customs of trade. Much less would it seem to be illegal in cases where the manufacturer has put his own mark on the goods, for the Bombay trader has also to put his mark on them, the one being the manufacturer's trade mark, the other the merchant's. The only ground on which the putting the Bombay merchant's mark in the form above given could be held to be illegal is that the *necessary* inference is that the mark represents that the goods were made in Bombay. The only prohibition against the importation of goods bearing a mark or name which is not that of the actual maker is where goods, not made in the United Kingdom or British India, bear the mark or name of a manufacturer, dealer or trader in the United Kingdom, or British India; Act IV of 1889, Sect. 10. This would seem to support the view above contended for, but at the same time another difficulty may arise under it. Some goods are partly made in Germany, and are then sent to England to be finished. When finished they are sent out to Bombay with no name on them, but that of the Bombay merchant. Does that contravene the last quoted section? I should think not, because, although a part of the goods is made in Germany, the goods as merchandize are in fact made in England. Take, for instance, a microscope, made in England, but fitted with foreign lenses. The article exported is a microscope as a whole, and that has been made in England, and the lenses as such are not a microscope, and do not form part of it, even, until the process of fitting them to it has been performed in England. Consequently, the whole process of manufacture of the article exported must be held to have been performed in England.

Of course, the foregoing remarks do not apply to cases in which there is a false trade mark or description which is false by reason of its containing a positive erroneous statement or being a colourable imitation of some one else's trade mark.

On the sale of goods, by a manufacturer of such goods, *who is not otherwise a dealer in them*, there is, in the absence of any usage in the particular trade or as regards the particular goods to

supply goods of other makers, an implied contract that the goods shall be those of the manufacturer's own make; *Johnson* v. *Raylton*, 7 *Q. B. D.* 438.

Section 4, clauses 1 and 2, with its sub-clauses (*a*) and (*b*) are copied from clause 2 and clause 3 with its sub-clauses (*a*) and (*b*) of the English Act, but clause 3 is not in the English Act, which, however, has to clause 2 a sub-clause (*c*), which is in the following terms: 'any name or initials of a person which are either those of a fictitious person, or of some person not *bonâ fide* carrying on business in connexion with such goods." Section 5 is a copy of Sect. 5 of the English Act.

Section 4 extends the provisions of the Act against false trade descriptions to marks which are not trade marks, but which perform the functions of trade marks, and at the same time do not necessarily come within the definition of trade descriptions. It is somewhat difficult to see the necessity of this section, because the first clause of the definition of a trade mark "a mark used for denoting that goods are the manufacture or merchandize of a particular person" would certainly include the marks and names mentioned in Sect. 4, cl. 1 and cl. 2 (*a*) and (*b*), unless it is to be held that the word "used" in the definition of trade mark means "has been accustomed to be used" by a particular person, so as to be recognized as the trade mark of that person. If so, Sect. 4 would refer to other marks and signs which would convey the same impression as a trade mark, but which are probably manufactured for the occasion in such a way as to avoid being trade marks in the foregoing sense of the word. This section is necessary in the English Act because there is no definition of trade mark in it, and the offences with regard to trade marks are forgery of a trade mark, and falsely applying to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive; consequently, the expression 'trade mark' applied only to a mark which was actually in use by some one, and therefore capable of being forged or imitated, whereas under the Indian Act, under Sects. 478 and 480, unless the foregoing interpretation of "used" be accepted, it is evident that the false mark need not be a forgery or imitation of a previously existing mark so long

as the inference to be drawn from it as to the manufacturer or merchant is false.

Under the provisions of Sect. 16 of this Act the Supreme Government have issued instructions which are to be observed by Criminal Courts in dealing with variations between a trade description and the goods to which it is applied. These will be found in the appendix.

APPLYING A FALSE TRADE DESCRIPTION.

Section 6. Penalty for applying a false Trade Description.—If a person applies a false trade description to goods, he shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be punished with imprisonment for a term which may extend to three months or with fine which may extend to two hundred rupees, and in the case of a second or subsequent conviction with imprisonment which may extend to one year, or with fine, or with both.

Triable by the High Court, or any Court constituted under the Criminal Procedure Code, but in the case of a second charge being made against a person previously convicted under this section, no Magistrate of the third class can take cognizance of the offence. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

All that the prosecution has to prove is that the defendant has applied a trade description to certain goods, and that the trade description so applied is false as defined in Sect. 2, cl. (3), of the Act, *ante*, p. 613. What is an application of the description is defined in Sect. 5, *ante*, p. 614. On proof of this the defendant must be convicted, unless he can prove that he acted without intent to defraud, see *ante*, p. 603. The respondents, who were manufacturers of gunpowder in England, entered into a contract with the English Government to supply powder. Owing to an accident they were unable to manufacture the powder themselves, and in order to carry out their contract they bought German powder, of a quality equal to that of their own manufacture, put it into

barrels supplied by Government, and put labels upon the barrels containing their own name, and a description applicable to the powder of their own manufacture which they would have delivered if they had not been prevented by the accident, but without any indication that the powder was of German manufacture. Held, that the respondents were guilty of the offence of applying a false trade description to goods, and that they had acted with intent to defraud; *Starey* v. *The Chilworth Gunpowder Co.*, 24 *Q. B. D.* 90. A person delivered casks of beer and left with them an invoice describing them as barrels. The delivery of such an invoice might amount to the application of the trade description of barrels to such casks, although the invoice was not physically attached to the casks, or any of them, *Budd* v. *Lucas* [1891], 1 *Q. B.* 408.

Fraud under the Merchandise Marks Act is not used in the sense of putting off a bad article on a customer as a good one, but the putting off on a purchaser of an article different from that which he intends to purchase, and believes that he is purchasing; *Starey* v *The Chilworth Gunpowder Co*, 24 *Q. B. D.* 90.

If he proves the facts set forth in Sect. 8 *ante*, p. 603, he will be entitled to an acquittal. Under Sect. 9 of the Act, *vide* Appendix, goods bearing a false trade description may be forfeited.

SELLING, &c., GOODS BEARING A FALSE TRADE DESCRIPTION.

Section 7. Penalty for selling Goods to which a false Trade Description is applied.—If a person sells, or exposes, or has in possession for sale or any purpose of trade or manufacture any goods or things to which a false trade description is applied he shall, unless he proves—

(*a*) *that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade description, and*

(*b*) *that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things or*

(c) that otherwise he had acted innocently,

be punished with imprisonment for a term which may extend to three months or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction with imprisonment which may extend to one year, or with fine, or with both.

Triable by the High Court, or any court constituted under the Criminal Procedure Code, but, in the case of a second charge being made against a person previously convicted under this section, no Magistrate of the third class can take cognizance of the offence. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

Prove the sale, exposure for sale, or possession for sale, or for any purpose of trade or manufacture, and that the goods or things bore a false trade description. On such proof the defendant will then be bound to prove the circumstances mentioned in clauses (*a*), (*b*) and (*c*) if he wishes to avoid a conviction.

The appellant, a mineral water manufacturer, was possessed for the purposes of his trade of glass bottles, on which were moulded his name and address, "T. Wood, 430, Hackney Road." A considerable number of his bottles so moulded found their way into the possession of the respondent, who was also a manufacturer of mineral waters. The respondent caused such bottles to be filled with mineral water of his own manufacture, and issued them so filled to his customer; but before issuing them, he caused a paper label bearing his own name and address to be affixed to the bottom of each bottle, and the delivery of such bottles to his customers was in every case accompanied by an invoice in the following terms, "Received from T. Burgess, Mineral Water Manufacturer." He had no authority from the appellant to use bottles bearing the appellant's name. On the 15th of January, 1889, there were found in the respondent's van, in the course of sale and delivery to the respondent's customers, certain of the appellant's bottles moulded, filled, and labelled as aforesaid. The respondent was

thereupon summoned for having in his possession for sale goods to which a false trade description, namely, the false name of T. Wood, was applied.

The magistrate found as a fact that the name T. Wood was applied as a trade description to the contents of the bottles; but he also found that the respondent had no intention to defraud his customers by representing his mineral waters to be of the appellant's manufacture and dismissed the summons. *Lord Coleridge*, C. J., and *Mathew*, J. however, held that the magistrate was wrong in dismissing the summons as an intent to defraud the purchaser was not a necessary ingredient in the offence charged; *Wood* v. *Burgess*, 24 *Q. B. D.* 162.

Under Sect. 9 goods or things bearing a false trade description will be liable to forfeiture.

(c) that otherwise he had acted innocently,

be punished with imprisonment for a term which may extend to three months or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction with imprisonment which may extend to one year, or with fine, or with both.

Triable by the High Court, or any court constituted under the Criminal Procedure Code, but, in the case of a second charge being made against a person previously convicted under this section, no Magistrate of the third class can take cognizance of the offence. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

Prove the sale, exposure for sale, or possession for sale, or for any purpose of trade or manufacture, and that the goods or things bore a false trade description. On such proof the defendant will then be bound to prove the circumstances mentioned in clauses (*a*), (*b*) and (*c*) if he wishes to avoid a conviction.

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Under Sect. 9 goods or things bearing a false trade description will be liable to forfeiture.

CHAPTER XIX.

Criminal Breach of Contracts of Service.

In the report of the Indian Law Commissioners, the following remarks upon this chapter are found:—"We agree with the great body of jurists in thinking that, in general, a mere breach of contract ought not to be an offence, but only the subject of a civil action. To this general rule there are, however, some exceptions. Some breaches of contract are very likely to cause evil such as no damages, or only very high damages, can repair, and are also very likely to be committed by persons from whom it is exceedingly improbable that any damages can be obtained. Such breaches of contract are, we conceive, proper subjects for penal legislation. In England, where the roads are secure, where the means of conveyance can easily be obtained, and damages sufficient to compensate for any inconvenience or expense which may have been suffered can easily be recovered, it would be unnecessary to provide a punishment for such breaches of contract as are made punishable by the 490th Section. But the mode of performing journeys and the state of society in India, are widely different. It is often necessary for travellers of the upper classes, even for English ladies, ignorant perhaps of the native languages, and with young children at their breast, to perform journeys of many miles over uninhabited wastes, and through jungles in which it is dangerous to linger for a moment, in palanquins, borne by persons of the lowest class. If, as sometimes happens, those persons should, in a solitary place, set down the palanquin and run away, it is difficult to conceive a more distressing situation than that in which their employer would be left. None but very high damages would be any reparation for such a wrong. But the class of people by whom alone such a wrong is at all likely to be committed can pay no damages. The whole property of the delinquents would probably not cover the expense of prosecuting them civilly. It, therefore, appears to us that breaches of contract of this description may, with strict propriety, be treated as crimes."

BREACH OF CONTRACT ON A JOURNEY.

Sect. 490. *Breach of Contract of Service during a Journey.* —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 or property during a voyage or journey, voluntarily omits to do so, 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.

Illustrations.

(*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, has not committed any offence.

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 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 their 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.

Triable by a Presidency Magistrate or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Compoundable. Prosecution must be by a person aggrieved by the offence ; *Cr. P. C*, 1882, *Sect.* 198.

Evidence.

Under all these sections there must be proof of a lawful contract as alleged in the charge. It is not necessary that every term of the contract should have been expressly agreed upon for the law will imply that the ordinary incidents of well-known classes of service were included when the general contract for that particular class of service was made; but there must be enough of the contract proved to allow the court to draw the necessary inferences of fact. The contract must also be lawful, that is, for a lawful object. Thus, a contract to convey stolen or smuggled goods from one place to another would not be lawful, and a person who made such a contract could not be punished under this section if he broke his contract in the middle of the journey. So, too, seeing that every contract imports a consideration, it is necessary that the consideration should be a good consideration, that is, a lawful one, which the law does not prohibit, but the courts will not enter into the sufficiency of the consideration, as that is a matter entirely to be determined between the employer and the employed; in fact, it is very probable that the court would only look to the voluntary engagement of the servant and the trust reposed in him by the master consequent thereupon, as that would be a sufficient contract (see *Chitty on Contracts*, 12*th edition*, p. 30) and not go

into the question of consideration, except for the purpose of seeing that it was not an unlawful one. There is no illustration appended to these sections of what a lawful contract is, and the only reference made to the lawfulness or unlawfulness of a contract is in *Illustration* (*d*) to Sect. 490, which is a case in which there was no contract at all in existence. The contract must be one to take a particular person or load of goods from one specified place to another, not to go from one place to another, in order at the latter to give the use of a cart at a specified rate of remuneration for a particular purpose, and a breach of the latter form of contract by not going to the place where the cart is to be employed does not fall under this section; *In re Keshav, B. R. 29th September* 1887.

A contract having been proved, the next thing is to shew a breach thereof, *i. e.*, that the defendant voluntarily omitted to perform it. This may be either by an actual refusal in words, or by his absenting himself when required to carry out the contract. Except in one case, the time of the act constituting the breach is unimportant so long as it is after the making of the contract. It is immaterial whether the breach be by a non-commencement of the contract or by a cessation of it. It is equally a breach whether, having made a contract, the contractor does not come at the time specified to commence his work, or, having commenced it, he leaves off in the middle. The exception is where no consideration is to pass from the employer to the employed, and there the work must have commenced: the employer must have actually reposed trust in the servant by committing to his care his own property or person, or the person whom the servant is to take charge of. "An action will not lie for *not* doing a thing where there is no consideration, such as reward, to uphold a promise to do it; yet, where there is a *delivery* of goods and chattels or moneys to a person who undertakes to do something respecting them even without any reward for his trouble, an action will lie on this bailment if there be a neglect in the management, by which the goods are spoiled or the like"; *Chitty on Contracts, 12th Edition*, p. 30; see, also, *Wheatly* v. *Low*, *Cro. Jac.* 667; *Shilliheer* v. *Glyn*, 2 *M. and W.* 143; and *Coggs* v. *Bernard*, 2 *Lord Raym.* 909: and the notes thereto in the first volume of *Smith's Leading Cases*.

If the omission on the part of the servant to carry out his contract arose from an accident, or superior force, or mistake, or the fraud of a person other than himself, it would not be voluntary, and he would be relieved from criminal responsibility. In Sect. 492 the words "or without reasonable cause" are introduced. Doubtless this arose from the fact that the urgency was greater under this section, and, therefore, no chance should be allowed to the servant to manufacture a "reasonable cause." A servant who, having made a contract to serve during a voyage, refused to go on board ship during a hurricane, his master being desirous of going, or one who refused to pass through or remain a reasonable time in a district where cholera was raging, would be liable.

If, however, the master knew of the latter fact before he made the contract, and concealed it from the servant, it is a great question whether the contract would not be entirely vitiated, and the servant be at liberty to go wherever he liked. A question might also arise, whether a servant would be liable who ran away on a journey on the approach of a tiger, unless the contract was expressly to guard as well as conduct, for self-preservation is the first law of nature; and besides, the fact of a servant standing his ground might result in his being killed, and thus his master might be permanently, instead of temporarily, deprived of his services. There could be no conviction under this or the following sections, if the defendant left his service under a *bonâ fide* belief that the law allowed him to do so; but then it must be most distinctly shewn that the omission was in pursuance of his supposed right, and not merely that he might possibly have acted under such a belief; *Willett* v. *Boote*, 30 *L. J. N. S. M. C.* 6.

The words "during a voyage or journey" apply to the whole section; therefore, a breach of contract to carry indigo from the field to the *vats* is not punishable under this section; *In re Nawa Tewaree*, 6 *W. R. Cr.* 80. In conformity with this decision the High Court at Calcutta have further ruled, that these words limit the offences created by this section to those committed against travellers. They, therefore, held, that a contract to convey the complainant's coal from one named place to another, and also for two years to convey his coal generally from whence he pleased to

where he pleased, the carter not agreeing to convey, but to "cause" it to be conveyed, did not come within the section; *Sage* v. *Nirunjun Chaterjee*, 9 *W. R. Cr.* 12. The same principle was applied to a contract for the conveyance of paddy on the accused's boat; *Emp.* v. *Vithu Govind*, *B. R.* 16*th June* 1892. Nor does it apply to servants hired by the month, and under a continuing implied contract to serve until the engagement is terminated by a month's notice; *Weir's Crim. R.* 338.

The contract has been held in *Unwin* v. *Clarke*, 1 *L. R. Q. B.* 417, not to be terminated by conviction and punishment; but the contrary, however, appears to have been ruled in Bengal; 2 *R. J. and P.* 24.

BREACH OF CONTRACT TO ATTEND ON HELPLESS PERSONS.

Sect. 491. *Breach of Contract to attend on Helpless Persons.*— **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 of bodily infirmity, is helpless, or incapable of providing for his own safety or of supplying his own wants, voluntarily omits to do so, 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.**

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Compoundable. Prosecution as under Sect. 490 *must be by person aggrieved.*

Evidence.

The evidence under this section will be the same as that under the foregoing one, with the same exception that the terms of the contract will be slightly varied. There are, however, no exceptions to the duty cast upon the servant of fulfilling his contract.

While that is in force and the servant is physically able to perform it, it is incumbent on him to do so; and this severity, it will be seen, is absolutely necessary, if the character and con-

dition of those intrusted to him is taken into consideration. If a servant is ill, and from that cause is unable to fulfil his contract, his omission is not voluntary, and he is, therefore, in that case not liable under the present section.

A contract to serve as an ordinary cook is not a contract to attend on or supply the wants of a helpless person; consequently, if a cook leaves his service without warning or permission he cannot be convicted under this section, although, at the time of leaving, his employer is ill and unable to supply his own wants; *Emp* v. *Solomon, B. R. 8th December* 1887.

BREACH OF CONTRACT TO SERVE AT A DISTANT PLACE.

Sect. 492. *Breach of Contract to serve at a Distant Place.*— **Whoever, being bound by a lawful contract in writing to work for another person as an artificer, workman, or labourer, for a period of 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.**

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Compoundable. Prosecution as under Sect. 490 *must be by person aggrieved.*

Evidence.

A lawful contract in writing must be proved between the defendant and some other person, to work for that other person as an artificer, workman, or labourer; and this contract must be

lawful both at the place it is entered into, and lawful in India, the place where the punishment for its breach is sought to be enforced. The contract may be entered into at any place.

The word "workman," or "labourer," has received a construction in the case of *Riley* v. *Ward*, 2 *Exch.* 59; 18 *L. J. N. S. Ex.* 120, where *Parke*, B., says that these words are "applicable to those persons only who strictly contract as *labourers*—that is, to such as enter into a contract to employ their *personal* services, and to receive payment for that in wages"; 2 *Exch.* p. 68. In this case, a person who took a contract to execute a certain cutting on a railway, at a certain sum per cubic yard, and employed several men under him to assist in doing the work, was held not to be a workman or labourer, although he did a portion of the work himself. This was upheld in the case of *Sharman* v. *Sanders*, 22 *L. J. N. S. C. P.* 87, 13 *C. B.* 176, where it was held that a man who contracted to load ironstone at so much a ton, but did not stipulate for his own personal labour, although he did, from time to time, work with the men he employed under him, was not an *artificer*. In that case, p. 89, *Jervis*, C. J., said:—"An artificer must be a person who is to have the personal performance of some work for which he is to be paid wages, and this must be with reference to the original contract or obligation." These two cases in the Exchequer and Common Pleas were followed by one in the Queen's Bench, *Bowers* v. *Loveless*, 25 *L. J. N. S. Q. B.* 371, 6 *E. & B.* 584, where butty colliers engaged to get coal from a mine at so much a yard or ton, and bound to work personally in the mine, were held to be artificers, although they might employ other men under them. These were all upheld in the Exchequer Chamber, in the case of *Ingram* v. *Barnes*, 26 *L. J. N. S. Q. B.* 319, 7 *E. & B.* 115, where the court held that the plaintiff, a man who entered into a contract to make bricks on the following terms, was not an artificer: The owner of the brick-field was to find clay and all materials, the plaintiff to find all the labour; the plaintiff was to make as many bricks as the other should require for the sum of 10*s.* 6*d.* per thousand, but he did not bind himself to work personally. Under the contract the plaintiff did part of the work himself, and employed others to do the rest.

A contract for the hire of carts is not a contract for the employment of an artificer, workman, or labourer; *In re Keshav, B. R. 29th September* 1887. On this point see also the notes to Act XIII. of 1859, Sect. 1, *post*, p. 632.

The contract must not be for a longer term than three years, and must be to work at some place in British India. There is no restriction as to the place where the contract is to be made; therefore, persons in England, or elsewhere out of India, contracting to work in India, will be liable under this section, if they break their contract after they have arrived in India and during the continuance of the contract.

It must further be shewn, and this will in general appear upon the face of the contract, that the employer has paid, or is to pay, the cost of conveying the workman to the place where the work is to be done. If he has paid that cost, the amount should be proved in evidence, to enable the court to inflict the proper fine.

It may be noted here, that the word "expense," which occurs twice in this section, has not the same extent of meaning in both cases. When it is first used, it is evident that it refers either to what has been paid by the master, or to what may have to be paid by him, and simply means, that part of the agreement is to be that the master shall take the workman to the place where the work is to be performed free of all cost to the latter. In the second place, it means the amount actually expended by the employer for the purpose of providing conveyance for the servant, and can only be ascertained when the servant has actually been carried to the scene of his labour at the cost of his master, or the master has in advance engaged a passage for him, and paid or rendered himself liable for the cost of conveyance. If the servant voluntarily deserts the service, before he starts for, or refuses to go to, the place whither he has engaged to proceed, fine cannot be inflicted as a punishment, but only imprisonment, unless the master can prove that he has been put to any expense in the way mentioned in the latter part of the last sentence. The fine is intended as an alternative, or increased punishment, in cases where there is not only desertion or refusal, but where that is aggravated by the

fact that the defendant has caused the prosecutor to expend a large sum of money upon him without getting the return for which he stipulated.

The act or omission constituting the offence must be proved to have taken place after the time when the agreement was to come into operation, and before the time when it was to terminate, either originally, or by virtue of any extension contemplated in the agreement. A person who deserts the service through illness, which prevents him from attending to it, or through some *vis major* which keeps him away, does not desert voluntarily. What is reasonable cause for a refusal to perform the service which has been contracted for must depend entirely upon the circumstances of each case, though the section specifically names two causes—ill-treatment, and neglect on the part of the master to perform his part of the contract.

Whether the service required is reasonable and proper service must also be determined greatly from the contract, though it would appear from the words of the section that, if a man were to contract to perform unreasonable and improper service, he could not be punished for refusing to perform it, if he afterwards repented of his contract, and said he would not go on with it. But what would amount to such unreasonable and improper service remains to be seen.

Emigrants refusing to embark after contract duly made are punishable under this section; *Mad. Act V. of* 1866, *Sect.* 12; *Act VII. of* 1871, *Sect.* 45; *Act III. of* 1876, *Sect.* 40.

ACT No. XIII. OF 1859.

An Act *to provide for the punishment of breaches of contract by Artificers, Workmen, and Labourers in certain cases.*

Preamble.—Whereas much loss and inconvenience are sustained by manufacturers, tradesmen, and others in the several Presidency towns of Calcutta, Madras, and Bombay, and in other places, from fraudulent breach of contract on the part of artificers, workmen, and labourers who have received money in advance on account of work which they have contracted to perform; and whereas the remedy by suit in the Civil Courts for the recovery of damages is wholly

insufficient, and it is just and proper that persons guilty of such fraudulent breach of contract should be subject to punishment; it is enacted as follows :—

Section 1. *If a workman neglect to perform work, on account of which he has received an advance of money, complaint may be made to the Magistrate.—When any artificer, workman, or labourer shall have received from any master or employer, resident or carrying on business in any Presidency town, or from any person acting on behalf of such master or employer, an advance of money on account of any work which he shall have contracted to perform, or to get performed by any other artificers, workmen, or labourers, if such artificers, workmen, or labourers shall wilfully and without lawful or reasonable excuse neglect, or refuse to perform, or get performed such work, according to the terms of his contract, such master, or employer, or any such person as aforesaid, may complain to a Magistrate of police, and the Magistrate shall thereupon issue a summons or a warrant, as he shall think proper, for bringing before him such artificer, workman or labourer, and shall hear and determine the case.*

Notes.

The Act for the Limitation of Suits does not apply to applications under this Act ; *In re Kittu, I. L. R.* 11 *Mad.* 332 ; *Emp.* v. *Konda, I. L. R.* 16 *Mad.* 347.

This Act does not apply if the work is to be performed in foreign territory ; *Gregory* v. *Vadakasi, I. L. R.* 10 *Mad.* 21.

As to who is a workman, artificer, or labourer, see the notes to Sect. 492 of the Penal Code, *ante*, p. 628.

A contract to supply labourers and to get labour performed falls within this Act, although the nature and extent of the work are not clearly defined ; *Rowson* v. *Hanama, I. L. R.* 1 *Mad.* 280. A contract, in consideration of an advance of money, to supply labourers to do certain work on an estate falls within the scope of this Act, and the fact that such contract contains covenants to pay penalties in default of supplying the labourers, and to repay the advance, if necessary, by personal labour for five years, does not take the contract out of the operation of this Act, so as to make illegal an order directing the contractor to be imprisoned for

failure to comply with an order directing him to repay the advance; *Ramasami* v. *Kandasami*, *I. L. R.* 8 *Mad.* 379. It has, however, been held, that a person who is a contractor, or sub-contractor, and engages to get work done, but does not engage to work himself, is not a workman, artificer or labourer; *Gilby* v. *Subbu Pillai*, *I. L. R.* 7 *Mad.* 100; *In re Balkhrishna Shaligram*, *I. L. R.* 10 *Bom.* 96. These two latter decisions do not seem to be in accord with those in *Rowson* v. *Hanuma* and *Ramasami* v. *Kandusami*, in neither of which does it appear that the contractor, if the contract was carried out, was to do any work himself, but was only to get others to do certain work. In the two later Madras cases no reference is made to what the court there had previously decided, and the Bombay case is decided entirely on the authority of the case in *I. L. R.* 7 *Mad.* The Act only applies to artificers, workmen, or labourers, and, in order to bring the case under the Act, it must be established that the accused belongs to one of those classes. The difficulty is to determine when a contractor is also an artificer, workman, or labourer, because it does not follow that, having once come under one of those classes, he always remains there. On the whole, it would seem that the decision in *I. L. R.* 7 *Mad.*, followed in *I. L. R.* 10 *Bom.*, is more conformable to reason than the decision in the other two cases, because a man, who collects a gang of coolies, superintends their work rather than works with them. If, however, he was himself to work, he would also be a labourer, and might be responsible criminally for non-performance of so much of the work as he had to do personally. In the case of *Caluram* v. *Chengappa*, *I. L. R.* 13 *Mad.* 351, the court held that personal labour was necessary to bring an accused under this section.

A labourer agreed to serve the prosecutor in consideration of money due from him on account of previous debts. He served for three months only, and then quitted service. The High Court held that he was not liable to be dealt with criminally, the breach of contract not being fraudulent within the meaning of this Act, and no money in advance having been received; *Reg.* v. *Jethya valad Vastya*, 9 *Bom. H. C. R.* 171; *Emp.* v. *Rajab*, *I. L. R.* 16

Bom. 368. A breach of contract to supply wood, although an advance be made, does not fall within the purview of this Act; *Upper Assam Tea Co.* v. *Thopoor*, 4 *B. L. R. App.* 1. This Act does not apply to contracts for *chákri* (domestic or personal service); *In re Domestic Servants*, 3 *B. L. R. A. Cr. J.* 32; nor does it apply where an advance has not only been worked off by a labourer, but there is an actual balance due to him; *Tara Dass* v. *Bhaloo Sheik*, 8 *W. R. Cr.* 69. This last case has been dissented from in *Emp.* v. *Inderjit*, *I. L. R.* 11 *All.* 262; where it was held that the use of the word "fraudulent" in the preamble does not limit the provisions of the subsequent sections, and *any* refusal to work which is wilful, and without lawful or reasonable excuse, will fall within the provisions of this section, although at the time of the refusal money might be due to the workman; *Emp.* v. *Rajab*, *ubi supra.*

Where a labourer received an advance of Rs. 95 from a cultivator in the Wynaad, and bound himself to work for the cultivator till repayment, it was ruled by the High Court, on breach by labourer and complaint from cultivator, that the contract was not within the Act. This was a reference to the High Court by a district magistrate of an order by a subordinate magistrate directing the labourer to perform the work according to the terms of his contract. The order was referred as illegal, on the grounds that it sanctioned a species of slavery; and the High Court, in making the above-mentioned ruling, said:—"A construction of the Act must not be adopted which would enforce a contract in the violation of a law of a more stringent character"; 7 *Mad. H. C. R. App.*, p. 31; see, also, *Ram Prasad* v. *Dirgpal*, *I. L. R.* 3 *All.* 744; *Emp.* v. *Rajab*, *I. L. R.* 16 *Bom.* 368; *Emp.* v. *Ningappa*, *B R* 10*th May* 1895.

Where a labourer contracted with the manager of a silk factory, for a money consideration, to work at the factory for four months in a year for three successive years, and, after receiving an advance of wages on account of the contract, broke the terms of his contract, he was held liable to a prosecution under this Act; *Koonjobehary Lall* v. *Raja Doomney*, 14 *W. R. Cr.* 29. It has been ruled that gold and silver money, given to an artificer as raw material to

make the article contracted for (an idol), is an advance of money within the meaning of this section. In this case the court said:—"The fact that the money was perhaps—and this is not clear—to be used as raw material, does not, in their opinion, prevent it being an advance"; 5 *Mad. H. C. R. App* 24. It seems somewhat difficult to determine on what grounds this ruling was based. This Act extends to coolies in Assam who have received advances on account of work to be done; *Reg.* v. *Gaub Gorab Cachares*, 8 *W. R. Cr.* 6.

The words "or in any station of the Settlement of Prince of Wales' Island, Singapore, and Malacca" stood originally in this section after the words Presidency town, but were repealed by Act XVI. of 1874.

When a complaint has been made against an artificer, &c., under this Act, the inquiry to be made under this section, is not an inquiry into an offence that may be tried summarily, *Pollard* v. *Motilal*, *I. L. R.* 4 *Mad.* 234.

Section 2. *Magistrate may order re-payment of advance, ance of Contract.—Penalty if Workman fail to comply with the Order. —If it shall be proved to the satisfaction of the Magistrate that such artificer, workman, or labourer, has received money in advance from the complainant on account of any work, and has wilfully and without lawful or reasonable excuse neglected, or refused to perform, or get performed the same, according to the terms of his contract, the Magistrate shall, at the option of the complainant, either order such artificer, workman, or labourer to repay the money advanced, or such part thereof as may seem to the Magistrate just and proper, or order him to perform, or get performed such work, according to the terms of his contract; and if such artificer, workman, or labourer shall fail to comply with the said order the Magistrate may sentence him to be imprisoned with hard labour for a term not exceeding three months, or if the order be for the repayment of a sum of money, for a term not exceeding three months, or until such sum of money shall be sooner repaid; provided that no such order for the repayment of any money shall, while the same remains unsatisfied, deprive the complainant of any civil remedy by action or otherwise which he might have had but for this Act.*

Notes.

An order of a magistrate under the section, "That the prisoner should work for a certain period, and in case he failed to do so should suffer rigorous imprisonment for one month," was annulled as to the latter part, as the magistrate had no power to make that order until the failure had occurred and been proved to him; *Reg.* v. *Jona bin Balu*, 4 *Bom. H. C. R. C. C.* 37; see, also, 6 *Mad. H. C. R. App.* 24; *In re Babaji*, *B. R.* 26*th April* 1888; *Emp.* v. *Sakharam*, *B. R.* 3*rd May* 1888.

The proper order to be made is (at the option of the complainant) either for repayment of the advance made, in whole or in part, at the discretion of the magistrate, or for performance of the contract; *Griffiths* v. *Tezia*, *I. L. R.* 21 *Calc.* 262. A conviction for breach of contract of service, followed by imprisonment, is a bar to any subsequent conviction for further breach by not returning to serve after the punishment has been suffered; *ib.*

Section 3. *Magistrate may require Workman to give Security for due performance of Order.—When the magistrate shall order any artificer, workman, or labourer to perform or get performed any work, according to the terms of his contract, he may also, at the request of the complainant, require such artificer, workman, or labourer to enter into a recognizance with sufficient security for the due performance of the order; and in default of his entering into such recognizance, or furnishing such security to the satisfaction of the magistrate, may sentence him to be imprisoned with hard labour for a period not exceeding three months.*

Section 4. *To what Contracts the Act extends.—The word "contract," as used in this Act, shall extend to all contracts and agreements, whether by deed, or written, or verbal, and whether such contract be for a certain time, or for specified work, or otherwise.*

Section 5. *Act may be extended by Government.—This Act may be extended by the Governor-General of India in Council, or by the Executive Government of any Presidency or place, to any place within the limits of their respective jurisdictions. In the event of this Act being so extended, the powers hereby vested in a magistrate of police shall be exercised by such officer or officers as shall be specially appointed by Government to exercise such powers.*

CHAPTER XX.

OFFENCES RELATING TO MARRIAGE.

FRAUDULENT MARRIAGE CEREMONY, &c.

Sect. 493. *Cohabitation in consequence of a belief of Lawful Marriage*—**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.**

Sects. 494, 495. See *post*, p. 639.

Sect. 496. *Marriage Ceremony gone through with Fraudulent Intent without Lawful Marriage*—**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**

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable. Prosecution must be by person aggrieved, Cr. P. C., 1882, Sch. 198.

Charge under Section 493.

That you, the said A B on or about the day of , at , by deceit, did cause a certain woman, to wit, C D, not lawfully married to you, to believe that she was lawfully married to you, and in that belief to cohabit or have sexual intercourse with you, the said A B; and that you, the said A B, have thereby committed an offence punishable under Sect. 493 of the Indian Penal Code, and within, &c.

Evidence.

The offences created in these two sections are very closely allied.

The distinction, however, between them consists in this: the former almost supposes the previous existence of the latter: the offence created by Sect. 496 may be committed by a man or a woman, and does not necessarily require that one party should have been deceived by the other, nor that cohabitation or sexual intercourse should have followed the act of marriage. Under Sect. 493, the woman must have been deceived by the man, and, in consequence of that deception, have cohabited with him, or permitted him to have sexual intercourse with her.

The means by which the woman may be deceived are various. It may be by representing that when she was a child the defendant was lawfully married to her, or by him representing that he is a Mahomedan or a Hindu, and then going through the Mahomedan or Hindu form of marriage with a Mahomedan or Hindu woman, as the case may be. Deceit of this, or of some other cognate nature, must be proved. The deceit must, however, go to the extent of inducing the woman to believe that she is lawfully married to the man. It must then be proved that, in consequence of the deception and in the belief implanted by it, the woman cohabited with the man, or allowed him to have sexual intercourse with her.

Under Sec. 496, not only must it be shown that a man and woman went through the ceremony of being married without thereby being legally married, but that it was done dishonestly, or with a fraudulent intent, as in the case of a pretended lawful marriage to enable the parties to obtain property coming to one or both of them on marriage; or if a man, wishing to obtain money, jewels or other property belonging to a woman, should deceive her into going through an invalid marriage ceremony, in order to obtain them, and then abscond from cohabiting with her. See *Reg.* v. *Kudum*, *W. R.* 1864, *Cr.* 13. An offence may be committed under this section without either party having been previously married. It further applies to cases in which a ceremony is gone through which would in no case constitute a marriage,

and in which one of the parties is deceived by the other into the belief that it does constitute a marriage, or in which effect is sought to be given by the proceeding to some collateral fraudulent purpose. Where the ceremony gone through does, but for the previous marriage, constitute a lawful marriage, and both parties are aware of the circumstances of the previous marriage, Sect. 494 applies; *Reg.* v. *Rama Sona*, *B. R. 24th July* 1878.

The mere abuse of the marriage ceremony, whether of a religious character or not, is not an offence where there is no deceit practised on the woman, and where there is no dishonest or fraudulent intention.

BIGAMY.

Sect. 494. *Marrying again during the Lifetime of Husband or Wife.*—**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.—**This 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.**

Sect. 495. *Same offence with Concealment of the former Marriage.*—**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.

Sect. 496. See *ante*, p. 637.

Triable by the Court of Session. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable under Sect. 494, *but not under Sect.* 495. *Not compoundable. No prosecution is to be entertained except on complaint of some person aggrieved by the offence; Cr. P. C.*, 1882, *Sect.* 198.

Charge.

That you, the said A B, having a wife, to wit, one E B, living, on or about the day of , at , did marry one C D, such last-mentioned marriage being void by reason of its taking place during the lifetime of such wife, to wit, E B, (you having concealed from the said C D the fact of your said former marriage); and that you, the said A B, have thereby committed an offence punishable under Sect. 494 (495) of the Indian Penal Code, and within, &c.

Evidence.

The marriage between the defendant and E B must be proved strictly; mere reputation, or the opinion of members of the family, will not suffice; Act I. of 1872, Sect. 50. It is immaterial whether it be celebrated in a foreign country or not; 1 *Hale*, 692; so long as it is valid according to the law of the country where it was celebrated and that law is recognised in the country where the second marriage ceremony is gone through. A valid marriage must, however, be proved; *per Bayley*, J., in *Smith* v. *Huson*, 1 *Phillimore*, 287; the law will not presume it, as in civil cases, in a case of bigamy; *ib.*; and it must be proved with the same strictness as any other material fact; *Emp.* v. *Hamber Singh*, *I. L. R.* 5 *Cal.* 566. It is not, however, necessary to prove the registration of the marriage, the licence, the publication of the banns, or any other matter merely preliminary; the marriage may be proved by some person who was present and saw the

ceremony performed; *R.* v. *Allison*, *R. and R.* 109; *Reg.* v. *Manwaring*, 1 *Dears. and B. C. C.* 132; provided he deposes to facts of which the court can take judicial notice as constituting a valid marriage. If celebrated in a foreign country, circumstances should be proved by those acquainted with the laws of that country from which a conclusion may be come to as to whether it is a valid marriage according to those laws. In England and other Christian countries, only those marriages are reckoned valid which are celebrated according to the general principles obtaining in Christian countries, *viz.*, that a man should have but one wife, and a woman but one husband at once. On this subject *Wilde*, J. O., in *Hyde* v. *Hyde and Woodmansee*, 35 *L. J. N. S. P. and M.* 57, following *Warrender* v. *Warrender*, 2 *Cl. and F.* 530, says:—"I conceive that marriage, as understood in Christendom, may be defined as the voluntary union for life of one man and one woman, to the exclusion of all others"; and refused to take any notice of a marriage contracted among the Mormons, and cited as the only authority, independent of general principles, the case of *Ardaseer Cursetjee* v. *Perozeboye*, 10 *Moo. P. C. C.* 375, in which the Privy Council held that Parsee marriages were not within the force of a charter extending the jurisdiction of the ecclesiastical courts to Her Majesty's subjects in India, "so far as the circumstances and occasion of the said people shall admit and require." See, also, *Bethell* v. *Hildyard*, 38 *Ch. D.* 220, which was a case of the marriage in, and of a woman belonging to, a country in which polygamy was allowed. Where, however, there is a marriage with a native of a country, according to local customs, in which monogamy is the rule, that will be held in England to be a valid marriage; *Brinkley* v. *Att. Gen.*, 15 *P. D.* 76. In India, however, where there are a vast number of creeds, all of whom, to a certain extent, can claim the free exercise of their peculiar religions, judicial notice must be taken of the particular custom of each.

Among Christians, proof that the ceremony was performed by a person appearing and officiating as a Christian priest, and that it was understood by the parties to be the marriage ceremony, according to the rights and customs of the country in which it was cele-

brated, would be sufficient presumptive evidence of the marriage; *R.* v. *The Inhabitants of Brampton*, 10 *East*, 282; so as to throw upon the defendant the *onus* of impugning its validity. It has also been established by the case of *Reg.* v. *Millis*, 10 *Cl. and Fin.* 534, that by the common law of England a marriage between British Christian subjects, although celebrated according to the rites of the Church of England, is void, unless solemnised in the presence of a person in Holy Orders. It is also settled by a decision of the House of Lords, that a priest in Holy Orders cannot lawfully solemnise a marriage between *himself* and another person; *Beamish* v. *Beamish*, 9 *H. L. Cases*, 274. But among Christians it is not necessary to prove that any religious ceremony took place, if at the time of the marriage, no religious ceremony was enjoined by the law of the place. Among Mahomedans, where there is a legal marriage, a *mollah* would be present, with the necessary witness and *vakils*, to read the *sigha*, which differs in the case of minors and adults, and the *akd* would be performed, without which would be no legal marriage; *Badal* v. *Emp.*, *I. L. R.* 19 *Cal.* 79.

It has never been decided under these two sections whether the evidence of the husband or wife, whichever was the aggrieved party, alone, is sufficient proof of marriage, but see *Emp.* v. *Subbarayam*, and *Emp.* v. *Pitamber Singh*, in the notes to Sect. 498.

Proof of a first marriage, which is voidable merely, will support a charge of bigamy; 3 *Inst.* 88. Thus, a marriage by a minor in Ireland, without consent, which by the Irish Marriage Act is voidable only within a year, will support a conviction for bigamy if the marriage be not vacated, *R.* v. *Jacobs*, 1 *Mood. C. C.* 140. But it is otherwise if the marriage be not voidable merely, but void; as, for instance, if a woman marry A, and in the lifetime of A marry B, and after the death of A, and while B is alive, marry C, she cannot be indicted for bigamy in her marriage with C, because her marriage with B was a mere nullity; 1 *Hale*, 693. So the marriage of an idiot, or of a lunatic not in a lucid interval, is void, because he is deemed in law incapable of entering into such a contract: 1 *Bl. Com.* 438, 439. So, in

England, if a boy under fourteen and a girl under twelve contract matrimony, it is void, unless both the wife and the husband consent to and confirm the marriage after they arrive at the age of consent; *Co. Lit.* 79; see *R.* v. *Gordon, R. and R.* 48. The Statute 5 and 6 Will. IV, c. 54, s. 2, makes all marriages within the prohibited degrees of consanguinity or affinity (*i. e.*, all marriages which were at that time voidable in the ecclesiastical courts by reason of their being within the prohibited degrees) absolutely null and void to all intents and purposes. Since this statute, therefore, a marriage with the sister of a deceased wife is absolutely void; *Reg.* v. *Chadwick*, 11 *Q. B.* 173; although solemnised abroad between British subjects, in a country by the law of which such a marriage was valid; *Brook* v. *Brook*, 3 *Smale and G.* 481; for a natural-born English subject does not, by the acquisition even of a foreign domicile, shake off his allegiance to the Crown of England, but continues liable to be affected by the laws of England; *Deck* v. *Deck*, 29 *L. J. N. S. P. and M.* 129.

Among Mahomedans, in the case of an alleged marriage of a mere child, she has the option under the *Shiah* law of ratifying, and under the *Sunni* law of repudiating, the marriage on her attaining puberty; and if, after she attains puberty, she marries again without having allowed the former marriage to be consummated, she is not guilty of bigamy; *Badal* v. *Emp.*, *I. L. R.* 19 *Cal.* 79.

The customary cohabitation of the sexes in Canara, under Alyasantaram law, is not marriage, but creates only a casual relation which the woman may terminate at her pleasure, subject only to certain conventional restraints among the more respectable classes; *Koraga* v. *Reg.*, *I. L. R.* 6 *Mad.* 374.

The prisoner's admission of a prior marriage, before a competent authority, is evidence that it was lawfully solemnised; *Reg.* v. *Newton*, 2 *M. and Rob.* 503; *Reg.* v. *Simonsto*, 1 *C. and K.* 164. Where a man and woman were married in Ireland with the ceremonies making a marriage of Roman Catholics valid, they declaring themselves to be Roman Catholics, it was holden that the man could not, on an indictment for bigamy, set up his

alleged Protestantism to defeat such marriage; *Reg.* v. *Orgill*, 9 *C. and P.* 80.

The prosecution must then prove the defendant's second marriage, for which purpose, after proof of the first marriage, the second wife is a competent witness. To make the defendant punishable under the Penal Code, the second marriage must have been contracted in India; Sect. 2; except in the case of a Native Indian subject, or of an European British subject going through the form of the second marriage in a Native State; *Cr. P. C.*, 1882, *Sect.* 188.

This second marriage must be proved in the same manner as the first. It seems, however, that the offence will be complete, though the defendant assume a fictitious name at the second marriage; *R.* v. *Allison*, *R. and R.* 109. Where, upon an indictment for marrying Anna T. the defendant's first wife being alive, it appeared that her name was not Anna but Susanna, but the defendant wrote her name Anna in the note for the publication of banns, and signed the register in which she was so called, it was held that, although her name might not be Anna, he could not defend himself on the ground that he did not marry Anna T.; *R.* v. *Edwards*, *R. and R.* 283. So, also, where the second wife was married by the name of Eliza Thick, which name she had assumed purposely when the banns were published, so that she might not be known to be the person she really was (her name being Eliza Brown), *Gurney*, B., held it to be no answer to the charge; *R* v. *Penson*, 5 *C. and P.* 412. And even though the subsequent marriage would have been void for consanguinity or the like, the defendant is guilty of bigamy; *R.* v. *Brawn*, 1 *C. and K.* 144. Where a person already bound by an existing marriage goes through a form of marriage known to and recognised by the law as capable of producing a valid marriage, for the purpose of a pretended and fictitious marriage, the case is not the less within the law by reason of any special circumstances, which, independently of the bigamous character of the marriage, may constitute a legal disability in the particular parties, or make the form of marriage resorted to specially inapplicable to their individual case; *Reg.* v. *Allen*, *L. R.* 1 *C. C.* 367. Among Mahomedans, if

a married woman goes through the *nika* ceremony with a man, that is sufficient to support a charge of bigamy against her; *Reg.* v. *Jwloo*, 6 *W. R. Cr* 60.

A Mahomedan guardian of a married female infant, who, while her husband is living, causes a marriage ceremony to be gone through in her name with another man, but without her taking any part in the transaction, does not commit the offence of abetting an offence under Sect. 494; *Emp.* v. *Abdool Cureem*, *I. L. R.* 4 *Cal.* 10.

These two sections, however, only apply to cases where the second marriage is void in consequence of its taking place during the lifetime of the first wife or husband. Therefore, where polygamy is not forbidden, a man who, by the law applicable to him, is allowed more than one wife, cannot commit an offence under this section. Hence, a Hindu man could not commit this offence, for although bigamy and polygamy are prohibited, except under certain special circumstances (*Manu*, *ch.* ix., *vs.* 80-82), yet that has been held to be directory only, and not mandatory; *per Scotland*, C. J., in *Veeraswami* v. *Appaswami*, 1 *Mad. H. C. Rep.* 375. Nor could a Mahomedan, unless, perhaps, having four legal wives (*Mac. M. L.* 255), he married a fifth. But a Hindu or Mahomedan female might commit this offence, as, although the law allows a plurality of wives, it does not permit more than one husband; 2 *R. C. C. Cr.* 48. However, among some of the Hill-tribes, the *Todas* on the Neilgherries, and on the Malabar Coast, for instance, the case is just the reverse, each woman being the wife of all the brothers of a family; in such a case, however, the woman might perhaps commit bigamy, by going through the form of marriage with a man outside the husband's family. In such cases, too, there is often only one marriage, that to the eldest brother, the younger ones having a right to their share of his wife as they grow up to puberty, by virtue of her marriage to him. See, also, the case of *Koraga* v. *Reg.*, *I. L. R.* 6 *Mad.* 374.

There appears, however, to be no mode by which a Hindu woman can so get rid of her husband as to be able to marry again, for *Manu* says (*ch.* ix. *v.* 46):—"Neither by sale nor desertion can a wife be released from her husband; thus, we fully acknowledge the law enacted of old by the Lord of creatures"; followed in

In re Ram Kumari, I. L. R. 18 *Cal.*, p. 269. Therefore, in a case before the Bombay High Court, it was held that a custom of the Talapda Koli caste, that a woman should be permitted to leave the husband to whom she has been first married, and to contract a second marriage, *nâtrâ*, with another man in the lifetime, and without the consent of the first husband, is invalid, as being entirely opposed to the spirit of the Hindu law; and that such second marriage was "void, by reason of its taking place during the life of such husband," and therefore punishable, as regards the woman, under Sect. 494 of the Penal Code; and as regards the man, whom she attempted to marry, under Sect. 497; *Reg.* v. *Karson Goja*; *Reg.* v. *Bai Rupa*, 2 *Bom. H. C. Rep.* 117. Further, a custom which authorises a woman to contract a *nâtrâ* marriage, without a divorce, on payment of a certain sum of money to the caste to which she belongs, has been held to be an immoral custom, and one which cannot be judicially recognised; *Uji* v. *Hathi Lalu*, 7 *Bom. H. C. Rep. A. C. J.* 133; but there is nothing immoral in a caste custom by which divorce and re-marriage are permitted on mutual agreement on one party paying to the other the expenses of the latter's original marriage; *Sankaralingam* v. *Subban*, *I. L. R.* 17 *Mad.* 479. Courts of law will not acknowledge the authority of a caste to declare a marriage void, or to give permission to a woman to re-marry, and a *bonâ fide* belief in the power of the caste to give such permission is no defence to a charge under Sect. 494, or to one of abetting the commission of such offence; *Reg.* v. *Sumbhu Raghu*, *I. L. R.* 1 *Bom.* 347. Where a man belonging to the caste of Ajang Rajput Gujars executed a deed of divorce to his wife, but not for a sufficient cause, such as incontinence on the part of the wife, and subsequently the woman married again, it was held that the party entering into the second marriage had committed an offence under Sect. 494, and that the priest who performed the marriage had abetted such offence; *Emp.* v. *Uni*, *I. L. R.* 6 *Bom.* 126. But in a Madras case, where a custom was set up as existing in Southern India, that a woman might divorce her husband for cause shewn, such as impotence, drunkenness, or misconduct, and then marry again, the High Court confined itself to

saying that the custom had not been made out; *Kerasoo Nachiar v. Government, O. S.* 62 *of* 1866; and in Calcutta it has been held that a conviction for marrying again during the lifetime of a husband or wife cannot be sustained, where there is evidence to shew that such marriages are common among people of the same caste as the accused, and it is not *proved* that such marriages are void; *In re Chamia*, 7 *C. L. R.* 354; nor where a man has relinquished his wife, and by the custom of the caste she is entitled to marry again; *Jukni* v. *Emp.*, *I. L. R.* 19 *Cal.* 627.

Difficulties may, however, arise in cases where the prisoner has changed from one religion to another. As where a man, once a Roman Catholic, had, during his assumed Christianity, married a woman according to the Christian form; and, afterwards becoming again a professing Hindu, had married a Hindu woman according to the Hindu forms; 3 *Mad. H. C. Rep. App.* 7. In this case, the following judgments were delivered:—*Holloway*, J., said: "The Session Judge of Guntoor has, on a charge of bigamy, treated the prisoner as being still a Roman Catholic Christian who has contracted a second marriage in such circumstances as would render the second marriage void during the existence of the former. It seems impossible to assume that a man is not equally free to go from Hinduism to Christianity, and, if he pleases, back from Christianity to Hinduism. If then he is a Hindu, although there is the greatest doubt whether the primitive Hindu law authorised polygamy, it is impossible, after the numerous decisions upon the subject, to say that a second marriage of a Hindu is void, in consequence of a previous valid Hindu marriage. It is manifest, therefore, that the second Hindu marriage cannot be rendered void, in consequence of a previous marriage which the Hindu law would not have recognised, it not having been performed with any reference to its provisions. The ceremony could not make it a Hindu marriage, because that was not a Hindu ceremony; and the consensual contract could not make a Hindu marriage, because the consent was not to such a union, but to a very different one. If again, as it seems to me impossible to do, the man is to be treated as still a Christian, the union entered into with the Hindu woman would not, in the view

of any law governing Christian unions, be considered a marriage at all. In either point of view it seems impossible, on the facts found, to say that the prisoner has within the meaning of the section contracted a marriage which is void, in consequence of the previous marriage. There is no evidence that it is void."

Innes, J., said:—"Now that we have before us the record in this case, it seems to me that the conviction must be quashed unless it should appear clearly from the evidence that the second marriage was void by reason of its taking place during the life of the first wife. And there seems to be nothing in the evidence to establish the invalidity of the second marriage. The Statute 9, Geo. IV., c. 74, s. 70, has only application to persons in India professing the Christian religion at the time of the second marriage, which the prisoner did not, and the operation of it, therefore, need not be considered. If, in becoming a Christian, a man took upon himself the obligation of monogamy, *i. e.*, if the Christian religion restricted him on his embracing it to one wife, then I should say if such person married while still a Christian, he could not afterwards throw off his obligation by a mere change of profession. But I do not think that a profession of Christianity, *ipso facto*, imposes any such obligation, although doubtless the tendency of Christianity is adverse to polygamy. Polygamy, as an offence, exists only by statute, and there is no statute applicable to this country, which makes polygamy an offence, with the exception of the statute above referred to, and that, as before noticed, seems to apply to a second marriage, not by an apostate from Christianity to Hinduism, but by one still professing the Christian religion at the time of his second marriage. There was by statute, therefore, so far as I can see, no obligation imposed on the apostate to Hinduism to observe monogamy, and, therefore, nothing in the Statute Law which rendered void the second marriage, by reason of the first wife being alive. Then it does not appear to me that the Hindu law could regard the second marriage as void, by reason of the wife of the first marriage being still alive, since the Hindu law, in re-admitting the prisoner to caste, would altogether ignore the *status* which he had just abandoned, together with all obligations contracted under it, and would not recognise anything

as a marriage which was not entered upon by him as a Hindu and with Hindu forms and ceremonies."

In this case the judges who decided it seem almost to be of opinion that a man can at will change the law applicable to him by changing his religion, but they seem to have forgotten the principles laid down in *Abraham* v. *Abraham*, 9 *Moore, I. A.* 243, that "the profession of Christianity releases the convert from the *trammels* of the Hindu law, but it does not *of necessity* involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his right in, and his powers over, property." In these matters, however, he may, by his course of conduct after conversion, shew by which law he intended to be governed, but it would require a definite and well-established course of conduct for that purpose. The same principles would apply to a convert from Christianity to Hinduism, or Mahomedanism. The court also seemed to forget the principles which were laid down in *Hyde* v. *Hyde*, *ubi sup.*, as to monogamy being the law of Christianity, at any rate as interpreted for many centuries past. The question still remains to be answered, whether a person who changes his religion can at once assume as applicable to him all the laws which are observed by his new co-religionists, even in matters which are not directly connected with religion.

The principles involved in the decisions of *Brook* v. *Brook* and *Deck* v. *Deck*, *ubi sup.*, would seem to shew that a natural-born English subject could not do so, for if a man by going to a foreign country cannot shake off his subjection to English law, so as to enable him there to contract a valid marriage with a person with whom he could not intermarry in England, how can he get rid of his previous legal obligations by simply changing his religion? It would seem, therefore, that an Englishman turning Mahomedan would still be subject to English law, except in matters belonging purely to the domain of religion; and such seemed to be the opinion of the Privy Council in *Skinner* v. *Orde*, 14 *Moore, I. A.* 309. In this case the appellant, Helen Skinner, having renounced Christianity and become a Mahomedan, was married, according to a Mahomedan form, to one J. T. John, then the husband

of another wife, but who also renounced Christianity for Mahomedanism to qualify himself for the enjoyment of polygamous privileges, and the High Court having expressed doubts of the legality of the marriage, the Privy Council said they were well warranted in entertaining such doubts. A man by turning Mahomedan could not get the right to divorce a Christian wife, and it certainly is doubtful whether, if both turned Mahomedans, the law would allow him to divorce her against her consent by the forms of the new religion they had adopted. Why then should a man by turning Mahomedan be allowed to commit any other breach of the marriage contract as ordinarily understood among Christians? *e. g.*, by bringing in another wife to share the marriage bed. His change of religion deprives him of any benefits he might have got from his former one, but does not necessarily free him from the legal responsibilities he came under whilst he professed it, and it subjects him to the legal responsibilities and obligations of the new religion, while it does not necessarily in every matter give him the same freedom that his new co-religionists have. See *Roy Bahadur* v. *Bishin Dyal*, *I. L. R.* 4 *All.* 343. A Christian woman relapsed into Hinduism, and then married a Hindu, who, on finding she had been baptized, discarded her. Subsequently, a Roman Catholic priest, knowing of her previous marriage, married her to a Christian convert: it was held that the woman had been guilty of bigamy, and the priest of abetment of bigamy; *Emp.* v. *Millard*, *I. L. R.* 10 *Mad.* 218.

[h] If the apostacy dissolves the marriage, *caulet quæstio*. Thus, if a man was originally a Mahomedan, his apostacy would dissolve the former matrimonial union, and, therefore, the second marriage would be legally valid; *Baillie*, *Dig.* 182; but if a married Christian man becomes a Mahomedan, that does not dissolve the marriage; *ib.* 181; and in the event of his marrying again after his conversion, the principles before discussed would have to be applied. If he had been a Hindu he could only re-marry on complying with the provisions of Act XXI. of 1866. The conversion of a Hindu wife to Mahomedanism does not dissolve the marriage, with her husband, and she cannot, therefore, during his lifetime

enter into any other valid matrimonial contract; *Government of Bombay* v. *Ganga*, *I. L. R.* 4 *Bom.* 330; *In re Ram Kumari*, *I. L. R.* 18 *Cal.*, p. 269. The conversion of a husband and wife from Hinduism to Christianity does not dissolve a marriage entered into while both parties were Hindus by religion; *Gobardhan* v. *Jasadamoni*, *I. L. R.* 18 *Cal.* 252.

Evidence for the Defence.

1. That the first marriage has been declared void or set aside by a court of competent jurisdiction. A divorce *a vinculo* for adultery in a court in Scotland, of persons married or domiciled in England, is not within this proviso; because no sentence or act of any foreign country or State can dissolve an English marriage *a vinculo*, in respect of persons domiciled in England; *R.* v. *Lolley*, *R. and R.* 237; *Tollemache* v. *Tollemache*, 30 *L. J. N. S. P. and M.* 113. But the Divorce Court in England has jurisdiction to dissolve a marriage solemnised between foreigners in a foreign country on the ground of the adultery of the wife committed abroad, if the husband at the time the adultery is committed, and at the time the petition is presented, is *bonâ fide* and permanently resident in England; although for the purpose of succession he may not have acquired an English domicile; *Brodie* v. *Brodie*, 30 *L. J. N. S. P. and M.* 185. Although the terms of the exception (Sect. 494) are only "declared void," it would seem that those terms must include "set aside" and "dissolved"; or else it must be held that a person whose marriage has been dissolved has not a husband or wife living at the time of the second marriage.

2. That the former husband or wife at the time of the subsequent marriage has "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." Where the defendant's first wife had left him sixteen years, and it was proved by the second wife that she had known him for nine years living as a single man, and had never heard of the first wife, who, it appeared, had been living seventeen miles from where the defendant (a poor man) resided, he was held entitled to an acquittal under a similar proviso to the present; *Reg.* v. *Jones*, *C. and Mar.*

614. On the trial of a woman for bigamy, whose first husband had been absent from her for more than seven years, the jury found that they had no evidence that, at the time of her second marriage, she know that he was alive; but that she had the means of acquiring knowledge of that fact, had she chosen to make use of them. It was held upon this finding the conviction could not be supported; *Reg.* v. *Briggs*, 1 *Dears. and B.* 98. Where the prisoner was indicted for bigamy, and no evidence was given on either side as to the prisoner's knowledge that his wife was alive, but it was proved that they had separated by agreement in 1843, and in 1857 the prisoner produced her at a trial in which he was interested, it was held that it was a question for the jury whether there was an absence of knowledge on the part of the prisoner that his wife was alive in 1855, the date of the second marriage; *Reg.* v. *Cross*, 1 *F. and F.* 510, *per Cockburn*, C. J.

In *Reg.* v. *Dane*, 1 *F. and F.* 323, while laying down the rule that it was for the jury to say whether the prisoner knew that his first wife was alive, *Bramwell*, B., questioned whether the prosecution need give any evidence upon it; and about the same time *Willes*, J., in *Reg.* v. *Merrett*, 1 *F. and F.* 309, said that that depended upon the particular facts of each case. After these were decided, a case was carried to the Court of Criminal Appeal, where, on an indictment for bigamy, it was proved that the prisoner and his wife had lived apart for seven years, and that the prisoner then married again. There was no evidence of the prisoner's knowledge of the existence of his first wife at the time he married again. The prisoner was convicted. It was there held that the burthen of proof that the prisoner did not know that his wife was alive at the time he contracted his second marriage was not on the prisoner, and the conviction was therefore quashed: *Reg.* v. *Curgerven*, 35 *L. J. N. S. M. C.* 58; but see Evidence Act, Sect. 105. In England where the law as to the absence of husband or wife is the same as under the Penal Code, it has been held by nine judges against five, that, where a woman *within seven years* of her having been deserted by her husband married again, in good faith and on reasonable grounds believing her husband to

be dead, she could not be convicted of bigamy; *Reg.* v. *Tolson*, 23 *Q. B. D.* 168.

None of these circumstances, however, are of any avail as a defence, unless "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 affairs, so far as the same are within his or her knowledge."

Where a woman is charged with bigamy the brother of the husband is not a person aggrieved by such offence within the Cr. P. C., Sect. 198, so as to enable him to lay a complaint against her; *In re Bai Rukshmoni*, *I. L. R.* 10 *Bom.* 340.

Sections 494 and 495 are applicable to Parsis, under the Parsi Marriage and Divorce Act; Act XV. of 1865, Sect. 5.

Act III. of 1872, Sects. 15 and 16, provides that married persons marrying under its provisions, and persons married under its provisions marrying again while such marriage is still subsisting, shall be punishable under Sect. 494 or Sect. 495, *ante*, p. 612.

ADULTERY.

Sect. 497. *Adultery.*—**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 such case, the wife shall not be punishable as an abettor.**

Triable by a Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Compoundable. Complaint must be made by husband or some person having charge of the woman on his behalf; Sect. 199, *Cr. P. C.*, 1882.

Charge.

That you, the said A B, on or about the day of , at , did commit adultery with one C D, the wife of E D; and

that you, the said A B, have thereby committed an offence punishable under Sect. 497 of the Indian Penal Code, and within, &c.

Evidence.

Prove that the woman is the wife of the prosecutor, *i. e.*, that she had been lawfully married to him. This will be proved in the same way as on a charge of bigamy, which see, *ante*, p. 640, &c., and should be proved strictly; Act I. of 1872, Sect. 50; *Reg.* v. *Smith*, 4 *W. R. Cr.* 31; *Emp.* v. *Pitamber Singh*, *I. L. R.* 5 *Cal.* 566; *Emp.* v. *Kallu*, *I. L. R.* 5 *All.* 233. The bare assertion of a petitioner under the Divorce Act, 1869, is not a sufficient proof of the marriage to satisfy the requirements of that Act; *Rathnammal* v. *Manikkam*, *I. L. R.* 16 *Mad.* 455 (*F. B.*). A *sagai* marriage among the *Hulwaee* caste is a good marriage, so as to render sexual intercourse with a woman so married adultery; *Koree* v. *Emp.*, 3 *C. L. R.* 410; referred to in *Kally Churn* v. *Dukhee*, *I. L. R.* 5 *Cal.*, p. 696.

It must then be proved that the defendant has had sexual intercourse with her; for this she is a competent witness, or the fact may be proved by independent evidence; but if the wife is called to prove the case, it must be remembered that, although she cannot be *punished* as an abettor, she is in fact an accomplice, and her evidence therefore needs corroboration If the woman be not a witness, it will very seldom happen that the intercourse can be proved directly, because it is very unlikely that such acts will be committed where others would be able to see them; and the fact that the unlawful connection takes place with the woman's consent, makes her also a party to the concealment of the offence, which is not the case in rape; circumstances must, therefore, be proved, from which the court will be obliged to infer the adultery; *Reg.* v. *Madhub Chunder*, 21 *W. R. Cr.* 13. The court, however, will not require the fact of the connection to be proved with that strictness which is requisite in cases of rape or of forcible connection: Ruling of *Westropp*, J., in *Reg.* v. *Premji Dhanji*, *April Sessions*, *Bombay*, 1869.

Mere opportunity to commit adultery is not sufficient; *Harris* v. *Harris*, 2 *Hagg.* 379. There must be overt acts, or some proximate circumstances, which satisfy the legal conviction of the court

that the criminal act has been committed; *Williams* v. *Williams*, 1 *Hagg. Con.* 299; *Grant* v. *Grant*, 2 *Curt.* 57; *Harris* v. *Harris*, *supra*. The circumstances which will lead to such a conclusion cannot be laid down universally, because they may be infinitely diversified by the situation and character of the parties, the state of general manners, and other incidental circumstances, apparently slight and insignificant in themselves, but which may have most important bearings upon the particular case. The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion that the offence has been committed; *Loveden* v. *Loveden*, 2 *Hagg. Con.* 2; *Stone* v. *Stone*, 1 *Roberts*, 99; *Faussett* v. *Faussett*, 7 *Notes of Cases*, 95. Facts which, if isolated or detached, would not lead to a conclusion of crime, are not to be taken separately only, but collectively, since they mutually interpret each other. Gross indecorum, improper familiarities, with opportunities of privacy, advance to the footing of proximate acts, are such isolated facts; and if the privacy be shewn to be frequent, the court will infer the commission of crime; *Burgess* v. *Burgess*, 2 *Hagg. Con.* 228. Where there is proof of attachment, criminal intention, and opportunity, the presumption is that adultery has been committed; *Davidson* v. *Davidson*, 1 *Deane*, 132. The birth, maintenance, and acknowledgment of a child are evidence of adultery; *D'Aguilar* v. *D'Aguilar*, 1 *Hagg.* 777. If there is full proof of an important fact, such as the birth of a child, with impossibility of the husband's access, and the identity of the wife, the fact of the wife having committed adultery is sufficiently proved; *Richardson* v. *Richardson*, 1 *Hagg.* 11. In these cases, however, strict proof of non-access on the part of the husband is required; *Heathcote's Divorce Bill*, 1 *Macq. H. L. Ca.* 277. The law holds that the longest period of gestation is ten months, the shortest period six lunar months; *Routledge* v. *Carruther*, 4 *Dow. P. C.* 395. If it be once shewn that parties have been cohabiting in illicit connection, it must be presumed, if they are still living under the same roof, that the criminal intercourse still subsists, notwithstanding those living under the same roof may be unable to depose to that fact; *Turton* v. *Turton*, 3 *Hagg.* 350.

The circumstance of a woman going to a brothel, furnishes conclusive proof of adultery, since it would be almost impossible for a woman to go to such a place but for a criminal purpose; *Williams* v. *Williams*, 1 *Hagg. Con.* 303; *Loveden* v. *Loveden*, 2 *Hagg. Con.* 24; *Best* v. *Best*, 1 *Add.* 437. The visit of a married woman to a single man's lodging or house must be distinguished from her going to a brothel, as her visit may be for the purest and most innocent purpose, and cannot *per se* induce an inference of guilt; *Williams* v. *Williams*, 1 *Hagg. Con.* 303. But such a visit, together with other circumstances, such as the windows being shut, and the production of letters which could not be explained, otherwise than by the guilt of the parties, has been held to be conclusive proof of adultery; *Ricketts* v. *Ricketts*, 1 *Hagg. Con.* 303, *notis.*

In all these cases, however, not only must the guilt of the woman be proved, but it must be shewn, conclusively, that the other guilty person is the defendant.

The adultery must not be by the *consent or connivance* of the husband. The negative may be proved by the oath of the husband himself. If the defendant wants to prove the contrary, he must cross-examine the prosecutor, and then call witness to prove such a state of circumstances as will shew that the husband did either consent or connive.

Consent is a positive act, a positive permission to the paramour, on the part of the husband, to have connection with his wife.

Connivance is passive consent, a knowledge of and acquiescence in the conduct complained of. *Boulting* v. *Boulting*, 33 *L. J. N. S. P. and M.* 33; but to constitute connivance there must be something more than mere negligence, than mere inattention, than over-confidence, than dullness of apprehension, than mere indifference; *Phillips* v. *Phillips*, 1 *Roberts*, 145; *Croft* v. *Croft*, 3 *Hagg.* 312; *Rix* v. *Rix*, *ib.* 74. There must be an intention on his part that his wife should, or a knowledge that she was likely, to commit adultery. If such a state of things existed as would, in the apprehension of a reasonable man, result in the wife's adultery, whether that state of things was produced by the connivance of the husband or independently of it, and if the husband, intending that the result of adultery should take place, did not interfere,

when he might have done so, to protect his own honour, he is guilty of connivance; *Allen* v. *Allen and D'Arcy*, 30 *L. J. N. S. P. and M.*, p. 4. A husband who gives a willing assent to an act of adultery by his wife, desiring that it shall be committed, or is cognizant that adultery will result from transactions which he approves of or consents to, is guilty of connivance, although he may take no active step towards procuring it to be committed, and may not be an accessory before the fact: *Marris* v. *Marris and Burke*, 31 *L. J. N. S. P. and M.* 69; *Glennie* v. *Glennie and Bowles*, 32 *L. J. N. S. P. and M.* 17. And if a husband *wilfully* abstains from taking any steps to prevent an adulterous intercourse, which, from what passes before his eyes, he cannot but believe or reasonably suspect is likely to occur, he is guilty of connivance, even though there be not corrupt intention on his part; *Dipps* v. *Dipps and Hume*, in the House of Lords, 33 *L. J. N. S. P. and M.* 161. In Calcutta, in a case where the husband practically allowed his wife to commit adultery, *Phear*, J., in delivering judgment, said:—"The husband has been living in Calcutta, and has day after day seen his wife leading a life of immorality. He has seen her evening after evening passing up and down the same promenade as himself in the company of men, under whose protection he believed her to be living. He said he knew she must be living in adultery, because she had no other means of livelihood; but he never said that he had offered her any allowance, or given her any opportunity of return, except on one occasion, when he went into the green boat and asked her to come back to him. I know nothing of the circumstances under which she left his house, and it was only in answer to a question from me that he let fall a word as to this incident. He has had no recourse to the methods which lay open to him even before this (Divorce) Act came into operation, to vindicate his honour, or mete out justice to the offenders, but has been content to stand by for fourteen years; and it is only when this Act gives him the personal advantage of a dissolution of marriage as distinguished from a divorce *a mensa et thoro*, that he comes into court. This sequence of facts leads me to the conclusion that there has been something like connivance on his part at the course of life his

wife has been leading"; *Roe* v. *Roe*, 3 *Ben. L. R. App.* 9. In the case of *Gipps* v. *Gipps and Hume*, *supra*, the husband had agreed to withdraw a suit for the dissolution of marriage in consideration of a sum of money to be paid to him by the co-respondent in lieu of costs and damages, but made no stipulation as to his wife's future conduct. The co-respondent did not fulfil his part of the agreement, and there being a further case of adultery between the same parties, the petitioner filed a second petition, at the hearing of which the adultery charged was proved; but the court held that the petitioner's conduct amounted to connivance at, or consent to, the wife's intercourse with the co-respondent.

As to the knowledge by the defendant that the woman was *married*, see *post*, p. 660. Where a prisoner, accused of adultery, sets up in defence a *nâtrâ* contracted with the woman with whom he is alleged to have committed adultery, in accordance with the custom of his caste, the question the court has to determine is, whether or not the accused *honestly believed*, at the time of *contracting* the *nâtrâ*, that the woman was not the wife of another man; *Reg.* v. *Monohar Raiji*, 5 *Bom. H. C. Rep. C. C.* 17; *Reg.* v. *Balu Boghu*, and *Reg.* v. *Hasan Suleman*, *ib.* 19, *n.* See, also, *Uja* v. *Hathi Lalu*, *ante*, p. 619. There will also be the question as to whether the husband consented to, or acquiesced in, the *nâtrâ*.

The connection proved between the defendant and the woman must not amount to the offence of rape, as defined by Sect. 375, *ante*, p. 452.

Although a man cannot be charged with adultery except by the husband of the woman with whom he commits adultery, yet he may be charged with, and convicted of, house-trespass with intent to commit adultery, without the husband himself making the charge, if there is no consent or connivance on the part of the latter; *Mad. H. C. Rulings*, 1*st June* 1868, 3 *Mad. Jur.* 285; but where the husband *refused* to make a charge of house-trespass with intent to commit adultery, and only charged the accused with house-trespass with intent to commit theft, which was disproved, the magistrate was held to be right in refusing to convict of the charge which the husband refused to make, although the

accused said he was there for the purpose of carrying on an intrigue with the wife; 5 *Mad. H. C. Rep. App.* 5.

Where the accused is charged with rape, and committed on an alternative charge of rape or adultery, the mere fact of the husband appearing as a witness on the charge of rape, is not an instituting of a prosecution for adultery by the husband as required by the Cr. P. C.; *Emp.* v. *Kallu, I. L. R.* 5 *All.* 233.

If a man, who has been convicted of adultery with another man's wife, continues his adulterous intercourse, he will be liable to a second conviction and punishment for the fresh act, notwithstanding that the woman had not returned to the protection of her husband after the conviction of her paramour; *Reg* v. *Enajivalad Vitha, B. R. 28th October* 1880.

ENTICING AWAY A MARRIED WOMAN.

Sect. 498. *Enticing away a Married Woman.*—**Whoever takes or entices away any woman who is, and whom he knows, or has reason to believe to be, the wife of any 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.**

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Compoundable. Complaint must be made as in adultery, quod vide.

Charge.

That you, the said A B, on or about the day of , at , did take (*or* entice) away a certain woman, to wit, C D, the wife of E D, whom you knew (*or* had reason to believe) to be the wife of another man, to wit, the said E D, from the said E D (or from the care of G H, who had the care of the said C D on

behalf of the said E D), with intent that the said C D should have illicit intercourse with some person; and that you, the said A B, have thereby committed an offence punishable under Sect. 498 of the Penal Code, and within, &c.

Evidence.

To support a charge under this section it must be proved that the woman is married, as in a charge of bigamy or adultery, and that fact must be proved strictly, *i. e.*, by evidence of third parties of certain facts, such as nuptial ceremonies, &c., from which the court can judge whether there has been a legal marriage or not; *Emp.* v. *Pitamber Singh*, *I. L. R.* 5 *Cal.* 566, overruling *Reg.* v. *Wazira*, 8 *B. L. R. App.* 63, but the law has not laid down any particular way in which the marriage must be proved (except that mere reputation is insufficient; Act I. of 1872, Sect. 50; *Emp.* v. *Arshed Ali*, 13 *C. L. R.* 125); consequently, the evidence of a man and a woman that they have been married *with the usual nuptial ceremonies*, and thereafter cohabited as man and wife, is sufficient; *Emp.* v *Subbarayam*, *I. L. R.* 9 *Mad.*, dissenting from *Emp.* v. *Pitamber Singh*, *ubi sup.*, in so far as that case ruled that such proof was not sufficient. In the case of *Emp.* v. *Kallu*, *I. L. R.* 5 *All.* 233, the proof of the marriage really amounted to very little more than proof of cohabitation, there being no evidence of any nuptial ceremonies having been performed. It must then be shewn that this was known to the defendant, or that he had reason to believe it. There does not appear to have been any direct ruling as to what would amount to such a knowledge, but in two cases of dissolution of marriage, the court refused to condemn the co-respondent in costs from the probable absence of such knowledge. In the first, it appeared that the respondent was a drunken woman, who had been separated from her husband a considerable time when she met the co-respondent, and there was nothing to shew that the latter had the least knowledge as to who or what she was when he met her, except that she was disposed to become a prostitute; *Priske* v. *Priske and Goldby*, 29 *L. J. N. S. P. and M.* 195. In the other case, the co-respondent was the landlord of a tavern near the petitioner's residence, and his intercourse with the respondent

commenced about the beginning of 1862, and about the same time she was carrying on an adulterous intercourse with another man almost under her husband's nose. In the course of 1863, she took furnished lodgings in another part of the town, under an assumed name, and there carried on an adulterous intercourse with a third man. She was, also, in the habit of going out at night alone, when her husband was at home, and not returning until a late hour. The court said it appeared to be doubtful whether the co-respondent knew the respondent was a married woman, but suspected, although it was not very plainly made out, that he did know it. Under all the circumstances of the case, however, he was not condemned in costs; *Manton* v. *Manton and Stevens*, 34 *L. J. N. S. P. and M.* 121.

It must also be proved that she has been taken or enticed away from her husband, or from some person who has had charge of her on behalf of her husband, and the taking of a woman away is an offence under this section, although the advances and solicitations have proceeded from the woman, and the prisoner has for some time refused to yield to her requests; *Reg.* v. *Kumarasami*, 2 *Mad. H. C. Rep.* 331. On this point see, also, the remarks on the kidnapping and abducting of women for criminal purposes, *ante*, p. 442. The word "enticing" implies some blandishment or coaxing. Where the man and woman are perfectly agreed, the act of a third party, who merely accompanies the woman from her husband's house, amounts only to an abetment; *Rulings of Mad. H. C.* 1864, *on Sect.* 498. Under the present section, however, it is not necessary to prove the actual abduction, the mere concealment or detention is sufficient, and in this it differs from the previous sections referred to; provided only, that the accused knew or had reason to believe that the woman was the wife of another man; *Emp.* v. *Nadar*, *I. L. R.* 10 *All.* 580. The words "such woman" do not mean "such woman so enticed as aforesaid," but "such woman, being the wife of another man"; *ib.*, disapproving of *Emp.* v. *Tika Singh*, *I. L. R.* 4 *All.* 251. Physical restraint, however, is not essential to "detention." The wife may be detained and her husband deprived of her society by allurements and blandishments; *Reg.* v. *Soondaree Dosa*,

4 *Mad. H. C. Rep.* 20; but if a woman, deserted by her husband, goes of her own free will to live with another man, a conviction under this section cannot be maintained, as there is no taking or enticing *away* from the husband or other guardian; *Reg.* v. *Pochun Chang*, 2 *W. R. Cr.* 35.

Where a procuress induced a married woman of twenty to leave her husband, and the fact shewed that the wife "had made her deliberate choice, and was determined, of her own free will, to leave her husband and become a prostitute in Calcutta," the Bengal High Court held that the procuress could not be convicted of kidnapping under Sect. 366, *ante*, p. 441, but was guilty of enticing away a married woman under the present section, "for whatever the wife's secret inclinations were, she would have had no opportunity of carrying them out had not the prisoner interposed"; *Reg.* v. *Srimotee Poddee*, 1 *W. R. Cr. C.* 45.

It is not necessary that a woman should be actually living with her husband, or with the person in whose charge she is on his behalf, provided that she be living somewhere with his consent. Thus, a conviction was maintained where the prisoner had eloped with a woman from a house in Calcutta, hired for her by her husband, who was absent in Assam. In this case the Court said, "we cannot say as the Sessions Judge said, 'that a wife is always the property of her husband, whether he is absent or present'; but we think it clear that a wife living in her husband's house, or in a house hired by him for her occupation, and at his expense, is, during his temporary absence, living under his protection, so as to bring the case within the meaning of Sect. 498, provided, of course, that the defendant knew, or had reason to believe, that she was the wife of the man from whose protection he took her, or on whose behalf the person from whom he took her had charge of her, and also provided he took her with the intent specified in the Act. To hold otherwise would be to declare the worst cases of seduction not punishable under the Penal Code"; *Mutty Khan* v. *Mungloo*, 5 *W. R. Cr.* 50.

It must also be shewn that the intention with which any one of the foregoing acts is committed is that the woman may have

illicit sexual intercourse with some man, and it is immaterial whether the wife is a consenting party or not.

A finding on this section should state definitely on what part of the section the accused is guilty; only when it is doubtful what is the exact offence proved against the accused should a general finding in the words of the section be resorted to; *Reg.* v. *Mothoora*, 22 *W. R. Cr.* 72.

Where a husband makes a complaint under Sect. 366 in respect of acts done to his wife which do not support such a complaint, the accused may be convicted, if the evidence justifies it, under this section, without a fresh complaint by the husband; *Jatra* v. *Rezat*, *I. L. R.* 20 *Cal.* 483.

CHAPTER XXI.

DEFAMATION.

Sect. 499. *Defamation.*—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 hereafter excepted, to defame that person.

Explanation 1.—It may amount to imputation to impute anything 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 the family or other 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.

First Exception. Imputation of any Truth for the Public Good.—It is not defamation to impute anything 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.

Second Exception. Public conduct of Public Servants.—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 farther.

Third Exception. Conduct of any Person touching any Public Question.—It is not defamation to express 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. Publication of Reports of Proceedings of Courts of Justice.—**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 proceeding.**

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.**

Fifth Exception. Merits of a Case decided in a Court of Justice, &c.—**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.**

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.**

Sixth Exception. Merits of a Public Performance.—**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.**

Explanations.—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. Censure passed in good faith by a Person having lawful authority over another.—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.

Illustrations.

A Judge censuring in good faith the conduct of a witness, or 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. Accusation preferred in good faith to a duly authorised Person.—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.

Illustrations.

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.

Ninth Exception. Imputation made in good faith by a Person for the protection of his Interests.—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.

Illustrations.

(*a*) 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. Caution intended for the good of the Person to whom it is conveyed.—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.

Sect. 500. *Punishment for Defamation.* Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

Sect. 501. *Printing Defamatory Matter.*—Whoever prints or engraves any matter, 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.

Sect. 502. *Sale of Defamatory Matter.*—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.

Triable by the Court of Session, a Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Compoundable. Prosecution must be by person aggrieved by the offence; Cr. P. C., 1882, Sect. 198.

Charge.

That you, the said A B, on or about the day of , at , defamed one C D, to wit, by writing and publishing concerning him, the said C D, the words and matters following (*or* by making and publishing concerning him, the said C D,

a certain imputation in the words and to the effect following), that is to say (*here insert the defamatory matter*), intending to harm, or knowing or having reason to believe that such imputation would harm, the reputation of the said C D; and that you, the said A B, have thereby committed an offence punishable under Sect. 500 of the Indian Penal Code, and within, &c.

Evidence.

The Penal Code makes no distinction between written and spoken defamation; *Reg.* v. *Mohunt Pursoram*, 2 *W. R. Cr.* 36.

The offence must be proved to have been committed within the jurisdiction where the offender is being tried. In the case of libel if a letter containing the libel reach the person to any whom it is addressed in the jurisdiction in over that person with ought; see *R.* v. *Johnson*, 7 *East*, 65; *R.* accusation. *id.* 342; even though addressed to him ou , *R.* v. *Watson*, 1 *Camp.* 215; or even if a se ..aining the libel, be put into the post office in the ses Z befor diction; *R.* v. *Burdett*, 4 *B. and Ald.* 95; it is a suffi t publication of the libel within that jurisdiction; in the last case, three out of four judges held, that if a man write and compose a libel in L, with intent to publish it, and afterwards publish it in M, he may be indicted in either jurisdiction. Where a libel is printed in one town, and sent by post to people in another town, it is published in both places; *Emp.* v. *Girjashankar*, *I. L. R.* 15 *Bom.* 286. There is no publication, however, if the libel be addressed to the party himself; *Phillips* v. *Jansen*, 2 *Esp.* 624; *Komul* v. *Nobin*, 10 *W. R. Civ.* 184; *Emp.* v. *Taki Husain*, *I. L. R.* 7 *All.* 205; *Wennhak* v. *Morgan*, 20 *Q. B. D.*, p. 637; *Emp.* v. *Sadashiv Atmaram*, *I. L. R.* 18 *Bom.* 205; giving a letter to be copied is sufficient publication; *Heckford* v. *Galstin*, 2 *Hyde*, 274; *Pullman* v. *Hill* [1891], 1 *Q. B.* 524; but if a solicitor, writing a letter on a privileged occasion on behalf of a client, dictates it to a clerk, and gives it to a clerk in his office to be copied, that is not a publication; *Boosins* v. *Goblet* [1894], 1 *Q. B.* 842. Sending one to a man's wife is a publication; *Wenman* v. *Ashe*, 13 *C. B.* 836; but a disclosure of a libel by the defendant to his wife

is not a publication; *Wennhak* v. *Morgan*, 20 *Q. B. D.* 635. A libel addressed to a firm (being intended to be read by two only of the partners) and opened and read in the usual course of business by one of the clerks is published; *Pullman* v. *Hill* [1891], 1 *Q. B.* 524. A charge of defamation may be founded on a republication or reproduction of what has already been published, although no charge has been laid in respect of the original publication; *In re Howard*, *I. L. R.* 12 *Bom.* 167; *Reg.* v. *Holt*, 8 *Cox's C. C.* 411; *Waithman* v. *Weaver*, 11 *Price*, 257, *note*.

Proof that the defamatory matter, if written, is in the defendant's handwriting, is said to be presumptive evidence of publication, so as to throw the *onus* of proving non-publication on him; *R.* v. *Beare*, 1 *Ld. Raym.* 417; *Lamb's Case*, 9 *Rep.* 599; but a libel may be found under circumstances which preclude such presumption. The publication may also be by selling the libel, distributing it gratis, reading it to others (if he knew the tendency of it before), or by sending it, and having it delivered to another person; *Bac. Abr. Libel*, *B.* 2; 1 *Hawk.* c. 28, p. 546. Evidence of the libel having been purchased in a bookseller's shop, or at a newspaper office, of a servant there, in the course of business, will sustain a count charging the master with having published it; *Bac. Abr. Libel*, *B.* 2; *R.* v. *Almon.*, 5 *Bur.* 2686.

Printing a libel, unless qualified by circumstances, is said to be, *primâ facie*, a publishing; for it must be delivered to the compositors and other subordinate workmen; *Baldwin* v. *Elphinstone*, 2 *W. Bl.* 1038; but this proposition is denied in *Watts* v. *Fraser*, 7 *A. and E.*, p. 233. Indeed, the mechanical work of compositors, and the division of labour among them, almost preclude the presumption that any of them have obtained any knowledge of the sense of what they were composing. If the manuscript of the libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, although there is no evidence to shew that the printing and publishing were by the direction of the defendant; *R.* v. *Lovett*, 9 *C. and P.* 462.

Where the libel has been printed by the directions of the defendant, and he has taken away some of the impressions, a copy of those left with the printer may be read in evidence; *Watson's Case*, 2 *Stark*, *N. P. C.* 129. In order to shew that the defendant had caused a libel to be inserted in a newspaper, a reporter to the paper was called, who proved that he had given a written statement to the editor, the contents of which had been communicated by the defendant for the purpose of publication, and that the newspaper produced contained the same, with the exception of one or two slight alterations, not affecting the sense; it was held that what the report published might be considered as published by the defendant, but that the newspaper could not be read in evidence without producing the written statement delivered by the reporter to the editor; *Adams* v. *Kelly*, *Ry. and Moo.* 157. A statement at the foot of a newspaper that it is published or printed by a certain person is not even *primâ facie* evidence against him; *Reg.* v. *Stanger*, *L. R.* 6 *Q. B.* 352; but an attested copy of a declaration made by the editor of a paper under Act XXV. of 1867, Sect. 5, that he was the printer and publisher of the paper is *primâ facie* proof of the publication of a defamatory statement contained in the paper; *Ramasami* v. *Lokanada*, *I. L. R.* 9 *Mad.* 387. But where an editor in good faith entrusts the temporary management of his paper to a competent person, and, during his absence, and without his knowledge, a libel is inserted, the editor cannot be held to have published the libel; *ib.*

A delivery of a newspaper, containing a libel, according to the provisions of the 38 Geo. III c. 78, to the officer of the stamp office, has been held a publication, though such delivery was direct by the statute, for the officer had an opportunity of reading the libel; *Amphlett's Case*, 4 *B. and C.* 35; see also, *Cook* v. *Ward*, 6 *Bing.* 408; *Rex.* v. *Hart*, 10 *East*, 94.

The intention to harm by the imputation, or the knowledge that the imputation is likely to harm the person against whom it is made, must be proved Where a man publishes a writing, which upon the face of it is untrue, the law presumes that he does so with such a malicious intention as would constitute an offence, and it is unnecessary to give any further proof of intent; under the

Penal Code, he would be presumed to have published it with the intention of harming, or knowing or having reason to believe that it would harm, the reputation of the person defamed. Thus, in *Harvey's Case*, 2 *B. and C.* p. 269, *Abbott, C. J.*, said:—"If it be true that a malicious intention be necessary to render amenable to law a person who publishes defamatory matter, I say that unless that malicious intent may be inferred from the publication of the slander itself, in a case where no evidence is given to rebut that inference, the reputation of all His Majesty's subjects, high and low, would be left without that protection which the law ought to extend to them." So in *Sir Francis Burdett's Case*, 4 *B and Ald.*, p. 120 *Best*, J., said:—"I told the jury that the question, whether it (the libel) was published with the intention alleged in the information, was peculiarly for their consideration; but I added that the intention was to be collected from the paper itself, unless the import of the paper were explaind by the mode of publication, or any other circumstance. I added that if it appeared that the contents of the paper were likely to excite sedition and disaffection, the defendant must be presumed to intend that which his act was likely to produce." It is not necessary to prove that the complainant has actually suffered from the scandalous imputation alleged, but it is sufficient to shew that the defendant knew or had reason to believe that the imputation would be likely to harm the reputation of the prosecutor; *Reg.* v. *Thakur Das*, 6 *N. W.* 86. It is, however, open to the defence to shew the reputation of the person who is alleged to have been harmed, and thus to shew that the matter on the whole is a true account; *Laidman* v. *Hearsey*, *I. L. R.* 7 *All*, 906; provided that the reputation proved shews the probability of what is alleged against him in the libel; *Bell* v. *Parke*, 11 *Ir. C. L. R.* 413; but this does not let in evidence of general reputation that he was guilty of the particular act charged against him in the libel; *ib.* See, also, *Scott* v. *Sampson* 8 *Q. B. D.* 491.

It may, however happen, where the expressions are ambiguous or the intentions of the defendant doubtful, that it is necessary to adduce evidence for the purpose of shewing positively the motive which prompted the publication. For this purpose any circum-

stances are admissible which may elucidate the transaction, and enable the jury rightly to conclude whether the defendant acted with the intention and for the pupose of causing the evil consequences enumerated in Sect. 499. With this end in view, in an action for libel contained in a weekly paper, evidence was allowed to be given of the sale of other papers, with the same title, at the same office, for the purpose of shewing that the papers were sold deliberately, in the regular course of circulation, and vended in regular transmission for public perusal; *Plunkett* v. *Cobbett*, 5 *Esp.* 136. So, where on the trial of an action for libel contained in a newspaper, subsequent publications by the defendant in the same paper were tendered in evidence to shew *quo animo* the defendant published the libel in question, *Lord Ellenborough* said that doubtless they would be admissible in the case of an indictment; *Stuart* v. *Lovell*, 2 *Stark, N. P. C.* 95. So, also, in the trial of an action against the editor of a monthly publication for a libel contained in it, articles published from month to month, alluding to the action, and attacking the plaintiff, are admissible to shew the intent with which the libel was published, and also that it was published concerning the plaintiff; *Chubb* v. *Westley*, 6 *C. and P.* 436. *Lord Ellenborough* also held that any words or acts of the defendant are admissible to shew his intent in making use of the words which form the basis of the action; *Rustel* v. *Macquister*, 1 *Camp.* 49; and either the prosecutor or the defendant is entitled to read extracts from different parts of the paper or book containing libels relating to the same subject; *Rex* v. *Lambert and Perry*, 2 *Camp.* 398. See, also, where the publication is *primâ facie* excusable, on account of its cause, as in the case of servants' characters, or confidential advice, or communications to persons who ask it, or have a right to expect it, malice in fact must be proved; *per Bayley*, J., in *Bromage* v. *Prosser*, 4 *B. and C.* 256. The same doctrine is laid down in the case of *M'Pherson* v. *Daniels*, 10 *B. and C.* 272; and *Parke*, *B.*, in *Wright* v. *Woodgate*, *Tyr. and G.* 15, said:—"Where a man has a right to make a communication, you must either shew malice intrinsically from the language of the letter or prove express malice." Looking, however, to the terms of Sect. 105 of the Evidence Act, it can scarcely

be contended that the law contained in the last two sentences applies in its entirety to India, but I think that the following may be regarded as the way in which it would be applied:—When from the evidence adduced by the prosecution it appears *primâ facie* that the occasion was privileged, and the communication made *bonâ fide*, then it lies on the prosecution to prove affirmatively the existence of the intentions or knowledge set out in Sect. 499. Where a person wrote defamatory matter to W, under circumstances which rendered the writing privileged, but by mistake enclosed it in an envelope to X, it was held that the latter publication was also privileged in the absence of express malice on his part; *Tompson* v. *Dashwood*, 11 *Q. B. D.* 43.

But in all cases where the matter is defamatory in its nature, the *onus* of proving the truth of the statement, or, at least, that he had reasonable ground for believing it to be true, and was actuated in making such statement, not by malicious motives, but by intelligent zeal for the public interest, so as to shew that the imputation was made in "good faith," lies on the person making the statement; *Allaf Hoossein* v. *Tauad-dooh Hoossein*, 2 *Agra*, 87; *Sealy*, v. *Ramnarain*, 4 *W. R. Cr.* 22; *Reg.* v. *Kilubhai Purbhoodas*, 9 *Bom. H. C. Rep.* 451; *In re Shibo Prosad*, *I. L. R.* 4 *Cal.* 124. See, also, the Evidence Act of 1872, Sect. 105. As none of the exceptions to Sect. 499 are, in any way, connected with the section imposing a punishment for defamation, they need not noticed or negatived in the charge.

Writing a letter to a young and virtuous woman containing a proposal that she should surrender her chastity to the writer for a sum of money, is a defamatory libel tending to provoke a breach of the peace; *Reg.* v. *Adams*, 22 *Q. B. D.* 66. *Quære* whether this would be defamation in India, because it was not published of her, but *to* her. It would probably fall under Sect. 509, *post.*

Explanation 1. *Imputation against a deceased person.*—In the case of an imputation against a deceased person, it must be proved that what is complained of is, as regards the deceased, defamation under the Penal Code, and then that it is intended to be hurtful to the feelings of his faimily or other near relatives. In this explanation the words used with regard to the intention of the accused differ

from those used in the section itself; there they are "*intending* to harm, or *knowing or having reason to believe* that they will harm," the reputation; here the imputation must be "*intended* to be hurtful," &c., thus shewing that the intention in such a case must be express, &c., not merely to be *implied* from the fact that the natural result of what is imputed to the deceased may be likely to hurt the feelings of his relatives. This is the law in England; see *Reg.* v. *Topham*, 4 *T. R.*, p. 129, where *Kenyon*, C. J., says:—"To hold that, even after ages are past, the conduct of bad men cannot be contrasted with the good, would be to exclude the most useful part of history; and, therefore, it must be allowed that such publications may be made fairly and honestly. But, let this be done whenever it may, whether soon or late after the death of the party, if it be done with a malevolent purpose, to vilify the memory of the deceased, with a view to injure his posterity, then it is done with a design to break peace, and it is illegal." A *suit* by the heir and nearest relation of a deceased Hindu person, in respect of a statement about the deceased causing damage to plaintiff as a member of his family, is not maintainable; *Luckumsey Rowjee* v. *Hurbum Nursey*, *I. L. R.* 5 *Bom.* 580.

Explanation 2. *Imputation against a company or collection of persons.*—To come under the terms of this explanation the defamatory words must apply to all the class, but the libel need not name the class as such; it is sufficient if the words can only be interpreted in such a way as to reflect upon all the members of that class. Thus, where a libel was published concerning "an East India Director," and it was charged as being a libel on the East India Company, *Lee*, C. J., said:—"It is objected to, as not being a libel against all of them; but the advertisement seems equally applicable to every one of the Directors. Where a paper is printed equally reflecting upon a certain number of people, it reflects upon all; and readers according to their different opinions may apply it so. It has been the rule of this court always to prevent libels upon societies of men"; *Rex* v. *Jenour*, 7 *Mod.* 401. The same principle had been applied in the *Jews' case*; *Rex* v. *Osbourne*, 1 *Bar. K. B.* 138, 166, where it was held libellous to print a book giving such an account

of certain Jews who lived near Broad Street, London, as would tend to make people believe them so barbarous as to burn a woman and a child because it was begotten by a Christian; and was subsequently applied in the case of a libel against all the clergy in Durham; *Rex* v. *Williams*, 5 *B. and Ald.* 595. The libel, however, must be against a particular circumscribed body of men, not against mankind in general, nor against a particular order of men, as, for instance, men of the gown; *Rex* v. *Alme*, 3 *Salk.* 224; and if a person said that all lawyers were thieves, the bar could not sue him, nor could a particular lawyer, unless there was something to point to the particular individual; *Willes*, J., in *Eastwood* v. *Holmes*, 1 *F. and F.* 349.

An action for libel lies at the suit of a joint stock company for statements defamatory of the character of the company in respect of the management of their business without proof of special damage; *Helton Coal Co.* v. *North Eastern News Association* [1894], 1 *Q. B.* 133.

Explanation 4. *Definition of harm to a person's reputation.*—This explanation does not apply where the expressions used are in themselves defamatory. If an expression used is doubtful as to its signification, and some evidence is necessary to decide whether it is calculated to harm a particular person's reputation, it is possible that the principle enunciated in this explanation might and would with propriety be applied; *Emp.* v. *McCarthy*, *I. L. R.* 9 *All.* 420; see, also, *Reg.* v. *Thakur Das*, 6 *N. W.* 86; *Laidman* v. *Hearsey*, *I. L. R.* 7 *All.* 906; *Bell* v. *Parke*, 11 *Ir. C. L. R.* 413.

Exception 1. *Imputation of any truth for the public good.*—This is practically included in *Exception* 9, the difference between the two being that this exception applies only to a *true* imputation made for the public good, whereas the ninth exception is not confined to a true imputation provided it be made *bonâ fide* and for one of the purposes therein mentioned. In deciding whether it is for the public good that a matter relating to a particular person should be discussed, the position of the person whose conduct is canvassed must be taken into consideration, and the privilege must be confined to reports or comments upon persons whose position

is of public interest to the whole community, or with reference to matters of public interest to the whole community; *Purcell* v. *Sowler*, 1 *C. P. D.* 781; affirmed on appeal, 2 *C. P. D.* 215. The following matters have been held to be matters of public interest:—The conduct of a clergyman in the recognized public worship of the Church of England; *Kelly* v. *Tinling*, *L. R.* 1 *Q. B.* 699; the character of a person, individually of no public interest but in reference to his capacity to reconstruct the navy of England; *Henwood* v. *Harrison*, *L. R.* 7 *C. P.* 606; comments on charges made by a member of Parliament in the House of Commons, impugning the character and conduct of a judge; *Wason* v. *Walter*, *L. R.* 4 *Q. B.* 73; the reason for which the name of a medical practitioner was removed from the register of legally qualified practitioners; *Allbut* v. *Council of Medical Education*, 23 *Q. B. D.* 400; a true account of the proceedings of a *quasi*-public society in the expulsion of a member for a cause within its jurisdiction; *Barrows* v. *Bell*, 7 *Gray* (*Massachusetts*), 301.

Making and *publishing*. Whether the making or publication of a particular imputation is for the public good is a question of fact; *Emp.* v. *Janardhan Damodar*, *I. L. R.* 19 *Bom.* 703; and while an imputation may be held to be true and made for the public good, the Court may at the same time hold that the manner of publication was not for the public good, and convict; *ib.*

Exception 2. *Public conduct of public servants.*—To bring a case under this exception, the opinion expressed must be a fair one, and half truths must not be told; therefore, where, although the statement made by the defendant was the truth, but was incomplete and misleading, portions having been omitted which entirely took the sting out of what was published, it was held that the accused could not plead that the imputation made by him on the complainant's character was made in good faith for the public good; *Emp.* v. *Kakde*, *I. L. R.* 4 *Bom.* 298.

Exception 3. *Conduct of any person touching any public question.*—This exception is confined to opinions expressed as to the conduct of a person, *no matter what his own position* may be, in regard to a *public question*, and his character so far as appears from that conduct.

The cases cited under Exception 1 are also applicable here. The conduct of persons at a public meeting, although they do not go there in a public capacity, held for the purpose of promoting the election of a candidate for a seat in Parliament, may be made the subject of fair and *bonâ fide* discussion by a writer in a public newspaper, and unfavourable comments made upon such conduct in the course of such discussion are privileged; *Davis* v. *Duncan*, *L. R.* 9 *C. P.* 396. Where the prosecutor, a medical man, had inserted an advertisement in a medical paper of which the accused was the editor, soliciting the public to subscribe to a hospital of which he was the surgeon in charge, and stating the number of successful operations which had been performed, it was held the advertisement had the effect of making such hospital a public question, and of submitting it to the judgment of the public, and that the accused in commenting on the conduct of the prosecutor in connection with the insertion of the advertisement was within the third, sixth, and ninth exceptions of this section; *Emp.* v. *McLeod*, *I. L. R.* 3 *All.* 342.

The sanitary condition of cottages let by a colliery company to its workmen is a matter of public interest, and fair comment thereon is not libellous; *Helton Coal Co.* v. *North Eastern News Association* [1894], 1 *Q. B.* 133.

Unfavourable comments upon the conduct of persons who take a public position with regard to public matters stand on a very different footing to the publication of untrue and libellous matters stated at public meetings in respect to third persons. These are not privileged when reported in a newspaper, even when reported fairly, although they may happen to have been privileged at the time they were made; *Davison* v. *Duncan*, 7 *E. and B.* 229; *Popham* v. *Pickburn*, 7 *H. and N.* 891; *Purcell* v. *Sowler*, 2 *C. P. D.* 215. These reports have, however, been declared to be privileged by the Statute 44 and 45 Vict. c. 60, s. 2, provided that the meeting was a public meeting, lawfully convened for a lawful purpose, and open to the public; that the report was fair and accurate, and published without malice; that the publication was for the public good; and the defendant has not refused to publish, when asked, a reasonable letter of explanation or con-

tradiction. See *Odgers on Libel*, 2 *Edit.*, pp. 377-383. Such reports would not be privileged under *Exception* 4, which only applies to proceedings in a court of justice.

Exception 4. *Publication of reports of proceedings of Courts of Justice.*—It always has been the law in England that "a fair account of what takes place in a court of justice is privileged, and the reason is that the balance of public benefit from the publicity is great. It is of great consequence that the public should know what takes place in court, where the proceedings are under the control of the judges"; *Campbell*, C. J., in *Davison* v. *Duncan*, *ubi sup.*:—"Such reports only extend that publicity which is so important a feature in the administration of the law in England, and thus enable to be witnesses of it not merely the few whom the court can hold, but the thousands who can read the reports"; *Wilde*, B., in *Popham* v. *Pickburn*, *ubi sup.* The report, however, must be a fair and substantially accurate report, favouring neither one side nor the other, and not ommitting important matters which may alter the aspect of the case. The publication of such a report in parts is not libellous, so long as all the parts put together give a fair account of the whole proceeding, and no part is left out which is necessary to the report being a fair report of the proceeding; *Lewis* v *Levy*, *E. B. and E.* 537; but the publication of the last scene alone, *i. e.*, the judgment and the reasons for it, may expose the publisher to considerable risk, *per Lord FitzGerald*, in *Macdougall* v. *Knight*, 14 *App. Ca.* at p. 207. There is no presumption one way or the other as to whether a judge's judgment, or summing up to a jury, does or does not give such a complete and substantially accurate account of the case in respect of matters upon which he is adjudicating as to bring it within the privilege: that must be a matter of evidence; *per Halsbury*, L. C., in *Macdougall* v. *Knight*, 14 *App. Ca.* at p. 200. In the court below, it was held that a fair and accurate report of the judgment in an action, apart from the evidence published *bonâ fide* and without malice, is privileged; *Macdougall* v. *Knight*, 17 *Q. B. D.* 636; but this ruling was not overruled by the House of Lords, and the Court of Appeal in a subsequent case intimated

that they considered their ruling was still good law; *Macdougall* v. *Knight*, 25 *Q. B. D.* 1.

It is doubtful, too, even under this exception, to what extent the publication of a report of proceedings in a court of justice may extend. Suppose a charge of publishing a defamatory libel be dismissed for some other cause than that the publication is not a defamatory libel. The case itself may be reported, but would the re-publication of the defamatory words be privileged? In England, on shewing cause against a rule for a criminal information, for publishing a blasphemous and seditious libel, it was urged that it was merely the report of a judicial proceeding; yet the court held that if the report contained anything blasphemous, seditious, indecent, or defamatory, the defendant had no right to publish so much of it, although it had actually taken place in a court of justice; *Carlile's Case*, 3 *B. and Ald.* 167.

This exception by itself, without the explanation, would not have permitted the publication of a report, of an inquiry prior to committal before a magistrate, because a magistrate while engaged in such an inquiry is not a judge, and none but a judge or a number of judges can constitute a court of justice, and the explanation itself is not happily worded. The last ten words, to make the explanation legally accurate, should have been "is a *court of justice* within the meaning of the above *explanation*." But there would not seem to be any doubt but that this explanation was intended to, and does alter the law as it was in England many years ago, and under which it was decided that the publication of preliminary or *ex parte* proceedings in a court of justice cannot be justified; as the publication of depositions before a Justice of the Peace on a charge of murder; *Lee's Case*, 5 *Esp.* 123; or the proceedings of a Coroner's inquest; *Fleet's Case*, 1 *B. and Ald.* 379. Now, however, it would seem that in England, the only point which would be considered would be whether the report was a *fair report of what took place in a court*, and that it would make no difference whether the report was of a trial in a court which could give a final decision, or of a preliminary investigation prior to commitment, or whether the application was *ex parte* or not; *Wason* v. *Walter*, *L. R.* 4 *Q. B.* 73; *Usill* v. *Hales*, 3 *C. P.*

D. 319; the report of an application for a summons which was afterwards dismissed on the hearing comes within this principle; *Kimber* v. *The Press Association* [1893], 1 *Q. B.* 65.

Exception 6. *Merits of a public performance.*—The same principles govern the application of this exception as that of *Exception* 3.

Exception 7. *Censure by one person having authority over another.*—The *gomastah* of a *gooroo*, who published an order of his master excommunicating the complainant from his caste, would come under this exception, if the complainant was really subject to the *gooroo*; 6 *Mad. H. C. Rep. App.* 46; *Reg.* v. *Sri Vidya Sankara, I.L. R.* 6 *Mad.* 381; and if the circumstances are such that all that was said or done was consistent with the duty imposed upon the two parties by law or custom, whether that duty be legal, moral, social, or spiritual; *Gardner* v. *Slade*, 13 *Q. B.* 796; but where the exercise of ecclesiastical jurisdiction is plainly *ultra vires*, or otherwise unsanctioned by the ordinances of a religious society, or where such ordinances controvert the general law, and, in either case, consequences result which the criminal law was intended to restrain, no privilege can exist; *In re Paul de Cruz, I. L. R.* 8 *Mad.* 140. The censure or excommunication, where lawful, must, however, be communicated in a proper manner, so as not to come into the hands of those whom it does not concern; for a communication which would be privileged if made by letter becomes unprivileged if made through the telegraph office, because it is necessarily communicated to all the clerks through whose hands it passes; it is like the case of the libel contained on the back of a post-card; *Williamson* v. *Freer*, *L. R.* 9 *C. P.* 393. Where N, having attended a Hindu widow marriage (legalised by Act XV of 1856), S, his *gooroo*, published a notice to the members of his sect declaring N to be an out-caste, and forbidding his disciples and the public of the town in which N lived to associate with him until he had done penance, it was held that this was privileged; *Reg.* v. *Sri Vidya Sankara*, *I. L.R.* 6 *Mad.* 381; approved of in *Bashumati* v *Budram I. L. R.* 22 *Cal.* 46. S also sent by post to N a registered post-card of similar import, and in so doing it was held, that he had committed the offence of defamation; *ib.* Where a Brahmin

who was out of caste had been re-admitted, in consequence of which there was a split in the caste, and the defendant, not approving of the re-admission, distributed handbills broadcast through the town calling the prosecutor a "sinner," it was held that the manner of publication was unnecessary, and in excess of the purpose for which privilege was allowed, and therefore no protected; *Emp.* v. *Krishnasami*, *I. L. R.* 15 *Mad.* 214.

The publication of a libel by giving it to the clerk of the writer to be copied is not privileged; *Pullman* v. *Hill* [1891], 1 *Q. B.* 524.

Language used by a Coroner in summing up a case to jury; *Thomas* v. *Chirton*, 31 *L. J. N. S. Q. B.* 139; and remarks of a County Court Judge while trying a case, *Scott* v. *Stansfield*, *L. R.* 3 *Ex.* 220, would come either under this exception or under *Exception* 9, and so would many other cases, such as remarks made in a caste meeting about one of the members of the caste, or the communication to the caste of the determination arrived at in such a meeting.

A judge cannot be prosecuted for defamation in respect of anything said by him as a judge without the sanction of Government, or the court superior to him; *In re Gulam Muhammad*, *I. L. R.* 9 *Mad.* 439.

Exception 8. *Accusation to a duly authorized person.*—A false accusation not made in good faith renders the party making it liable to be charged with defamation; *Sealy* v. *Rumnarain*, 4 *W. R. Cr.* 22. A letter written by a Brahman to the Brahman community of the neighbourhood, with a view to obtain their decision on a matter affecting his own religious interests, and those of the Brahman community, if written in good faith, falls within this exception, and *Exception* 10; *Reg.* v. *Kashinath Bagul*, 8 *Bom. H. C. Rep. C. C.* 168; followed in *Bashumati* v. *Budram*, *I. L. R.* 22 *Cal.* 46.

Exception 9. *Imputation made by a person for the protection of his interests.*—A communication made *bonâ fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has, or honestly believes he has, a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter, which, without

the privilege, would be defamatory and actionable; *Laughton* v. *The Bishop of Sodor and Man, L. R.* 4 *P. C.* 504; *Whitely* v. *Adams*, 15 *C. B. N. S.* 392; *Reg.* v. *Kikabhai Purbhoodas*, 9 *Bom. H. C. Rep.* 451; *Venkata* v. *Kotayya, I. L. R.* 12 *Mad.* 374; provided the communication be made in good faith, *i. e.*, if he had good reason for believing the allegations to be true; *In re Shibo Prosad, I. L. R.* 4 *Cal.* 124; therefore, where a person called upon by a *punchayet* convened by the complainant's relations, to explain why he had made a defamatory remark concerning the complainant, made a statement by way of explanation, it was held that such statement was privileged, and a conviction in respect of that statement was illegal; *In re Govindappa, I. L. R.* 7 *Mad.* 36. The *gomastah* of a *gooroo* was convicted of defamation in having published an order of his master, excommunicating the complainant from his caste. The letter publishing the excommunication contained a statement that the complainant disobeyed some one, and treated him with disrespect. It was held that the letter contained no expression defamatory *per se*. If the person so treated was in a position entitling him to demand respect, and to make non-submission an offence, then that position would render the communication privileged under *Exception* 1 or this exception, and if not, then the mere statement that the complainant did not obey one whom he was not bound to obey was not defamatory; 6 *Mad. H. C. Rep. App.* 46. A petition by certain *raiyats* in a *zamindari* village, addressed to the *Tehsildar*, and praying that the village Munsiff might be retained in his office, notwithstanding the zamindar's petition for his removal, is a privileged communication; *Venkata* v. *Kotayya, I. L. R.* 12 *Mad.* 374. But the communication must be made with due care and attention; consequently, the making of an inaccurate statement may be sufficient to take away the privilege which would otherwise exist. C was put out of caste by a *punchayet* on the ground that there was an improper intimacy between him and a woman of the same caste, who was also excommunicated. Certain members of the *punchayet* circulated a letter to the caste stating that these two persons had been excommunicated, and the reasons for it, and requested the caste not to receive them into their houses or eat with them. In this letter

they made certain statements as to a criminal charge, which might apply equally to C or to the woman, or to both of them, such statements not being true if intended to apply to C. It was held that such persons would have been protected if they had simply stated that C and the woman had been excommunicated, but as they chose to add statements of facts, untrue as regards C, which might be understood to apply to him, they had not acted in good faith, and could not escape from the result of their carelessness by saying that they intended the remarks to apply to the woman only; *Emp.* v. *Ramanand*, *I. L. R.* 3 *All.* 664. A person who declares another excommunicated, without allowing him an opportunity of refuting the charge on which he is excommunicated or of explaining his conduct, does not act in good faith; *Vallabha* v. *Muhammadsaheb*, *I. L. R.* 12 *Mad.* 495.

It is not sufficient that the defendant should merely *believe* the person to whom the communication is made has an interest therein corresponding to his own; he must *actually* have an interest; *Heldditch* v. *McIlwaine* [1894], 2 *Q. B.* 54.

A solicitor in respect of his action on behalf of a client stands in the same position with regard to privilege as his client would stand; *Baker* v. *Carrick* [1894], 1 *Q. B.* 838.

If the President of a Marine Insurance Company, having reason, from information received by him, to believe that the plaintiff, the master of a ship, is addicted to intemperate habits, informs the owner of the ship, that the Company cannot continue to insure that ship or any other ship while the plaintiff was in command, without assigning any reason therefor, he is not liable to an action for damages at the suit of the master, as it was a representation made *bonâ fide* in the conduct of the affairs of the Company, and in matters in which their own interest was concerned; *Hamon* v. *Falle*, 4 *App. Ca.* 247. Where an accused was watching a civil case on behalf of his partner, and during the hearing informed the judge that the complainant was tampering with the witnesses, and prayed that he might be made to sit in court, it was held that in the absence of malice or bad faith on the part of the accused, he was protected by this exception; *Emp.* v. *Purshotam um Kala*, *I. L. R.* 9 *Bom.* 269.

Where magistrates for a borough, in order to facilitate the business of the general annual licensing meeting, ordered the defendant, who was head constable of the borough, to issue to persons having business before the meeting copies of a report made by him to the magistrates stating the grounds of objections taken to the renewal of licenses, it was held that this publication by the defendant in accordance with the order of the magistrates was privileged; *Andrews* v. *Nott Bower* [1895], 1 *Q. B.* 888.

A railway company dismissed a guard on the ground that he had been guilty of a gross neglect of duty, and published his name in a printed monthly circular addressed to their servants, stating in it that he had been dismissed, and the ground of his dismissal; it was held that the communication was made on a privileged occasion; *Hunt* v. *Great Northern R. Co.* [1891], 2 *Q. B.* 189.

Where the Mayor of a town informed a guest, whose valet the plaintiff was, that he had received a communication from the police of the town where the guest had previously been staying that his valet was suspected of having committed a theft there in an hotel in which he and his master had been staying, in consequence of which the guest dismissed the plaintiff, it was held that this was a privileged communication; *Stuart* v. *Bell* [1891], 2 *Q. B.* 341.

There may be at times great difficulty in defining what kind of social or moral duty, or what amount of interest, will afford a justification; but this must be determined by the judge, as a matter of law, on the facts of each case as it arises; *Whitely* v. *Adams*, 15 *C. B. N. S.* 392; *Stuart* v. *Bell*, *ubi supra*.

As to the privilege of judges, counsel, parties and witnesses in England, in *Rex* v. *Skinner*, *Lofft*, 55, *Lord Mansfield* said:—"Neither party, witness, counsel, jury, or judge can be put to answer civilly or criminally for words *spoken in office*"; and although some judges thought that those words were a little too general, and that a judge might be held to be liable for words spoken *in abuse* of office with express malice, yet in the case of *Scott* v. *Stansfield*, *L. R.* 3 *Ex.* 220, it was held that the law as then settled was, that no action will lie against a judge for any acts done or words spoken in his judicial capacity; see also *Raman Nayar* v. *Subramanya*, *I. L. R.* 17 *Mad.* 87. A long course

of authorities, among which are *Astley* v. *Younge*, 2 *Burr.* 807, and *Johnson* v. *Evans*, 3 *Esp.* 32, have decided that no action of slander can be brought for any statement made by parties in the pleadings or during the conduct of the case. In *Revis* v. *Smith*, 18 *C. B.* 126, and *Henderson* v. *Broomhead*, 4 *H. and N.* 569, it was held that scandalous, false, and malicious statements upon a person not a party to the cause, in an affidavit made in the course of the cause, give no cause of action. In *Dawkins* v. *Lord Rokeby*, *L. R.* 7 *H. L.* 744, followed in *Seaman* v. *Netherclift*, 1 *C. P. D.* 540, it was held that as regards a witness, his privilege for words spoken in giving evidence with reference to the inquiry on which he is called as a witness is absolute and unqualified. Thus, the English law clearly gives the fullest privilege against any proceeding, civil or criminal, to parties, witness, counsel, jury and judge in respect of words spoken in office; and that law was distinctly approved of and followed in *Bhikumber* v. *Becharam*, *I. L. R.* 15 *Cal.* 264. In *Ganesh Dutt* v. *Mugneeram*, 11 *Ben. L. R.* 321, the Privy Council in a case on appeal from Calcutta held that witnesses cannot be sued in a Civil Court for damages in respect of evidence given by them upon oath in a judicial proceeding; and the High Court at Madras in *Hinde* v. *Baudry*, *I. L. R.* 2 *Mad.* 13, held that, with respect to persons rightfully making an application in a suit, the principle of public policy which guards the statements of a party or a witness against an action would protect them, whether the statement was malicious or not; see, also, *Chidumbara* v. *Thirumani*, *I. L. R.* 10 *Mad.* 87; *Nathji* v. *Lalbhai*, *I. L. R.* 14 *Bom.* 97. These last cases were, however, civil suits. Now the only exceptions under which counsel, parties, or witnesses could claim any privilege on a charge of defamation under the Penal Code are the eighth and ninth, and both require that what is done should be done "in good faith"; and by Sect. 52, "nothing is said to be done in good faith which is done without due care and attention." Consequently it would, at first sight, seem that in India, in regard to criminal charges, the privilege of these three classes of persons is absolute, as in England, but that it is qualified by the necessity of their acts and words being spoken and done "with due care and attention." In consider-

ing whether there is good faith, the position of the person making the imputation must be taken into consideration, whether he is a barrister making it on instructions, or a party making it of his own motion; *In re Nagarji*, *I. L. R.* 19 *Bom.* 340. In accordance with this it has been ruled in *Greene* v. *Delanney*, 14 *W. R. Cr.* 27 (followed in *In re Nagarji*, *I. L. R.* 19 *Bom.* 340), that the criminal law of India depends entirely on the construction of the Penal Code, and not what may be the English law on the subject, and, consequently, that the act of filing in court a petition containing imputations concerning a person, calculated to harm his reputation with the intention that it should be read by other persons, is not privileged under this exception, as not having been made in good faith. It has also been held that defamatory statements are not privileged *merely* because they are used in a petition preferred in a judicial proceeding; *Abdul Hakim* v. *Tej Chandur*, *I. L. R.* 3 *All.* 815; and in a much earlier case, it had been held that a charge would lie against a person for defamatory expressions used by him against his prosecutor, while he was a defendant in a criminal case, when those expressions were not used with due care and attention; *Reg.* v. *Pursoram*, 3 *W. R. Cr.* 45. In accordance with this, the High Court at Madras has held that where an accused, *defended by Counsel*, ejaculates a defamatory expression referring to a witness in the box, he cannot claim privilege, as it was not in the *ordinary course* of the proceeding; *Hayes* v. *Christian*, *I. L. R.* 15 *Mad.* 414; relying on *Dawkins* v. *Lord Rokeby*, *L. R.* 8 *Q. B.* 225; *L. R.* 7 *H. L.* 744. But it has been held that a *witness* deposing in the witness box is absolutely protected in respect of defamatory or insulting expressions used by him, so long as they are relevant to the inquiry in the broadest sense of the term; *Daran Singh* v. *Mahip Singh*, *I. L. R.* 10 *All.* 425; *Manjaya* v. *Sesha*, *I. L. R.* 11 *Mad.* 477; *Emp.* v. *Babaji*, *I. L. R.* 17 *Bom.* 127; *Emp.* v. *Balkrishna*, *ib.* 573. A statement made in answer to a question put by a police officer under Sect. 161, *Cr. P. C.*, in the course of an investigation made by him, is privileged, and cannot be made the subject of a prosecution for defamation; *Emp.* v. *Govinda Pillai*, *I. L. R.* 16 *Mad.* 235. In the case of counsel who only acts upon

instructions or argues on facts brought out in the course of the case, in the absence of proof of express malice, the absence of good faith ought not lightly to be found, *In re Nagarji*, *I. L. R.* 19 *Bom.* 340. Therefore, an advocate, pleader or mookhtiar, relying upon the statements of his client, and in good faith, and in accordance with his instructions, introducing into a pleading a defamatory statement, will be protected by the exception, but the case would be otherwise, if the pleading was prepared by a person who has no such employment, and does not act in good faith; *Reg.* v. *Christien*, 2 *N. W. P.* 473. But it has also been held that an advocate in this country cannot be proceeded against criminally or civilly for words uttered in his office as advocate, since anything uttered in his office as advocate would be in good faith, because it would be upon instructions given to him by his client which he is bound to accept, *Sullivan* v. *Norton*, *I. L. R.* 10 *Mad.* 28 (*F. B.*). See, also, *Bhikumber* v *Becharam*, *I. L. R.* 15 *Cal.* 264.

Where a body of persons is not acting in a judicial, but only in an executive, capacity, a member of that body making a defamatory statement is not entitled to absolute immunity from an action, but only to the ordinary privilege attaching to a privileged occasion, *Royal Aquarium* v *Parkinson* [1892], 1 *Q. B.* 431.

It has after many years been at last held in England that the publication of reports of the debates in Parliament is for the public good, and that consequently such a report is privileged, even though it may contain matter defamatory of a particular individual, *Wason* v. *Walter*, *L. R.* 4 *Q. B.* 73. As to reports of public or *quasi* public meetings in general, see 44 and 45 *Vict.* c. 60, s. 2, referred to *ante*, p. 679.

Exception 10. *Caution for the good of the person to whom it is conveyed.*—The principles, cited in the notes to *Exception* 9, from *Laughton* v. *The Bishop of Sodor and Man*, apply to this section, as do also the principles laid down in all cases cited there down to *Human* v *Fulle*. It is necessary that the defendant in conveying the caution should not use language too violent for the occasion, and should only state what he believes, or might reasonably believe, *Spill* v. *Maude*, *L. R.* 4 *Ex.* 232. This is simply that exercise of due care and attention which is necessary

to constitute good faith. For the same reason it is necessary that the caution should be conveyed by the proper means; *e. g.*, to a father, privately, if the caution be about his children, and not in the midst of a gathering of people or the columns of a newspaper; *Somerville* v. *Hawkins*, 10 *C. B.* 583. If, however, a person makes comments on the conduct of another in the presence of those to whom he is entitled to make them, the fact, that there are other persons present who did not introduce, and whom he could not by his own act of filing does not, in the absence of malice, make the occasion privileged; *Pittard* v. *Oliver* [1891], *Q. B.* 474.

Act X. of 1882, Sect. 521, provides for the destruction of all the copies of the thing in respect of which there is a conviction under Sects. 501 and 502.

Where a married woman is defamed by the imputation of unchastity, her husband is a person aggrieved, upon whose complaint a magistrate can, under Sect. 198, Cr. P. C., take cognizance of the offence; *Chellam* v. *Ramasami*, *I. L. R.* 14 *Mad.* 379.

CHAPTER XXII.

CRIMINAL INTIMIDATION, INSULT, AND ANNOYANCE.

CRIMINAL INTIMIDATION.

Sect. 503. *Criminal Intimidation.*—**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 that person 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.**

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.

Sects. 504, 505. See *post*, pp. 693, 694.

Sect. 506. *Punishment for Criminal Intimidation.*—**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.**

Sect 507. *Criminal Intimidation by an Anonymous Communication.*—**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 comes, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.**

Offences under the first portion of Sect. 506 *are triable by Presidency Magistrate, or a Magistrate of the first or second class ; those under the latter portion of Sect.* 506, *and those under Sect.* 507, *by the Court of Session, a Presidency Magistrate or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable Offences under the first portion of Sect.* 506 *are compoundable, the others are not.*

Charge.

That you, the said A B, on or about the day of , at , did commit criminal intimidation, to wit, by threatening one C D with injury to his person, with intent to cause alarm to the said C D (*or* to cause the said C D to desist from prosecuting a civil suit in which the said C D was plaintiff and one E F defendant) ; and that you, the said A B, have thereby committed an offence punishable under Sect. 506 of the Indian Penal Code, and within, &c.

Evidence.

Prove the threat made by defendant, and shew with what intent the threat is uttered. The proof of these matters will be very similar to that of the same matters in extortion, see *ante*, p. 484, and defamation, see *ante*, p. 672. The difference between this present crime and the others is in the intent

The threat referred to in Sect. 503, *ante*, p. 691, must be a threat communicated or uttered with the intention of its being communicated, to the person threatened, for the purpose of influencing his mind ; *Ganga Chunder* v. *Gour Chunder*, *I. L. R.* 15 *Cal.* 671.

If the threat be of injury to a person other than the one to whom the threat is addressed, the latter must have a personal interest in the former, so as to render it likely that the threat will have some influence upon his feelings or conduct.

Therefore, where the prisoner sent a letter to the Commissioner, S. D., containing a threat that, if a certain forest officer were not removed from his post, the officer would be killed, and it was shewn that the Commissioner had neither official nor personal interest in the officer, it was held that the prisoner could not be convicted of criminal intimidation : *Emp.* v. *Mangesh*, *I. L. R.* 11 *Bom.* 376.

Where the accused went to the complainant, the brother of an adult woman, and told him that he had come from the *Sirkar*, and would get him six months' imprisonment if he did not let his sister go, it was held that these words did not constitute either the offence of criminal intimidation within the meaning of Sect. 503 (there having been no threat of *injury* in the sense in which that word is used in the Code), or any other offence known to the law ; *Reg.* v. *Morobu Bhaskerjee*, 8 *Bom. H. C. Rep., C. C.* 101.

A threat of getting a person dismissed from service as a Police Constable does not fall under this section. *Emp.* v. *Dada Hanmant*, *B. R.* 5*th September* 1895.

If a person, at one and the same time, criminally intimidates three different persons, and each of them brings a separate charge against him, he may be convicted and sentenced for three separate offences ; *Reg.* v. *Goolzar Khan*, 9 *W. R. Cr.* 30.

Although an offence under the latter half of Sect. 506, *ante*, p. 691, is not compoundable, yet a withdrawal from the prosecution may be allowed in a proper case ; *Emp.* v. *Vithoba*, *B. R.* 23*rd June* 1887, following *Reg.* v. *Devama*, *I. L. R.* 1 *Bom.* 64.

INSULT TENDING TO BREACH OF THE PEACE.

Sect. 504. *Intentional Insult with intent to provoke a Breach of Peace.*—**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.

Triable by any Magistrate. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Compoundable.

Evidence.

The prosecution must prove that the accused did intentionally do some act, or utter words, which amounted to an insult; that the act or words were likely to cause the person to whom they were addressed to break the peace, and that he intended or knew it to be likely that such should be the result. An insult which, under ordinary circumstances, would be likely to provoke the person insulted to break the peace, is within the provisions of this section, although the person insulted may, by the insult, have been reduced to such a state of abject terror as to render it improbable that he would commit a breach of the peace; *Emp.* v. *Jogayya*, *I. L. R.* 10 *Mad.* 353.

SEDITIOUS STATEMENT.

Sect. 505. *Circulating False Report, with intent to cause Mutiny or an Offence against the State, &c.*—**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.**

Sect. 503. See *ante*, p. 691.

Sect. 507. See *ante*, p. 692.

Triable by a Presidency Magistrate, a Magistrate of the first or second class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are not bailable. Not compoundable.

Charge.

That you, the said A B, on or about the day of , at , did circulate (*or* publish) a certain statement (*or* rumour, *or* report), to wit, (*here set out statement*), knowing the said statement, &c , to be false, with intent thereby to cause fear to the public, and thereby to induce some person to commit an offence against the public tranquillity, that is, the offence of rioting; and that you have thereby committed an offence punishable under Sect. 505 of the Indian Penal Code, and within, &c.

Evidence.

The evidence necessary to prove this offence will be the same as that required under defamation. In fact, the libel in the former case is defamatory; in the present, seditious. Then what amounts to sedition? According to *Archbold*, political writings and words may be classed under three heads: those which are overt acts of treason; those which are seditious; and those which are allowable and justifiable. Writings which import a compassing of the Queen's death are sufficient acts of this species of treason, if published; 1 *Hale*, 118; 3 *Inst.* 14; *Fost.* 198: as, for instance, writings exciting persons to kill the Queen; *R.* v. *Twyn*, *Kel.* 22; or the like. See the several cases collected in *Pyne's Case*, *Cro. Car.*, 117. So, words of advice or persuasion are sufficient overt acts of this species of treason, if they advise or persuade to an act which would itself, if committed, be a sufficient overt act; *Fost.* 195, 200; *R.* v. *Charnock*, 12 *St. Tr.* 1377; 2 *Salk.* 631.

But loose words, which have no reference to any act or design or which are not words of persuasion or advice, cannot be deemed overt acts of treason; *Fost.* 200-205; *R.* v. *Thering*, *St. Tr* 79-90.

On the other hand, a man may lawfully discuss and criticise the measures adopted by the Queen and her ministers for the government of the country, provided he do it fairly, temperately, with decency and respect, and without imputing to them any corrupt or improper motive; *R.* v. *Lambert and Perry*, 2 *Camp.* 398. All political writings between these extremes may be deemed seditious, and, under the present section, might be punished.

As, for instance, if a man curse the Queen, wish her ill, give out scandalous stories about her; *R.* v. *Harvey*, 2 *B. and C.* 257; or do anything that may lower her in the esteem of her subjects, or may raise jealousies between her and her people, or if he deny the Queen's right to the throne in common and advised disavowal, all these are seditious; 4 *Bl. Com* 123. In *R.* v. *Tutchin*, 14 *St. Tr.* 1096; *Holt* 424; *Lord Holt* said, "that if men shall not be called to account for possessing the people with an ill opinion of the Government, no Government can subsist; nothing can be worse to any Government than to endeavour to procure animosities as to the management of it; this has always been looked upon as a crime, and no Government can be safe unless it be punished." And *Lord Ellenborough*, in *Reg.* v. *Cobbett* (*Holt on Libel*, 114; *Stark. on Libel*, 4th Edit., 629), said, "that if a publication be calculated to alienate the affections of the people, by bringing the Government into dis-esteem, whether the expedient resorted to be ridicule or obloquy, the writer, &c., is punishable. And, whether the defendant really intended by his publication to alienate the affections of the people from the Government or not, is immaterial, if the publication be calculated to have that effect, it is a seditious libel"; *R.* v. *Burdett*, 4 *B. and Ald.* 95; *R.* v. *Harvey*, *supra*.

Under this section, if the statement be true in fact, the defendant will be entitled to be acquitted, whatever might be the result of the publication, &c., and with whatever intent he might have published it, for the section requires that he should know it to be false, and does not introduce any qualification as to his not knowing it to be true, as in the case of false evidence.

THREATENING TO MAKE A PERSON AN OBJECT OF DIVINE DISPLEASURE.

Sect. 508. *Act done to induce a Person to believe that he will be rendered an object of Divine Displeasure.*—**Whoever voluntarily causes, or attempts to cause, any person to do anything which that person is not legally bound to do, or to omit to do anything 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.

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.**

Triable by a Presidency Magistrate, or a Magistrate of the first or second class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Charge.

That you, the said A B, on or about the day of at , voluntarily did cause (*or* attempt to cause) a certain other person, to wit, one C D, to do something which the said C D was not legally bound to do, to wit (*here set out act to be done*), by inducing (*or* attempting to induce) the said C D to believe that he, the said C D (*or* some person in whom he, the said C D, is interested) would become (*or* be rendered), by an act of the said A B, to wit (*here set out act*), an object of Divine displeasure, if he, the said C D, did not do the said act or thing which the said A B desired him, the said C D, to do; and that

you, the said A B, have thereby committed an offence punishable under Sect. 508 of the Indian Penal Code, and within, &c.

INSULTING THE MODESTY OF A WOMAN.

Sect. 509. *Word, &c., intended to insult the Modesty of a Woman.*—**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 punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.**

Triable by a Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

Evidence.

The act done by the defendant must be proved. The intention of the offender must be presumed from the nature of the act. If the act be one which would naturally insult the modesty of a woman, then the defendant will be presumed to have done it with that intention, if he has done it to a woman whom he did not know to be immodest, for the law will, for the sake of morality, presume every woman to be modest until the contrary be clearly shewn. And, even if the woman be immodest by profession or character, still an offence might be committed if the act were done in a public place, where even an immodest woman might be desirous of conducting herself decently.

The doctrine, that "though the woman were virtuous, yet 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, there would be no offence," seems to be a dangerous doctrine, as, if allowed as rule of law, it would leave women who, while perfectly modest, had been perhaps a little too free and open in their behaviour, entirely

unprotected from the insults of any libertine who chose to try to insult them.

As to outrages on the modesty of a woman, see Sect. 354, *ante*, p. 436.

ANNOYANCE THROUGH INTOXICATION.

Sect. 510. *Misconduct in Public by a Drunken Person.*—**Whoever, in a state of intoxication, appears in any public place or in any place 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.**

Triable by any Magistrate. A warrant should issue in the first instance. Police officers may not arrest without a warrant. Defendants are bailable. Not compoundable.

CHAPTER XXIII.

ATTEMPTS TO COMMIT OFFENCES.

Sect. 511. *Attempts to commit Offences.*—**Whoever attempts to commit an offence punishable by this Code with transportation or imprisonment, or to cause 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, as the case may be, 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 having nothing in his pocket: A is guilty under this section.**

Note.

All the provisions as to place of trial, issue of a summons or warrant, arrest with or without a warrant, and bail, depend upon the provisions laid down for those matters in the case of the actual commission of the offences themselves. Compoundable only when the offence attempted is compoundable.

Charge.

That you, the said A B, on or about the day of , at , did attempt to commit theft, and in such attempt you

did an act towards the commission of such offence, to wit, put your hand into the pocket of one C D with intent to commit theft therefrom, and that you, the said A B, have thereby committed an offence punishable under Sects. 379 and 511 of the Indian Penal Code, and within, &c.

Evidence.

This section applies only to attempts to commit offences punishable with transportation or imprisonment, *and not to offences punishable with death only, or with fine only*; it would seem also to be doubtful whether it applies to offences punishable with death, or transportation for life, in the alternative. This limitation contained in the section itself, curiously enough, was entirely overlooked by *Couch*, C. J., and *Westropp*, J., in the case of *Reg.* v. *Cassidy*, 4 *Bom. H. C. Rep. C. C.* 17. *Couch*, C. J., at p. 23, quoted the section as follows:—"Whoever attempts to commit an offence punishable by this Code * * * and in such attempt does any act towards the commission of the offence, shall be punished." Thus, leaving out the words "with transportation or imprisonment," he argued out the result of his judgment as if they did not exist, and created an offence of attempting to murder other than that under Sect. 307. *Westropp*, J., while concurring, did so with difficulty, and apparently did not notice the omission by *Couch*, C. J., of the words "with transportation or imprisonment." In the case of all offences for which death is prescribed as a punishment, either special provision is made for the attempt to commit that offence, or else the attempt does not constitute a separate offence. Sect. 121, *ante*, p. 138, allots the punishment of death to the offence of waging, or *attempting* to wage, war. Sects. 302 and 303, *ante*, p. 366, assign the punishment of death to the offence of murder; Sect. 307, *ante*, p. 393, provides for the punishment of what constitutes an attempt to murder, and although the section itself does not assign the term "attempt to murder" to the offence therein described, yet Schedule 2 to the Criminal Procedure Code describes the offence punishable under Sect. 307 as "attempt to murder." Under Sect. 396, *ante*, p. 492, murder in dacoity is punishable with death; Sect. 397, *ante*, p. 492, provides a punishment for robbery or dacoity

with attempt to cause death; and Sect. 398, *ante*, p. 492, one for attempt to commit robbery or dacoity when armed with deadly weapons. These are the cases of offences punishable with death, in which special provision is made for the punishment of an attempt to commit such offences; and this section, not only does not include cases in which the punishment is death, but only applies "where no express provision is made by this Code for the punishment of such attempt," which words were not referred to in the case of *Reg.* v. *Cassidy*. See *Emp.* v. *Niddha*, *I. L. R.* 14 *All.*, p. 41.

Section 132, *ante*, p. 152, provides the punishment of death for abetment of mutiny, if mutiny is committed in consequence thereof, and Sect. 305, *ante*, p. 399, provides the same punishment for abetment of the suicide of a child, &c., but abetment is an offence which would seem to be impossible to *attempt* to commit. It would be difficult to imagine the facts which would support a charge of attempting to instigate, or attempting to engage in a conspiracy, or of attempting to aid, which would not also support a charge of instigating, engaging in a conspiracy, or aiding. Nobody has hitherto, as far as I am aware, been charged with an attempt to abet. For these reasons it would appear to be more than doubtful whether this section applies to attempts to commit offences punishable with death or transportation for life as alternatives. *Straight*, J., has held that no court has a right to resort to this section to convict a person of attempted murder; *Emp.* v. *Niddha*, *I. L. R.* 14 *All.*, p. 41.

As regards offences not punishable with death, Sects. 385, 387, and 389, *ante*, pp. 482 and 483, provide for *attempts* to put persons in fear of injury, death, grievous hurt or an accusation in order to commit extortion; Sect. 398, *ante*, p. 489, provides for an attempt to commit robbery. It has also been held that Sect. 511 does not apply to an attempt to commit dacoity; *Reg.* v. *Koonu*, 7 *W. R. Cr.* 48; because by Sect. 391, *ante*, p. 491, a person who attempts to commit dacoity "is said to commit dacoity."

The requirements of this section are, the intent to commit an offence, and an act done towards the commission of the offence; *Reg.* v. *Cassidy*, 4 *Bom. H. C. Reg. C. C.* 23; and further, that the

act should have been done in the attempt to commit the offence *Reg.* v. *Ramsarun*, 4 *N. W.* 46; *Reg.* v. *Dayal Bauri*, 3 *Ben. L. R. A. Cr. J.* 57, *per Mitter*, J. In this latter case the prisoner was convicted of attempting to cause mischief by fire, knowing that he would thereby destroy a building used as a human dwelling, and *Mitter*, J., in his judgment, said:—"The only fact proved against the prisoner is, that he was apprehended with a ball of rag containing a piece of lighted charcoal in his possession; but the fact is no more consistent with the intention of setting fire to a human dwelling than with that of setting fire to a stack of hay or to something else. There is not a particle of evidence to shew that the prisoner intended to destroy any particular object by fire, and, in the absence of such evidence, it is impossible to say that he intended to destroy a building used as a human dwelling. . . . In order to support a conviction for attempting to commit an offence of the nature described in Sect. 511, it is not only necessary that the prisoner should have done an overt act 'towards the commission of the offence,' but that the act itself should have been done '*in the attempt*' to commit it. The Sessions Judge says that the very fact that the prisoner went out of his house with the ball which was found in his possession was an overt act 'towards the commission of the offence,' but the question is, was there any attempt to commit a particular offence, and, if so, was the act done 'in such attempt?' I am of opinion that both these questions ought to be answered in the negative. Suppose a man goes out of his house into a street with a loaded gun in his possession, and suppose even that there is evidence to shew that he did so with the intention of shooting Z. If Z is not found in the street, or when found, no attempt is made to shoot him, either from fear, or repentance, or from any other cause, can it be said that the man is guilty of attempting to shoot Z? The going out of one's house with a loaded gun, and with the intention of shooting a particular individual, might be in one sense considered an act done towards the shooting of that individual; but so long as nothing further is done—so long as there is no attempt to shoot him, and no overt act done '*in such attempt*'—it is impossible to hold that there has been an attempt to murder . . . The cases referred to in this

passage (*Russell on Crimes and Misdemeanours*, by *Greaves*, vol. i., pp. 910-916), when contrasted with the illustration of Sect. 511, given in the Code, leave no doubt in my mind that the facts of the present case are wholly insufficient to support an indictment for attempting to commit mischief by fire."

Mere preparation to commit an offence, *e. g.*, the purchase of a stamp paper in the name of a person whose name it is intended to forge thereon, does not, in itself, amount to an attempt to commit the offence; there must be further an act done towards the commission of the offence; *Reg.* v. *Ramsarun*, 4 *N. W.* 46; but if the accused goes on to prepare or cause to be prepared on the stamp paper a bond in the name of the person in whose name the paper was purchased without the authority of that person, then there is an attempt to commit forgery; *Emp.* v. *Kalyan Singh*, *I. L. R.* 16 *All.* 409; see also *Emp.* v. *Dhundi*, *I. L. R.* 8 *All.* 304. A married man who causes banns for his marriage with another woman to be published does an act *towards* the commission of the offence of marrying again during the wife's lifetime, but he does not thereby attempt to commit such offence; *Reg.* v. *Peterson*, *I. L. R.* 1 *All.* 316. A man who indecently assaults a woman does not thereby attempt to commit rape, unless he by his conduct manifests a determination under all circumstances, and in spite of all resistance to gratify his passion; *Emp.* v. *Shankar*, *I. L. R.* 5 *Bom.* 403. These last three cases are applications of the definition of an attempt to commit an offence laid down by *Blackburn*, J., in *Reg.* v. *Cheeseman*, *L. and C.* 145:—"There is no doubt a difference between the preparation antecedent to an offence and the actual attempt, but if the *actual transaction has commenced*, which would have ended in the crime if not interrupted, there is clearly an attempt to commit a crime." Thus, where the jury explained a verdict of guilty of attempting to commit forgery by saying that the prisoner had ordered certain receipt forms to be printed similar to those used by the Bengal Coal Company, and that one of those forms had been printed and the proof corrected by him; that the prisoner had the intention of making such additions to the printed form as would make it a false document, and that he did

this dishonestly and with intent to commit fraud; it was held that the prisoner was not guilty of attempting to commit forgery, and *Garth*, C. J., said:—"The prisoner would not be guilty of an attempt to commit forgery until he had done some act towards making one of those forms a false document. If, for instance, he had been caught in the act of writing the name of the company upon the printed form, and had only completed a single letter of the name, I think that he would have been guilty of the offence charged, because the actual transaction would have commenced, which would have ended in the crime of forgery, if not interrupted. But as it was, all that he did consisted in mere preparation for the commission of the offence. He was no more guilty of an attempt to commit forgery in having the forms printed, than he would have been of an attempt to commit burglary, by having a false key made of the house where he intended to commit the offence." *Prinsep*, J., also said that what the prisoner had done amounted, "at most, only to a preparation to commit a forgery, *which might have proceeded no further*"; *Emp.* v. *Riasat Ali*, *I. L. R.* 7 *Cal.* 352. An application for payment of money under a false pretence is an attempt to cheat, although the person to whom the application is made never intends to pay the money, because the accused by making the application and uttering the false pretence has done an act towards the commission of the offence; *Government of Bengal* v. *Umesh Chunder*, *I. L. R.* 16 *Cal.* 310.

The question whether a certain act is merely one of preparation or one committed in the course of an attempt is a question of fact; *In re MacCrea*, *I. L. R.* 15 *All.* 173.

While it is true that, "if the actual transaction has commenced, which *would* have ended in the crime, if not interrupted," there is an attempt to commit an offence; yet the illustrations to this section shew that this definition does not cover every act which would amount to an attempt to commit an offence, and that wherever the actual immediate transaction has commenced which is *intended to end directly in an offence*, there has been an attempt to commit that offence, even though from some reason over which

the prisoner had no control he could not have been able to complete the offence. Thus, in *Illustration* (*b*), if a thief puts his hand into a man's pocket intending to steal whatever might be there, that is an attempt to commit theft, although there may be nothing in the pocket. When once a criminal act has been done in the course of the attempt, the attempt is not deprived of its criminality because the accused may repent and not carry out his intention to commit the offence; *In re MacCrea, I. L. R.* 15 *All.* 173.

But in England it *was* different. In the first place there must have been an allegation in the indictment that the prisoner stole, or attempted to steal, the goods of the prosecutor; if the charge be that of stealing, the goods must be specified; if it be one of attempting to steal, a general allegation to steal the goods and chattels of the prosecutor is sufficient: *Reg.* v. *Johnson, L. and C.* 489, and 34 *L. J. N. S. M. C.* 24; but if the specific goods charged are not in the place where prisoner goes with the intention of committing theft, or, the property being described generally as the goods and chattels of the prosecutor, if there is no property of the prosecutor in that place, the prisoner could not have been convicted of an attempt to steal those goods; *Reg.* v. *McPherson, Dears. and B.* 197; *Reg.* v. *Collins, L. and C.* 471; this last case was, however, overruled in *Reg.* v. *Brown.* 24 *Q. B. D.* 357. Although these fine distinctions are done away with by this section, it will always be well when such cases arise in India not to specify too minutely what the prisoner intended to steal, though, of course, the act which he is alleged to have done should be charged accurately, in order that he may know what it is that he has to meet. The whole series of acts, which could be possibly done if there was no interruption, must, however, amount to an offence under the Penal Code. When a person cannot be convicted of criminal intimidation of A by threatening the life of B, because A has no interest in B, he cannot be convicted of an attempt to commit criminal intimidation; *Emp.* v. *Mangesh Jivaji, I. L. R.* 11 *Bom.* 376. It would seem also that a person (a boy under 14) who is in law physically incapable of committing an offence (rape) cannot be convicted of attempting to commit that offence; *Emp.* v. *Gopala, B. R. 16th July* 1896, *see ante*, p. 454; *Reg.*

v. *Waite* [1892], 2 *Q. B.* 600; but in *Reg.* v. *Williams* [1893], 1 *Q. B.* 320, this last mentioned ruling was somewhat doubted. *Quære*, whether a woman, who believing herself to be with child, though not actually so, attempts to bring on a miscarriage, might not be convicted of an attempt to procure abortion; see *Reg.* v. *Whitchurch*, 24 *Q. B. D.* 420.

In the case of *Reg.* v. *Cassidy*, 4 *Bom. H. C. Rep. C. C.* 17, it was held that, in order to constitute the offence of attempting to murder under Sect. 307, *ante*, p. 393, the act committed by the prisoner must be an act capable of causing death in the natural and ordinary course of events; but that under the present section it is otherwise. Therefore, where a prisoner presented an uncapped gun at E Q (believing the gun to be capped) with the intention of murdering him, but was prevented from pulling the trigger, it was held that he could not be convicted of an attempt to murder under Sect. 307, though he could be convicted under Sect. 511. See, however, the remarks on this case under Sect. 307, *ante*, p. 395.

As to what is "an act towards the commission of an offence," see also the remarks on attempts to commit suicide, *ante*, p. 400.

An attempt to commit an offence punishable with whipping is not so punishable; 2 *R. J. and P.* 272; *Reg.* v. *Yella*, 3 *Bom. H. C. Rep. C. C.* 37. Nor can a person who is convicted of an attempt to commit an offence under Chapter XII. or Chapter XVII. be subjected to extra punishment under Sect. 75, *ante*, p. 56, in consequence of a previous conviction under those chapters. That section applies only to cases where both convictions have been punishable *wholly* under those chapters; *Reg.* v. *Moonesawmy*, *per Bittlestone*, J., 1*st Madras Sess.* 1865; *Emp.* v. *Nana Rahim*, *I. L. R.* 5 *Bom.* 140; *Emp.* v. *Ram Dayal*, *I. L. R.* 3 *All.* 773. No second conviction of an attempt to commit an offence punishable under this section is punishable with whipping.

By Sect. 57, *ante*, p. 43, it is provided that in "calculating fractions of terms of punishment, transportation for life shall be reckoned equivalent to transportation for twenty years."

OFFENCES UNDER THE INDIAN POST OFFICE ACT, 1866.

STEALING AND SECRETING LETTERS OR THE CONTENTS THEREOF.

Sect. 48. *Penalty for stealing, &c., or opening Letters, &c., by Persons employed in the Post Office.—Whoever being in the employ of the Government in the Post Office Department, shall steal, fraudulently appropriate, or wilfully secrete, destroy or throw away any letter or other article, sent by post, or anything contained in any such letter or article, or shall mutilate or break open any such letter or other article, or any mail-bag or box, with the intention of fraudulently appropriating anything therein contained, shall be punished, on conviction before a Criminal Court, with imprisonment of either description as defined in the Indian Penal Code, for a term not exceeding seven years, and shall also be liable to fine.*

Triable by the High Court, Court of Session, Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Not bailable. Not compoundable.

Charge of stealing, &c.

That you, the said A B, on or about the day of , at , then being in the employ of the Goverment in the Post Office Department, to wit, , did steal (*or* fraudulently appropriate, *or* wilfully secrete, *or* destroy, *or* throw away) a certain letter, to wit, a letter addressed to , the property of the Postmaster-General of the Presidency of Bombay; and thereby committed an offence punishable under Sect. 48 of the Indian Post Office Act, 1866, and within, &c.

Charge of breaking open, &c.

That you (*as above*) did mutilate (*or* break open) a certain letter, to wit (*as above*) [*or* did break open, *or* mutilate a certain mail-bag, *or* box], the property (*as above*) with the intention of fraudulently appropriating a certain thing contained therein, to wit, , and thereby committed an offence punishable under Sect. 48 of the Indian Post Office Act, 1866, and within, &c.

Evidence.

The first thing to be proved is that the accused was a person employed by the post office, and for that it is sufficient to shew that he acted as such, without proving his appointment; *Rex* v. *Rees*, 6 *C. and P.* 606; *Reg.* v. *Townsend*, *C. and Mar.* 178. A letter-carrier who is asked by the Postmaster to assist him in sorting the mails is a person employed under the post office; *Reg.* v. *Reason*, *Dears.* 226 and 23 *L. J. M. C.* 11.

Then prove the act which is charged to have been done by the accused in respect of the letter, &c.

Letter sent by Post.—Any letter *posted* in the ordinary way, whatever may be its address or object, is a *post-letter*, under the English statute, *Reg.* v. *Young*, 1 *Den. C. C.* 194, and 2 *C. and K.* 466; and would be a letter sent by post under the Indian Act. Therefore, a fictitious letter, with money in it, which is duly posted in order to try the honesty of the accused, is a post-letter; *ib.* But where a letter is written by an officer of the post office, and by him or his directions put among letters which the prisoner has to sort, without being posted in the ordinary way, a conviction cannot be had for stealing a post-letter; *Reg.* v. *Rathbone*, 2 *Mood. C. C.* 242; *Reg.* v. *Shepherd*, *Dears.* 606. Where the post office was at an inn, and a letter was not put into the box, but given into the charge of a servant of the inn who was not authorized to receive letters, it was held that this was not a post-letter; *Reg.* v. *Harley*, 1 *C. and K.* 89. An unsealed letter, delivered by the post-mistress at G, to the accused, the letter-carrier between that place and L, with directions to obtain at the post-office at L a money order for one pound, and after enclosing it in the letter, to post the letter at L, was held to be, while in the possession of the accused, a post-letter, and the accused to be a person employed under the post-office; *per Creswell*, J., in *Reg.* v. *Bickerstaff*, 2 *C. and K.* 761. This, however, seems to conflict with a previous decision of the fifteen judges, on a case reserved by *Creswell*, J., in *Reg.* v. *Glass*, 2 *C. and K.* 395.

Steal, &c.—The theft of the letter must be proved in the same way as in an ordinary charge of theft. Where the accused, a person

employed in the post office, having committed a mistake in the sorting of the letters, put some post-letters down a water-closet, in order to avoid the supposed penalty attaching to such mistake, this was held to be, not only a *secreting*, but a *larceny* of the letters; *Reg.* v. *Wynn*, 1 *Den. C. C.* 365. Where an accused, whose duty it was to bring back to the post office letters which he failed to deliver, on his return from his round, handed in his pouch with some letters which he had not delivered, but said nothing about his having any others, and on being asked about another in which there was money, produced it from his pocket, it was held that he was rightly convicted of stealing the letter; *Reg.* v. *Poynton*, *L. and C.* 247. *Secrete* means to secrete or conceal in such a way as to frustrate delivery; *Emp.* v. *Venkatasami*, *I. L. R.* 14 *Mad.* 229. The accused while sorting letters put two bearing letters in his cloth, with the intention of giving them to the delivering peon to deliver and collect the amount due on them which was to be divided between the clerk and the peon; it was held that the clerk was guilty of stealing and fraudulently misappropriating the letters; *ib.*

The destroying of a post-letter supposed by the accused to contain, and in order to suppress, enquiries about her character, was held to be a larceny of the letter; *Reg.* v. *Jones*, 1 *Den. C. C* 188. Where the contents of a letter, not a post-letter, are stolen, the accused should be convicted of theft of the contents of the letter; *Reg.* v. *Rathbone*, *ubi supra*; *Reg.* v. *Shepherd*, *ubi supra*.

Where the accused slipped the cover off a vernacular newspaper; read the newspaper, and then returned it to its cover, it was held that he could not be convicted under the first part of this section; *In re Panna Lall*, 19 *W. R. Cr.* 4.

Where a servant who was sent with a letter and a penny to pay the postage, finding the door of the receiving house shut, put the penny inside the letter, fastened it by means of a pin, and then put the letter in the unpaid letter-box, it was held that a messenger in the post office, who stole the letter with the penny in it, might be convicted of stealing a post-letter containing money, although the money was not placed in it for the purpose of being transmitted by post; *Reg.* v. *Mence*, *C. and Mar.* 234.

Under a charge of *mutilating* or *breaking-open*, the act must be proved, and also the intention with which it was done; *In re Panna Lall, ubi supra.*

Abetment and Concealment.—Section 52 of the Post Office Act provides that the abetment (as defined by the Penal Code) and concealment of offences against the post office shall be punished in the same way as the offence abetted or concealed would be. Seeing that the abetment of an offence under this Act is specially provided for, and looking to the wording of Sect. 5 of the Indian Penal Code, to the effect that the Code is not to vary the provisions of any special law, it would seem as if the provisions of the Penal Code as to abetment were not applicable to the abetment of offences against this act, in spite of the amendment of Sect. 40, *ante*, p. 38, which applies the sections relating to abetment to offences punishable under any special law. The question is not of much importance, as it can only affect the punishment of an abettor when the offence is not committed in consequence of the abetment, which is lighter under the Penal Code than it would be under the Post Office Act. In the case of *Reg.* v. *Ramlugun*, 7 *W. R. Cr.* 54, *Kemp* and *Glover*, JJ., erred in holding that the Post Office Act made no provision for the punishment of abetment of offences under that Act, although the magistrate who tried the case was in error, at that time, in convicting the prisoner under Sect. 48 of this Act and Sect. 109 of the Penal Code.

A person who induces a post office servant to intercept and hand over a letter which is in the course of transmission is either guilty of larceny as a principal, or is accessory before the fact to the larceny committed by the servant of the post office, and in either case may be convicted of the larceny of the letter; *Reg.* v. *James*, 24 *Q. B. D.* 439.

Fraudulently altering Marks on Letters.

Sect. 49. *Penalty for fraudulently altering Marks on Letters, &c., by Persons employed in the Post Office.*—*Whoever being in such employ as last aforesaid shall fraudulently put any wrong mark on any letter or other article, or shall fraudulently alter, remove or cause to disappear any mark or stamp which is on any letter or other article; or*

shall fraudulently use or place with or upon any letter or other article, any stamp which shall have been removed from any other letter or other article; or, being entrusted with the delivery of any letter or other article, shall knowingly demand or receive any sum of money for the postage thereof, other than the sum duly chargeable for such postage, shall be punished, on conviction before a Criminal Court, with imprisonment of either description as defined in the Indian Penal Code, for a term not exceeding two years, and shall also be liable to fine.

Triable by any Court except a Magistrate of the third class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Bailable. Not compoundable.

Evidence.

The prisoner must be shewn to have been in the employ of the post office when he committed the act charged, as is set out, *ante*, p. 709.

Then it must be proved that he put a wrong mark; or altered, &c., a mark already on a letter; or put on a letter a stamp removed from another letter, and this must then be shewn to have been done fraudulently. Practically this would ordinarily mean that it was done for the purpose of defrauding the revenue. As to the meaning of "fraudulently," see *ante*, p. 31.

Under the last clause of the section, it must be proved that the prisoner knew what ought to be received in respect of some letter or article, and that he received more than that sum. If he received more than was right, accounted for the right sum, and kept the balance himself, an irresistible presumption of his knowledge would arise.

PREPARING INCORRECTLY, ALTERING AND SECRETING DOCUMENTS.

Sect. 50. *Penalty for preparing incorrectly or altering or secreting Documents by Persons employed in the Post Office.—Whoever being in such employ as last aforesaid, and being entrusted with the preparing or keeping of any document, shall, with a fraudulent intention, prepare the document incorrectly, or alter that document, or secrete or destroy that document, shall be punished, on conviction before a Criminal Court, with imprisonment of either description as*

defined in the Indian Penal Code for a term not exceeding two years, and shall also be liable to fine.

Triable, &c., in the same way as an offence under Sect. 49.

Evidence.

Prove the employment as *ante*, p. 709. Prove that the prisoner was entrusted with the preparation or custody of a document. Prove that he prepared it incorrectly, altered, secreted or destroyed it, and lastly, prove that the intention with which he did those acts was fraudulent.

Sect. 51. *Penalty for sending Letters on which Postage has not been paid or charged by persons employed in the Post Office.—Whoever being in employ as last aforesaid, shall send by the post, or put into any mail-bag or box any unstamped letter or other article upon which postage has not been paid or charged in the manner prescribed in this Act, intending thereby to defraud the Government of the postage on such letter or other article, shall be punished, on conviction before a Criminal Court, with imprisonment of either description as defined in the Indian Penal Code for a term not exceeding two years, and shall also be liable to fine.*

Triable, &c., in the same way as an offence under Sect. 49.

Evidence.

Prove the employment of the accused as *ante*, p. 709. Prove the wrongful act alleged to have been done, and that it was done for the purpose of defrauding the Government of the postage which ought to have been paid or charged.

OFFENCES UNDER THE INDIAN TELEGRAPH ACT, 1876.

Damaging, &c., Telegraphs, &c.

Sect. 15. *For damaging, &c., Telegraphs with intent to prevent transmission, to tap, to commit mischief.—Whoever, intending—(a) to prevent or obstruct the transmission, conveyance or delivery of any message, (b) to intercept or to acquaint himself with the contents of any message, or (c) to commit mischief, damages, removes, tampers with, or touches any battery, machinery, wire, cable, post or other thing whatever, being part of or used in or about any telegraph or in the working*

thereof, shall be liable to imprisonment for a term which may extend to three years, or to fine, or to both.

Such offences to be cognizable and non-bailable.—All offences under this section shall be cognizable and non-bailable within the meaning of the Code of Criminal Procedure.

Triable by the High Court, Court of Session, Presidency Magistrate, or a Magistrate of the first class. A warrant should issue in the first instance. Police officers may arrest without a warrant. Not bailable. Not compoundable.

Evidence.

These offences can be committed by any person. Prove the act done, and that it was done with one or more of the three intents mentioned in the section.

OMITTING TO DELIVER, OR DIVULGING MESSAGES.

Sect. 17. *Penalty for omitting to transmit or deliver Messages; for intercepting or divulging Messages; for divulging purport of Signals.—Any telegraph officer who wilfully secretes, makes away with, alters or omits to transmit any message which he may have received for transmission or delivery, or wilfully, or otherwise than by the official order of a Secretary to the Government of India or to the Local Government, or of such other officer as the Governor-General in Council authorizes to give such order, intercepts any message, or any part thereof, or divulges any message or the purport of any message, or of any part thereof, to any person not entitled to receive the same, or divulges the purport of any telegraphic signal to any person not entitled to become acquainted with the same, shall be liable to imprisonment for a term not exceeding three years, or to fine, or to both.*

Triable, &c., in the same way as offences under Sect. 15.

Evidence.

Prove the employment of the accused as *ante*, p. 709. Under this section there are three classes of offences; (1) wilfully secreting, making away with, or omitting to transmit any message received for transmission or delivery; (2) wilfully, or without the authorization described in the section, intercepting a message or part thereof; (3) divulging any message or any part thereof, or any

telegraphic signal, to any person not entitled to become acquainted with the same. An omission to transmit, if by authority of a proper person, would amount to an intercepting, and would therefore be justifiable, but not otherwise. The names of the sender and addressee of a message are parts of the message, and therefore the divulging the fact that a certain firm had sent or received a telegraphic message without saying to whom it was sent or from whom it was received, would be an offence. In fact, in some cases the divulging of either of these facts in certain quarters might be as injurious as if the whole message was divulged. The divulging must be to some person not entitled to become acquainted with the message, &c. Therefore, the private communication of it to the addressee himself would not be an offence, although it might be an infringement of office rules.

Sending Messages without Payment.

Sect. 20. *For sending Messages without payment to Government.—Any telegraph officer who transmits by telegraph any message upon which the prescribed charge has not been paid, intending thereby to defraud the Government, shall be liable to imprisonment for a term which may extend to three years, or to fine, or to both.*

Triable, &c., in the same way as offences under Sect. 15.

Evidence.

Prove the employment of the accused as *ante*, p. 709. Then prove the transmission of the message without payment, and the intent to defraud the Government. It is important to prove this last, as now that Government are entering into trading operations, *e. g.*, railways, there are occasions, such as the happening of an accident, when the sending of telegrams without charge might not be in fraud of Government, but only what a private company would do under similar circumstances.

Fabricated Messages. Detaining Messages.

Sect. 2. *For sending fabricated Message.—Whoever transmits or causes to be transmitted by a telegraph a message which he knows to be false or fabricated, shall be liable to imprisonment for a term which may extend to three years, or to fine, or to both.*

Sect. 22. *For retaining Messages, &c., delivered by mistake.—Whoever fraudulently retains, or wilfully secretes or makes away with, or keeps or detains a message which ought to have been delivered to some other person, or being required by a telegraph officer to deliver up any such message, neglects or refuses to do so, shall be liable to imprisonment for a term which may extend to two years, or to fine, or to both.*

Offences under Sect. 21 *are triable, &c., in the same way as those under Sect.* 15; *those under Sect.* 22 *are triable by any Court, except a Magistrate of the third class. A summons should issue in the first instance. Police officers may not arrest without a warrant. Bailable. Not compoundable.*

APPENDIX.

APPENDIX.

ACTS OF PARLIAMENT.

39 *and* 40 *Vict.* c 46.

AN ACT *for more effectually punishing Offences against the Laws relating to the Slave Trade.*

[11th August 1876.]

WHEREAS under an Act passed in the Session holden in the thirty-second and thirty-third years of the reign of Her present Majesty, the Governor-General of India in Council is empowered to make laws for Native Indian subjects of Her Majesty without and beyond British India:

And whereas under an Act passed in the Session holden in the twenty-eighth and twenty-ninth years of the reign of Her present Majesty, the Governor-General of India in Council is empowered to make laws for all British subjects of Her Majesty, within the dominions of Princes and States in India in alliance with Her Majesty, whether in the service of the Government of India or otherwise:

And whereas the several Princes and States in India in alliance with Her Majesty have no connexions, engagements, or communications, with Foreign Powers, and the subjects of such Princes and States are, when residing or being in the places hereinafter referred to, entitled to the protection of the British Government, and receive such protection equally with the subjects of Her Majesty:

And whereas it is expedient to make provision for more effectually punishing offences against the laws relating to the slave trade by British subjects and other persons protected by the British Government in such places:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. *Certain offenders on High Seas punished as though offence committed in India.*—If any person, being a subject of Her Majesty or of any Prince or State in India in alliance with Her Majesty, shall, upon the High Seas or in any part of Asia or Africa which Her Majesty may from time to time think fit to specify by any Order in Council in this behalf, commit any of the offences defined in sections 367, 370, and 371 (in the schedule to this Act respectively recited) of Act 45 of 1860, passed by the Governor-General of India in Council and called "The Indian Penal Code," or abet within the meaning of the fifth chapter of the said Penal Code the commission of any such offence, such person shall be dealt with in respect of such offence or abetment, as if the same had been committed in any place within British India in which he may be or may be found.

2. *Sect.* 1 *may be made to apply to future amendments of this Act.*—If the Governor-General of India in Council shall, at a meeting for making laws and regulations, amend the provisions of the said sections 367, 370, and 371, of the

said Penal Code, or any of them, or the said fifth chapter thereof so far as relates to the abetment of any of the offences forbidden by any sections, or make any further provision for preventing or suppressing the making, buying, or selling of slaves or any of the offences comprised in the said three sections, the Secretary of State for India shall, unless Her Majesty has disallowed such amendment or further provision, lay a copy of the amending Act before each House of Parliament, and after the same shall have lain on the table of both Houses of Parliament for the space of forty days, it shall be lawful for Her Majesty, unless either House of Parliament shall present an address to Her Majesty to the contrary, to direct by Order in Council that the provisions of the first section of this Act shall apply to the law so amended or enlarged, and the same shall be applicable accordingly.

3. *Powers of High Court for purpose of obtaining evidence.*—For the purpose of obtaining evidence of the commission of the offences made punishable by this Act or any Act of Parliament relating to slavery or the slave trade, every High Court in India shall have, as respects the persons in the first section of this Act referred to, and as respects any British colony, settlement, plantation, or territory, wherein any witness may be, the same powers as are conferred on the Court of Queen's Bench by the fourth section of an Act made and passed in the Session of Parliament holden in the sixth and seventh years of Her Majesty's reign; chapter ninety-eight with respect to such British colonies, settlements, plantations, and territories as are therein referred to.

And every High Court may, if it thinks fit, issue such commission as is mentioned in section 330, of Act 10 of 1872, passed by the Governor-General of India in Council, and called "The Code of Criminal Procedure," to any consular officer of Her Majesty in the parts of Asia or Africa specified in any Order of Her Majesty in Council under section 1 of this Act, or to any political officer or agent of the Governor-General of India in Council or of any Indian Government in the said parts or in the dominions of any Prince or State in India in alliance with Her Majesty or to any magistrate in Her Majesty's Indian dominions.

And the depositions taken by virtue of the said powers or under such commission shall be deemed by every court of original or appellate jurisdiction in India in any trial or proceeding under this Act or any Act of Parliament relating to slavery or the slave trade to be as good and competent evidence as if the witnesses deposing had been present and examined *viva voce* and had made oath or affirmation as required by law.

4. *Subjects of certain Indian Princes made amenable to certain Orders in Council.*—And whereas by certain Orders of Her Majesty in Council made by virtue of an Act made and passed in the Session of Parliament holden in the sixth and seventh years of Her Majesty's reign, chapter ninety-four, which Orders are dated respectively the ninth August One thousand eight hundred and sixty-six and the fourth November One thousand eight hundred and sixty-seven, it is ordered that the provisions of such Orders relating to British subjects shall extend and apply to all subjects of Her Majesty; whether by birth or by naturalisation, and also to all persons enjoying Her Majesty's protection in the several dominions mentioned in such Orders respectively.

It is hereby declared and enacted that for the purposes of the said Orders in Council and of any Orders in Council which Her Majesty may hereafter think fit to make by virtue of the said Act of the sixth and seventh years, of Her Majesty's reign, chapter ninety-four, all subjects of the several Princes and States in India in alliance with Her Majesty, residing and being in the several dominions comprised in such Orders respectively, are and shall be

deemed to be persons enjoying Her Majesty's protection therein. [*Repealed by 53 and 54 Vict. c. 37.*]

5. *Saving powers of Governor-General.*—Nothing in this Act shall be deemed to restrict the legislative power which the Governor-General of India in Council possesses at meetings for the purpose of making laws and regulations.

6. *Not to affect Orders made under 6 and 7 Vict c. 94.*—Save as aforesaid nothing in this Act shall be deemed to affect any Order made or to be made by Her Majesty in Council by virtue of the said Act of the sixth and seventh years of Her Majesty, chapter ninety-four. [*Repealed by 53 and 54 Vict. c. 37.*]

41 *and* 42 *Vict. c* 73.

AN ACT *to regulate the Law relating to the Trial of Offences committed on the Sea within a certain distance of the Coasts of Her Majesty's Dominions.*

[16th August 1878.]

WHEREAS the rightful jurisdiction of Her Majesty, her heirs and successors, extends and has always extended over the open seas adjacent to the coasts of United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions:

And whereas it is expedient that all offences committed on the open sea within a certain distance of the coast of the United Kingdom and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

1. *Short title.*—This Act may be cited as the Territorial Waters Jurisdiction Act, 1878.

2. *Amendment of the law as to the jurisdiction of the admiral.*—An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within the jurisdiction of the admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried and punished accordingly.

3. *Restriction on institution of proceedings for punishment of offences.*—Proceedings for the trial and punishment of a person who is not a subject of Her Majesty, and who is charged with any such offence as is declared by this Act to be within the jurisdiction of the Admiral, shall not be instituted in any court of the United Kingdom, except with the consent of one of Her Majesty's Principal Secretaries of State, and on his certificate that the institution of such proceedings is in his opinion expedient, and shall not be instituted in any of the dominions of Her Majesty out of the United Kingdom, except with the leave of the Governor of the part of the dominions in which such proceedings are proposed to be instituted, and on his certificate that it is expedient that such proceedings should be instituted.

4. *Provisions as to procedure.*—On the trial of any person who is not a subject of Her Majesty for an offence declared by this Act to be within the jurisdiction of the Admiral, it shall not be necessary to aver in any indictment or information on such trial that such consent or certificate of the Secretary of State or Governor as is required by this Act has been given, and the fact of the same having been given shall be presumed unless disputed by the defendant at the trial; and the production of a document purporting to be signed by one of Her Majesty's Principal Secretaries of State as respects the United Kingdom, and by the Governor as respects any other part of Her Majesty's dominions, and containing such consent and certificate, shall be sufficient evidence for all the purposes of this Act of the consent and certificate required by this Act

Proceedings before a justice of the peace or other magistrate previous to the committal of an offender for trial or to the determination of the justice or magistrate that the offender is to be put upon his trial shall not be deemed proceedings for the trial of the offence committed by such offender for the purposes of the said consent and certificate under this Act.

5. *Saving as to jurisdiction*.—Nothing in this Act contained shall be construed to be in derogation of any rightful jurisdiction of Her Majesty, her heirs or successors, under the law of nations, or to affect or prejudice any jurisdiction conferred by Act of Parliament or now by law existing in relation to foreign ships or in relation to persons on board such ships.

6. *Saving as to piracy*.—This Act shall not prejudice or affect the trial in manner heretofore in use of any act of piracy as defined by the law of nations, or affect or prejudice any law relating thereto, and where any act of piracy as defined by the law of nations is also any such offence as is declared by this Act to be within the jurisdiction of the Admiral, such offence may be tried in pursuance of this Act, or in pursuance of any other Act of Parliament, law, or custom relating thereto.

7. *Definitions*.—In this Act, unless there is something inconsistent in the context, the following expressions shall respectively have the meanings hereinafter assigned to them, that is to say,

"*Jurisdiction of the Admiral*."—"The jurisdiction of the Admiral," as used in this Act, includes the jurisdiction of the Admiralty of England and Ireland, or either of such jurisdictions as used in any Act of Parliament, and for the purpose of arresting any person charged with an offence declared by this Act to be within the jurisdiction of the Admiral, the territorial waters adjacent to the United Kingdom, or any part of Her Majesty's dominions, shall be deemed to be within the jurisdiction of any judge, magistrate, or officer having power within such United Kingdom, or other part of Her Majesty's dominions, to issue warrants for arresting or to arrest persons charged with offences committed within the jurisdiction of such judge, magistrate or officer

"*United Kingdom*"—"United Kingdom" includes the Isle of Man, the Channel Islands, and other adjacent islands

"*The territorial waters of Her Majesty's dominions*."—"The territorial waters of Her Majesty's dominions," in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty, and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions

"*Governor*"—"Governor," as respects India, means the Governor-General or the Governor of any presidency; and where a British possession consists of several constituent colonies, means the Governor-General of the whole possession or the Governor of any of the constituent colonies; and as respects any other British possession means the officer for the time being administering the government, of such possession; also any person acting for or in the capacity of Governor shall be included under the term "Governor";

"*Offence.*"—"Offence" as used in this Act means an act, neglect, or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force:

"*Ship.*"—"Ship" includes every description of ship, boat, or other floating craft:

"*Foreign ship.*"—"Foreign ship" means any ship which is not a British ship.

44 and 45 *Vict.* c. 69.

AN ACT *to amend the Law with respect to Fugitive Offenders in Her Majesty's Dominions, and for other purposes connected with the Trial of Offenders.*

[27th August 1881.]

Be it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords, Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows; (that is to say),

1. *Short title.*—This Act may be cited as the Fugitive Offenders' Act, 1881.

PART I.—RETURN OF FUGITIVES.

2. *Liability of fugitive to be apprehended and returned.*—Where a person accused of having committed an offence (to which this part of this Act applies) in one part of Her Majesty's dominions has left that part, such person (in this Act referred to as a fugitive from that part) if found in another part of Her Majesty's dominions, shall be liable to be apprehended and returned in manner provided by this Act to the part from which he is a fugitive.

A fugitive may be so apprehended under an endorsed warrant or a provisional warrant.

3. *Endorsing of warrant for apprehension of fugitive.*—Where a warrant has been issued in one part of Her Majesty's dominions for the apprehension of a fugitive from that part, any of the following authorities in another part of Her Majesty's dominions in or on the way to which the fugitive is or suspected to be; (that is to say),

(1) A judge of a superior court in such part, and

(2) In the United Kingdom a Secretary of State and one of the magistrates of the Metropolitan Police Court in Bow Street, and

(3) In a British possession, the governor of that possession,

if satisfied that the warrant was issued by some person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be a sufficient authority to apprehend the fugitive in the part of Her Majesty's dominions in which it is endorsed, and bring him before a magistrate.

4. *Provisional warrant for apprehension of fugitive.*—A magistrate of any part of Her Majesty's dominions may issue a provisional warrant for the apprehension of a fugitive who is or is suspected of being in or on his way to that part on such information, and under such circumstances, as would in his opinion justify the issue of a warrant if the offence of which the fugitive is accused had been committed within his jurisdiction, and such warrrant may be backed and executed accordingly.

A magistrate issuing a provisional warrant shall forthwith send a report of the issue, together with the information or a certified copy thereof, if he is in the United Kingdom, to a Secretary of State, and if he is in a British possession, to the governor of that possession, and the Secretary of State or governor may, if he think fit, discharge the person apprehended under such warrant

5. *Dealing with fugitive when apprehended.*—A fugitive when apprehended shall be brought before a magistrate, who (subject to the provisions of this Act) shall hear the case in the same manner and have the same jurisdiction

and powers, as near as may be (including the power to remand and admit to bail) as if the fugitive were charged with an offence committed within his jurisdiction.

If the endorsed warrant for the apprehension of the fugitive is duly authenticated, and such evidence is produced as (subject to the provisions of this Act), according to the law ordinarily administered by the magistrate, raises a strong or probable presumption that the fugitive committed the offence mentioned in the warrant, and that the offence is one to which this part of this Act applies, the magistrate shall commit the fugitive to prison to await his return, and shall forthwith send a certificate of the committal and such report of the case as he may think fit, if in the United Kingdom to a Secretary of State, and if in a British possession to the governor of that possession.

Where the magistrate commits the fugitive to prison he shall inform the fugitive that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*, or other like process.

A fugitive apprehended on a provisional warrant may be from time to time remanded for such reasonable time not exceeding seven days at any one time as under the circumstances seems requisite for the production of an endorsed warrant.

6. *Return of fugitive by warrant*.—Upon the expiration of fifteen days after a fugitive has been committed to prison to await his return, or if a writ of *habeas corpus* or other like process is issued with reference to such fugitive by a superior court, after the final decision of the court in the case,

(1) if the fugitive is so committed in the United Kingdom, a Secretary of State, and

(2) if the fugitive is so committed in a British possession, the governor of that possession,

may, if he thinks it just, by warrant under his hand order that fugitive to be returned to the part of Her Majesty's dominions from which he is a fugitive, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or some one or more of them, and to be held in custody, and conveyed by sea or otherwise to the said part of Her Majesty's dominions, to be dealt with there in due course of law as if he had been there apprehended, and such warrant shall be forthwith executed according to the tenor thereof.

The governor or other chief officer of any prison, on request of any person having the custody of a fugitive under any such warrant, and on payment or tender of a reasonable amount for expenses, shall receive such fugitive and detain him for such reasonable time as may be requested by the said person for the purpose of the proper execution of the warrant.

7. *Discharge of person apprehended if not returned within one month*.—If a fugitive who, in pursuance of this part of this Act, has been committed to prison in any part of Her Majesty's dominions to await his return, is not conveyed out of that part within one month after such committal, a superior court, upon application by or on behalf of the fugitive, and upon proof that reasonable notice of the intention to make such application has been given, if the said part is the United Kingdom to a Secretary of State, and if the said part is a British possession to the governor of the possession, may, unless sufficient cause is shewn to the contrary, order the fugitive to be discharged out of custody.

8. *Sending back of persons apprehended if not prosecuted within six months or acquitted.*—Where a person accused of an offence and returned in pursuance of this part of this Act to any part of Her Majesty's dominions, either is not prosecuted for the said offence within six months after his arrival in that part, or is acquitted of the said offence, then if that part is the United Kingdom a Secretary of State, and if that part is a British possession the governor of that possession, may, if he think fit, on the request of such person, cause him to be sent back free of cost and with as little delay as possible to the part of Her Majesty's dominions in or on his way to which he was apprehended.

9. *Offence to which this part of this Act applies.*—This part of this Act shall apply to the following offences, namely, to treason and piracy, and to every offence, whether called felony, misdemeanor, crime, or by any other name, which is for the time being punishable in the part of Her Majesty's dominions in which it was committed, either on indictment or information, by imprisonment with hard labour for a term of twelve months or more, or by any greater punishment; and for the purposes of this section, rigorous imprisonment, and any confinement in a prison combined with labour, by whatever name it is called, shall be deemed to be imprisonment with hard labour.

This part of this Act shall apply to an offence notwithstanding that by the law of the part of Her Majesty's dominions in or on his way to which the fugitive is or is suspected of being it is not an offence or not an offence to which this part of this Act applies; and all the provisions of this part of this Act, including those relating to a provisional warrant and to a committal to prison, shall be construed as if the offence were in such last-mentioned part of Her Majesty's dominions an offence to which this part of this Act applies

10. *Powers of superior court to discharge fugitive when case frivolous or return unjust.*—Where it is made to appear to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the court seems just.

11. *Power of Lord Lieutenant in Ireland.*—In Ireland the Lord Lieutenant, also the chief secretary, may, as well as a Secretary of State, execute any portion of the powers by this part of this Act vested in a Secretary of State. (57 and 58 Vic. c. 56.)

PART II.—INTER-COLONIAL BACKING OF WARRANTS, AND OFFENCES.

Application of part of Act.

12. *Application of part of Act to group of British possessions.*—This part of this Act shall apply only to those groups of British possessions to which, by reason of their contiguity or otherwise, it may seem expedient to Her Majesty to apply the same.

It shall be lawful for Her Majesty from time to time by Order in Council to direct that this part of this Act shall apply to the group of British possessions mentioned in the Order, and by the same or any subsequent Order to except

certain offences from the application of this part of this Act, and to limit the application of this part of this Act by such conditions, exceptions, and qualifications as may be deemed expedient.

Backing of Warrants.

13. *Backing in one British possession of warrant issued in another of same group.*—Where in a British possession of a group to which this part of this Act applies a warrant has been issued for the apprehension of a person accused of an offence punishable by law in that possession, and such person is or is suspected of being in or on the way to another British possession of the same group, a magistrate in the last-mentioned possession, if satisfied that the warrant was issued by a person having lawful authority to issue the same, may endorse such warrant in manner provided by this Act, and the warrant so endorsed shall be a sufficient authority to apprehend, within the jurisdiction of the endorsing magistrate, the person named in the warrant, and bring him before the endorsing magistrate, or some other magistrate in the same British possession.

14. *Return of prisoner apprehended under backed warrant.*—The magistrate before whom a person so apprehended is brought, if he is satisfied that the warrant is duly authenticated as directed by this Act and was issued by a person having a lawful authority to issue the same, and is satisfied on oath that the prisoner is the person named or otherwise described in the warrant, may order such prisoner to be returned to the British possession in which the warrant was issued, and for that purpose to be delivered into the custody of the persons to whom the warrant is addressed, or any one or more of them, and to be held in custody and conveyed by sea or otherwise into the British possession in which the warrant was issued, there to be dealt with according to law as if he had been there apprehended. Such order for return may be made by warrant under the hand of the magistrate making it, and may be executed according to the tenor thereof.

A magistrate shall, so far as is requisite for the exercise of the powers of this section, have the same power, including the power to remand and admit to bail a prisoner, as he has in the case of a person apprehended under a warrant issued by him.

15. *Backing in one British possession of summons, &c., of witness issued in another possession of same group.*—Where a person required to give evidence on behalf of the prosecutor or defendant on a charge for an offence punishable by law in a British possession of a group to which this part of this Act applies, is or is suspected of being in or on his way to any other British possession of the same group, a judge, magistrate, or other officer who would have lawful authority to issue a summons, requiring the attendance of such witness, if the witness were within his jurisdiction, may issue a summons for the attendance of such witness, and a magistrate in any other British possession of the same group, if satisfied that the summons was issued by some judge, magistrate, or officer having lawful authority, as aforesaid, may endorse the summons with his name; and the witness, on service in that possession of the summons, so endorsed, and on payment or tender of a reasonable amount for his expenses, shall obey the summons, and in default shall be liable to be tried and punished either in the possession in which he is served or in the possession in which the summons was issued, and shall be liable to the punishment imposed by the law of the possession in which he is tried for the failure of a witness to obey such a summons. The expression "summons" in this section includes any subpœna or other process for requiring the attendance of a witness.

16. *Provisional warrant in group of British Possessions.*—A magistrate in a British possession of a group to which this part of this Act applies, before the endorsement in pursuance of this part of this Act of a warrant for the apprehension of any person, may issue a provisional warrant for the apprehension of that person, on such information and under such circumstances as would in his opinion justify the issue of a warrant if the offence of which such person is accused were an offence punishable by the law of the said possession, and had been committed within his jurisdiction, and such warrant may be backed and executed accordingly; provided that a person arrested under such provisional warrant shall be discharged unless the original warrant is produced and endorsed within such reasonable time as may under the circumstances seem requisite.

17. *Discharge of prisoner not returned within one month to British possession of same group.*—If a prisoner in a British possession whose return is authorised in pursuance of this part of this Act is not conveyed out of that possession within one month after the date of the warrant ordering his return, a magistrate or a superior court upon application by or on behalf of the prisoner, and upon proof that reasonable notice of the intention to make such application has been given to the person holding the warrant and to the chief officer of the police of such possession or of the province or town where the prisoner is in custody, may, unless sufficient cause is shewn to the contrary, order such prisoner to be discharged out of custody.

Any order or refusal to make an order of discharge by a magistrate under this section shall be subject to appeal to a superior court.

18. *Sending back of prisoner not prosecuted or acquitted to British possession of same group.*—Where a prisoner accused of an offence is returned in pursuance of this part of this Act to a British possession, and either is not prosecuted for the said offence within six months after his arrival in that possession or is acquitted of the said offence, the governor of that possession, if he thinks fit, may, on the requisition of such person, cause him to be sent back, free of cost, and with as little delay as possible, to the British possession in or on his way to which he was apprehended.

19. *Refusal to return prisoner where offence too trivial.*—Where the return of a prisoner is sought or ordered under this part of this Act, and it is made to appear to a magistrate or to a superior court that by reason of the trivial nature of the case, or by reason of the application for the return of such prisoner not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities of communication, and to all the circumstances of the case, be unjust or oppressive, or too severe a punishment, to return the prisoner either at all or until the expiration of a certain period, the court or magistrate may discharge the prisoner absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such order in the premises as to the magistrate or court seems just.

Any order or refusal to make an order of discharge by a magistrate under this section shall be subject to an appeal to a superior court.

PART III.

Trial, &c., of Offences.

20. *Offences committed on boundary of two adjoining British possessions.*—Where two British possessions adjoin, a person accused of an offence

committed on or within the distance of five hundred yards from the common boundary of such possessions may be apprehended, tried, and punished in either of such possessions.

21. *Offences committed on journey between two British possessions.*—Where an offence is committed on any person or in respect of any property in or upon any carriage, cart, or vehicle whatsoever employed in a journey, or on board any vessel whatsoever employed in a navigable river, lake, canal, or inland navigation, the person accused of such offence may be tried in any British possession through a part of which such carriage, cart, vehicle, or vessel passed in the course of the journey or voyage during which the offence was committed; and where the side, bank, centre, or other part of the road, river, lake, canal, or inland navigation along which the carriage, cart, vehicle, or vessel passed in the course of such journey or voyage is the boundary of any British possession, a person may be tried for such offence in any British possession of which it is the boundary:

Provided that nothing in this section shall authorise the trial for such offence of a person who is not a British subject, where it is not shewn that the offence was committed in a British possession.

22. *Trial of offence of false swearing or giving false evidence.*—A person accused of the offence (under whatever name it is known) of swearing or making any false deposition, or of giving or fabricating any false evidence, for the purposes of this Act, may be tried either in the part of Her Majesty's dominions in which such deposition or evidence is used, or in the part in which the same was sworn, made, given, or fabricated, as the justice of the case may require.

23. *Supplemental provision as to trial of person in any place.*—Where any part of this Act provides for the place of trial of a person accused of an offence, that offence shall, for all purposes of and incidental to the apprehension, trial, and punishment of such person, and of and incidental to any proceedings and matters preliminary, incidental to, or consequential thereon, and of and incidental to the jurisdiction of any court, constable, or officer with reference to such offence, and to any person accused of such offence, be deemed to have been committed in any place in which the person accused of the offence can be tried for it; and such person may be punished in accordance with the Courts (Colonial) Jurisdiction Act, 1874.

37 *and* 38 *Vict. c.* 27.

24. *Issue of search warrant.*—Where a warrant for the apprehension of a person accused of an offence has been endorsed in pursuance of any part of this Act in any part of Her Majesty's dominions, or where any part of the Act provides for the place of trial of a person accused of an offence, every court and Magistrate of the part in which the warrant is endorsed or the person accused of the offence can be tried shall have the same power of issuing a warrant to search for any property alleged to be stolen or to be otherwise unlawfully taken or obtained by such person, or otherwise to be the subject of such offence, as that court or Magistrate would have if the property had been stolen or otherwise unlawfully taken or obtained, or the offence had been committed wholly within the jurisdiction of such court or magistrate.

25. *Removal of prisoner by sea from one place to another.*—Where a person is in legal custody in British possession either in pursuance of this Act or otherwise, and such person is required to be removed in custody to another place in or belonging to the same British possession, such person, if removed

by sea in a vessel belonging to Her Majesty or any of Her Majesty's subjects, shall be deemed to continue in legal custody until he reaches the place to which he is required to be removed; and the provisions of this Act with respect to the retaking of a prisoner who has escaped, and with respect to the trial and punishment of a person guilty of the offence of escaping or attempting to escape, or aiding or attempting to aid a prisoner to escape, shall apply to the case of a prisoner escaping while being lawfully removed as aforesaid, in like manner as if he were being removed in pursuance of a warrant endorsed in pursuance of this Act.

PART IV.

SUPPLEMENTAL.

Warrant and Escape.

26. *Endorsement of warrant.*—An endorsement of a warrant in pursuance of this Act shall be signed by the authority endorsing the same, and shall authorise all or any of the persons named in the endorsement, and of the persons to whom the warrant was originally directed, and also every constable to execute the warrant within the part of Her Majesty's dominions or place within which such endorsement is by this Act made a sufficient authority, by apprehending the person named in it, and bringing him before some magistrate in the said part or place, whether the magistrate named in the endorsement or some other.

For the purposes of this Act every warrant, summons, subpœna, and process, and every endorsement made in pursuance of this Act thereon, shall remain in force, notwithstanding that the person signing the warrant or such endorsement dies or ceases to hold office.

27. *Conveyance of fugitives and witnesses.*—Where a fugitive or prisoner is authorised to be returned to any part of Her Majesty's dominions in pursuance of Part One or Part Two of this Act, such fugitive or prisoner may be sent thither in any ship belonging to Her Majesty or to any of her subjects.

For the purpose aforesaid, the authority signing the warrant for the return may order the master of any ship belonging to any subject of Her Majesty bound to the said part of Her Majesty's dominions to receive and afford a passage and subsistence during the voyage to such fugitive or prisoner, and to the person having him in custody, and to the witnesses, so that such master be not required to receive more than one fugitive or prisoner for every hundred tons of his ship's registered tonnage, or more than one witness for every fifty tons of such tonnage.

The said authority shall endorse or cause to be endorsed upon the agreement of the ship such particulars with respect to any fugitive prisoner or witness sent in her as the Board of Trade from time to time require.

Every such master shall, on his ship's arrival in the said part of Her Majesty's dominions, cause such fugitive or prisoner, if he is not in the custody of any person, to be given into the custody of some constable, there to be dealt with according to law.

Every master who fails on payment or tender of a reasonable amount for expenses to comply with an order made in pursuance of this section, or to cause a fugitive or prisoner committed to his charge to be given into custody as required by this section, shall be liable on summary conviction to a fine not exceeding fifty pounds, which may be recovered in any part of Her

Majesty's dominions in like manner as a penalty of the same amount under the Merchant Shipping Act, 1854, 17 *and* 18 *Vict.* c. 104, and the Acts amending the same.

28. *Escape of prisoner from custody.*—If a prisoner escape, by breach of prison or otherwise, out of the custody of a person acting under a warrant issued or endorsed in pursuance of this Act, he may be retaken in the same manner as a person accused of a crime against the law of that part of Her Majesty's dominions to which he escapes may be retaken upon an escape.

A person guilty of the offence of escaping or of attempting to escape, or of aiding or attempting to aid a prisoner to escape, by breach of prison or otherwise, from custody under any warrant issued or endorsed in pursuance of this Act, may be tried in any of the following parts of Her Majesty's dominions, namely, the part to which and the part from which the prisoner is being removed, and the part in which the prisoner escapes and the part in which the offender is found.

Evidence.

29. *Depositions to be evidence, and authentication of depositions and warrants.*—A magistrate may take depositions for the purposes of this Act in the absence of a person accused of an offence in like manner as he might take the same if such person were present and accused of the offence before him.

Depositions (whether taken in the absence of the fugitive or otherwise) and copies thereof, and official certificates of or judicial documents stating facts, may, if duly authenticated, be received in evidence in proceedings under this Act.

Provided that nothing in this Act shall authorise the reception of any such depositions, copies, certificates, or documents in evidence against a person upon his trial for an offence.

Warrants and depositions, and copies thereof, and official certificates of or judicial documents stating facts, shall be deemed duly authenticated for the purposes of this Act if they are authenticated in manner provided for the time being by law, or if they purport to be signed by or authenticated by the signature of a judge, magistrate, or officer of the part of Her Majesty's dominions in which the same are issued, taken, or made and are authenticated either by the oath of some witness, or by being sealed with the official seal of a Secretary of State, or with the public seal of British possession, or with the official seal of a governor of a British possession, or of a colonial secretary, or of some secretary, or minister administering a department of the Government of a British possession.

And all courts and magistrates shall take judicial notice of every such seal as is in this section mentioned, and shall admit in evidence without further proof the documents authenticated by it.

Miscellaneous.

30. *Provision as to exercise of jurisdiction by magistrates.*—The jurisdiction under Part One of this Act to hear a case and commit a fugitive to prison to await his return shall be exercised,—

(1) in England, by a chief magistrate of the metropolitan police courts or one of the other magistrates of the metropolitan police court at Bow Street; and

(2) in Scotland, by the sheriff or sheriff substitute of the county of Edinburgh; and

(3) in Ireland, by one of the police magistrates of the Dublin metropolitan police district; and

(4) in a British possession, by any judge, justice of the peace, or other officer having the like jurisdiction as one of the magistrates of the metropolitan police court in Bow Street, or by such other court, judge, or magistrate as may be from time to time provided by an Act or ordinance passed by the legislature of that possession.

If a fugitive is apprehended and brought before a magistrate who has no power to exercise the jurisdiction under this Act in respect of that fugitive, that magistrate shall order the fugitive to be brought before some magistrate having that jurisdiction, and such order shall be obeyed.

31. *Power as to making and revocation of Order in Council.*—It shall be lawful for Her Majesty in Council from time to time to make Orders for the purposes of this Act, and to revoke and vary any Order so made, and every Order so made shall while it is in force have the same effect as if it were enacted in this Act.

An Order in Council made for the purposes of this Act shall be laid before Parliament as soon as may be after it is made if Parliament is then in session, or if not, as soon as may be after the commencement of the then next session of Parliament.

32. *Power of legislature of British possession to pass laws for carrying into effect this Act.*—If the legislature of a British possession pass any Act or ordinance—

(1) for defining the offences committed in that possession to which this Act or any part thereof is to apply; or

(2) for determining the court, judge, magistrate, officer, or person by whom and the manner in which any jurisdiction or power under this Act is to be exercised; or

(3) for payment of the costs incurred in returning a fugitive or a prisoner, or in sending him back if not prosecuted or if acquitted, or otherwise in the execution of this Act; or

(4) in any manner for the carrying of this Act or any part thereof into effect in that possession,

it shall be lawful for Her Majesty by Order in Council to direct, if it seems to Her Majesty in Council necessary or proper for carrying into effect the objects of this Act, that such Act or ordinance, or any part thereof, shall with or without modification or alteration be recognised and given effect to throughout Her Majesty's dominions and on the high seas as if it were part of this Act.

Application of Act.

33. *Application of Act to offences at sea or triable in several parts of Her Majesty's dominions.*—Where a person accused of an offence can, by reason of the nature of the offence or of the place in which it was committed, or otherwise, be, under this Act or otherwise, tried for or in respect of the offence in more than one part of Her Majesty's dominions, a warrant for the apprehension of such person may be issued in any part of Her Majesty's dominions in which he can, if he happens to be there, be tried; and each part of this

Act shall apply as if the offence had been committed in the part of Her Majesty's dominions where such warrant is issued, and such person may be apprehended and returned in pursuance of this Act, notwithstanding that in the place in which he is apprehended a court has jurisdiction to try him:

Provided that if such person is apprehended in the United Kingdom, a Secretary of State, and if he is apprehended in a British possession, the governor of such possession, may, if satisfied that, having regard to the place where the witnesses for the prosecution and for the defence are to be found, and to all the circumstances of the case, it would be conducive to the interests of justice so to do, order such person to be tried in the part of Her Majesty's dominions in which he is apprehended, and in such case any warrant previously issued for his return shall not be executed.

34. *Application of Act to convicts.*—Where a person convicted by a court in any part of Her Majesty's dominions of an offence committed either in Her Majesty's dominions or elsewhere, is unlawfully at large before the expiration of his sentence, each part of this Act shall apply to such person, so far as is consistent with the tenor thereof, in like manner as it applies to a person accused of the like offence committed in the part of Her Majesty's dominions in which such person was convicted.

35. *Application of Act to removal of person triable in more than one part of Her Majesty's dominions.*—Where a person accused of an offence is in custody in some part of Her Majesty's dominions, and the offence is one for or in respect of which, by reason of the nature thereof or of the place in which it was committed or otherwise, a person may under this Act or otherwise be tried in some other part of Her Majesty's dominions, in such case a superior court, and also if such person is in the United Kingdom a Secretary of State, and if he is in a British possession the governor of that possession, if satisfied that, having regard to the place where the witnesses for the prosecution and for the defence are to be found, and to all the circumstances of the case, it would be conducive to the interests of justice so to do, may by warrant direct the removal of such offender to some other part of Her Majesty's dominions in which he can be tried, and the offender may be returned, and, if not prosecuted or acquitted, sent back free of cost in like manner as if he were a fugitive returned in pursuance of Part One of this Act, and the warrant were a warrant for the return of such fugitive, and the provisions of this Act shall apply accordingly.

36. *Application of Act to foreign jurisdiction.*—It shall be lawful for Her Majesty from time to time by Order in Council to direct that this Act shall apply as if, subject to the conditions, exceptions and qualifications (if any) contained in the Order, any place out of Her Majesty's dominions in which Her Majesty has jurisdiction, and which is named in the Order, were a British possession, and to provide for carrying into effect such application.

37. *Application of Act to, and execution of warrant in, United Kingdom, Channel Islands, and Isle of Man.*—This Act shall extend to the Channel Islands and Isle of Man as if they were part of England and of the United Kingdom, and the United Kingdom and those islands shall be deemed for the purpose of this Act to be one part of Her Majesty's dominions; and a warrant endorsed in pursuance of Part One of this Act may be executed in every place in the United Kingdom and the said islands accordingly.

38. *Application of Act to past offences.*—The Act shall apply where an offence is committed before the commencement of this Act, or in the case of

Part Two of this Act, before the application of that part to a British possession or to the offence, in like manner as if such offence had been committed after such commencement or application.

Definition and Repeal.

39. *Definition of terms.*—In this Act, unless the context otherwise requires,—

"*Secretary of State.*"—The expression "Secretary of State" means one of Her Majesty's Principal Secretaries of State: [*Repealed*, 57 and 58 *Vict. c.* 56.]

"*British possession.*"—The expression "British possession" means any part of Her Majesty's dominions, exclusive of the United Kingdom, the Channel Islands, and Isle of Man; all territories and places within Her Majesty's dominions which are under one legislature shall be deemed to be one British possession and one part of Her Majesty's dominions:

"*Legislature.*"—The expression "legislature," where there are local legislatures as well as a central legislature, means the central legislature only:

"*Governor.*"—The expression "governor" means any person or persons administering the government of a British possession, and includes the governor and lieutenant governor of any part of India:

"*Constable.*"—The expression "constable" means, out of England, any policeman or officer having the like powers and duties as a constable in England:

"*Magistrate.*"—The expression "magistrate" means, except in Scotland, any justice of the peace, and in Scotland means a sheriff or sheriff substitute, and in the Channel Islands, Isle of Man, and a British possession means any person having authority to issue a warrant for the apprehension of persons accused of offences and to commit such persons for trial:

"*Offence punishable on indictment.*"—The expression "offence punishable on indictment" means, as regards India, an offence punishable on a charge or otherwise:

"—The expression "oath" includes affirmation or declaration in the case of persons allowed by law to affirm or declare instead of swearing, and the expression "swear" and other words relating to an oath or swearing shall be construed accordingly:

"*Deposition.*"—The expression "deposition" includes any affidavit, affirmation, or statement made upon oath as above defined:

"*Superior court.*"—The expression "superior court" means:

(1) in England, Her Majesty's Court of Appeal and High Court of Justice; and

(2) in Scotland, the High Court of Justiciary; and

(3) in Ireland, Her Majesty's Court of Appeal and Her Majesty's High Court of Justice at Dublin; and

(4) in a British possession, any court having in that possession the like criminal jurisdiction to that which is vested in the High Court of Justice in England, or such court or judge as may be determined by any Act or ordinance of that possession.

40. *Commencement of Act.*—This Act shall come into operation on the first day of January One thousand eight hundred and eighty-two, which date is in

this Act referred to as the commencement of this Act. [*Repealed, 57 and 58 Viet. c. 56.*]

41. *Repeal of Act in Schedule.*—The Act specified in the Schedule to this Act is hereby repealed as from the commencement of this Act:

Provided that this repeal shall not affect

(*a*) any warrant duly endorsed or issued, nor anything duly done or suffered before the commencement of this Act; nor

(*b*) any obligation or liability incurred under an enactment hereby repealed; nor

(*c*) any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed, nor

(*d*) any legal proceeding or remedy in respect of any such warrant, obligation, liability, penalty, forfeiture, or punishment as aforesaid;

and any such warrant may be endorsed and executed, and any such legal proceeding and remedy may be carried on, as if this Act had not passed. [*Repealed, 57 and 58 Viet. c. 56.*]

SCHEDULE.

Year and Chapter.	Title.
6 and 7 Viet. c. 34 . .	An Act for the better apprehension of certain offenders.

[*Repealed 57 and 58 Viet. c. 56.*]

ORDERS IN COUNCIL.

Zanzibar Order in Council of 29th November 1884, *published in "The London Gazette" of 5th December* 1884, *p.* 5649. *Portions relating to criminal matters.*

WHEREAS by Treaty, grant, usage, sufferance, and other lawful means, Her Majesty the Queen has power and jurisdiction, in relation to Her Majesty's subjects, and others, within the dominions of His Highness the Sultan of Zanzibar:

Now, therefore, Her Majesty, by virtue, and in exercise of the powers in this behalf by the Foreign Jurisdiction Acts, 1843 to 1878, or otherwise, in Her Majesty vested, is pleased, by and with the advice of her Privy Council to order, and it is hereby ordered, as follows:—

PART I.—PRELIMINARY.

Short Title.

1. This Order may be cited as the Zanzibar Order in Council of 1884.

3. The Order in Council, dated the 9th day of August 1866, for the regulation of Consular jurisdiction in the dominions of the Sultan of Zanzibar, the Zanzibar Order in Council of 1881, and the Zanzibar (Indian Penal Code) Order in Council, 1882, are hereby repealed, subject to the exceptions and qualifications in this order mentioned.

Interpretation.

4. In this Order—

(i) "Zanzibar" means the dominions of His Highness the Sultan of Zanzibar, including Zanzibar waters, that is to say, the territorial waters of those dominions;

(ii) "The Secretary of State" means one of Her Majesty's Principal Secretaries of State;

(iii) "The Consul-General" means Her Majesty's Consul-General for Zanzibar, including a person acting temporarily, with the approval of the Secretary of State, as, or for, Her Majesty's Consul-General there;

(iv) "Judicial Assistant" means—

(a) One of Her Majesty's Consular officers in and for Zanzibar, appointed by the Secretary of State to be Judicial Assistant of the Consul-General; and

(b) Any such officer acting temporarily by order of the Consul-General as, or for, a Judicial Assistant;

(v) "British subject" means a subject of Her Majesty, by birth or by naturalization;

(vi) "British-protected person" means a person enjoying Her Majesty's protection in Zanzibar, including, by virtue of the Act of Parliament of the Session of the 39th and 40th years of Her Majesty's reign (1876), chapter 46, all subjects of the several Princes and States in India in alliance with Her Majesty residing or being in Zanzibar;

(vii) "Resident" means having a fixed place of abode in Zanzibar;

(viii) "Zanzibar subject" means a subject of Zanzibar;

(ix) "Foreigner" means a subject or citizen of a State in amity with Her Majesty, other than Zanzibar;

(x) "Zanzibar or Foreign Court" means a Court of the Government of Zanzibar, or of any foreign State in amity with Her Majesty, and exercising lawful jurisdiction in Zanzibar, and includes every member or officer of such a Court;

(xi) "Administration" means (unless a contrary intention appears from the context) letters of administration, including the same with will annexed, or granted for special or limited purposes, or limited in duration;

(xii) "Ship" includes any vessel used in navigation, however propelled, with her tackle, furniture, and apparel, and any boat or other craft;

(xiii) "Offence" means any act or omission punishable by a Criminal Court;

(xiv) "Imprisonment" means imprisonment of either description, as defined in the Indian Penal Code;

(xv) "Month" means calendar month;

(xvi) "Will" means will, codicil, or other testamentary instrument;

(xvii) "Person" includes Corporation;

(xviii) Words importing the plural or the singular may be construed as referring to one person or thing, or to more than one person or thing, and words importing the masculine as referring to females (as the case may require).

Commencement.

5. (*a*) The Consul-General shall forthwith, on receipt of instructions from the Secretary of State in this behalf, affix and exhibit this Order conspicuously in his public office, and he shall keep the same so affixed and exhibited during one month thereafter.

(*b*) This order shall commence and have effect at the expiration of that month (which time is in this Order referred to as the commencement of this Order).

(*c*) But any appointment under this Order may be made at any time after its passing, and no proof shall in any proceedings be required of any of the matters prescribed by this Article.

PART II.—APPLICATION AND EFFECT OF ORDER.

6. (*a*) This Order applies to—

(i) British subjects being in Zanzibar, whether resident or not; and

(ii) British ships being in Zanzibar waters; and

(iii) Zanzibar subjects and foreigners, in the cases, and according to the conditions in this Order specified, but not otherwise.

(*b*) Such of the provisions of this Order as refer to British subjects extend also to British-protected persons, in so far as by Treaty, Capitulation, grant, usage, sufferance, or other lawful means, Her Majesty has jurisdiction in Zanzibar in relation to such persons.

7. All Her Majesty's jurisdiction exercisable in Zanzibar under the Foreign Jurisdiction Acts, for the hearing and determination of criminal or civil mat-

ters, or for the maintenance of order, or for the control or administration of persons or property, or in relation thereto, shall be exercised under and according to the provisions of this Order, so far as this Order extends and applies.

A Consul or Vice-Consul holding Her Majesty's Commission for Zanzibar or any part thereof or any person acting temporarily with the approval of a Secretary of State, or in case of emergency appointed temporarily by the Consul-General in writing as for a Consul or Vice-Consul as aforesaid, shall, in and for such district as may be assigned by his Commission or appointment, or by any direction of a Secretary of State, hold and form a Consular Court, and shall, subject to the provisions of this Order, have and exercise within the district, all the powers and jurisdiction which can be exercised by the Consul-General under this Order.

An appeal may be brought from a Judgment or Order of a District Court to the Consul-General in such cases and manner and subject to such regulations as may from time to time be directed or approved by a Secretary of State, and for the purpose of hearing and determining any such appeal the Consul-General may proceed in the same manner and shall have the same powers as if the appeal were an original proceeding instituted in his Court, and he shall certify his decision to the Court from which the appeal is brought, which shall give effect thereto.

Where an appeal is brought under this Article to the Court of the Consul-General, a further appeal shall be in the like cases and manner and on the like grounds and conditions in and on which an appeal can under this Order be brought from the Consul-General.

PART III.—APPLICATION OF CERTAIN PORTIONS OF THE LAW OF BRITISH INDIA

8. (*a*) Subject to the other provisions of this Order, and to any Treaties for the time being in force relating to Zanzibar, Her Majesty's criminal and civil jurisdiction in Zanzibar shall, so far as circumstances admit, be exercised on the principles of, and in conformity with, the enactments for the time being applicable as hereinafter mentioned of the Governor-General of India in Council, and of the Governor of Bombay in Council, and according to the course of procedure and practice observed by, and before, the Courts in the Presidency of Bombay beyond the limits of the ordinary original jurisdiction of the High Court of Judicature at Bombay according to their respective jurisdiction and authority, and so far as such enactments, procedure and practice are inapplicable, shall, so far as circumstances admit, be exercised under and in accordance with the common and statute law of England in force at the commencement of this Order.

(*b*) The following enactments are hereby made applicable to Zanzibar as from the commencement of the Order, namely —

The Indian Penal Code (Act XLV. of 1860)

The Indian Succession Act (Act X. of 1865).

The Bombay Civil Courts Act, 1869 (Act XIV. of 1869), except sections 6, 15, 23, 32, 33, 34, 38 to 43 (both inclusive), the last clause of section 19, and the last two clauses of section 22.

The Indian Evidence Act, 1872 (Act I. of 1872).

The Indian Oaths Act, 1873 (Act X. of 1873).

The Code of Criminal Procedure (Act X. of 1882).

The Code of Civil Procedure (Act XIV. of 1882).

Acts of the Governor-General of India in Council amending any of these Acts, and in force at the time of the passing of this Order.

The enactments relating to bankruptcy for the time being in force in the Presidency of Bombay.

(*c*) Any other existing or future enactments of the Governor-General of India in Council, or of the Governor of Bombay in Council, shall also be applicable to Zanzibar, but shall not come into operation until such times as may in the case of any of such enactments respectively be fixed by the Secretary of State.

(*d*) For the purpose of facilitating the application of any such enactments as before-mentioned—

(i) Any of the Courts established under this Order may construe any such enactment, with such alterations not affecting the substance, as may be necessary or proper to adapt the same to the matter before the Court;

(ii) The Secretary of State may by order from time to time direct by what authority any jurisdiction, powers, or duties incident to the operation of any such enactment, and for the exercise or performance of which no convenient provision has been otherwise made, shall be exercised or performed;

(iii) The Secretary of State may by order from time to time modify for the purposes of this Order, any provision of any of the before-mentioned enactments or of any amending or substituted enactment relating to civil or criminal procedure or to procedure in bankruptcy.

(iv) Any order of the Secretary of State made in pursuance of this Article shall be published in Zanzibar, and in India, in such manner as he directs, and shall have effect as from a date to be specified in the Order.

PART IV.—CRIMINAL MATTERS.

Application of the Code of Criminal Procedure.

9. Subject to the other provisions of this Order, the Code of Criminal Procedure and the other enactments relating to the administration of criminal justice in India for the time being applicable to Zanzibar, shall have effect as if Zanzibar were a district in the Presidency of Bombay, and the Judicial Assistant shall be deemed to be the Magistrate of the district, the Consul-General shall be deemed to be the Sessions Judge, the High Court of Judicature at Bombay (hereinafter called the High Court of Bombay) shall be deemed to be the High Court; and the powers both of the Governor-General in Council and of the Local Government under those enactments shall be exercisable by the Secretary of State, or with his previous or subsequent assent, by the Governor-General of India in Council.

Commitments to Hig'. Court of Bombay.

10. When any person is committed to the High Court of Bombay for trial, the Consul-General may, under and in accordance with the provisions of section 4 of "The Foreign Jurisdiction Act, 1843," send him to Bombay for trial; and may, if he thinks fit, bind over such of the proper witnesses as are British subjects, or any of them, in their own recognizances, to appear and give evidence on the trial.

Offence of Smuggling.

11. If a British subject smuggles or imports into or exports from Zanzibar any goods whereon any duty is charged or payable to the Government of Zanzibar, with intent to evade payment of the duty, he shall be punished with imprisonment for a term which may extend to two months, or with fine which may extend to 1,000 rupees, or with both.

Manner and Place of Imprisonment.

12. (*a*) The Consul-General may, if he thinks fit, from time to time, by general order, prescribe the manner in which, and the places in Zanzibar at which, sentences of imprisonment are to be carried into execution.

(*b*) The Consul-General may, if he thinks fit, in any case, by warrant signed by him, and sealed with his Consular Seal, cause an offender convicted and sentenced to imprisonment before a Criminal Court established under this Order to be sent and removed to, and imprisoned in any place in Zanzibar.

13. Where an offender convicted before any Court established under this Order is sentenced to imprisonment, and the Consul-General, proceeding under section 5 of "The Foreign Jurisdiction Act, 1843," authority in that behalf being hereby given to him, considers it expedient that the sentence should be carried into effect within Her Majesty's dominions, and the offender is, accordingly, sent for imprisonment to a place in Her Majesty's dominions, the place shall be either Bombay, or a place in some other part of Her Majesty's dominions out of the United Kingdom, the Government whereof consents that offenders may be sent thither under this Article.

14 (1) In cases of murder or culpable homicide, if either the death or the criminal act which wholly or partly caused the death happened in Zanzibar, a Court acting under this Order shall have the like jurisdiction over any British subject who is charged either as a principal offender or as an abettor, as if both such criminal act and the death had happened in Zanzibar.

(2) In the case of any crime committed on the high seas, or within the Admiralty jurisdiction, by any British subject who at the time of committing such crime was on Board a British ship, or on board a foreign ship to which he did not belong, a Court acting under this Order shall have jurisdiction as if the crime had been committed within Zanzibar.

(3) In cases tried under this Article no different sentence can be passed from the sentence which could be passed in England if the crime were tried there.

(4) The foregoing provisions of this Article shall be deemed to be adaptations for the purposes of this Order, and of "The Foreign Jurisdiction Act, 1878," of the following enactments described in the First Schedule to that Act (that is to say):—

The Admiralty Offences (Colonial) Act, 1849.

The Admiralty Offences (Colonial) Act, 1860.

The Merchant Shipping Act, 1867, Section 11.

And the said enactments shall, so far as they are repeated and adapted by this Article (but not further or otherwise), extend to Zanzibar.

15. "The Fugitive Offenders' Act, 1881," shall apply to Zanzibar in the same manner as if it were a British possession, and for the purposes of

Part II. of the said Act, and of this Article, Zanzibar, British India, Natal and the Cape of Good Hope shall be deemed to be one group of British possessions, and the Consul-General shall, as regards any place within his jurisdiction, have the powers of a Governor or Superior Court of a British possession.

Security for Good Behaviour.

16. Where a British subject is convicted of an offence, the Court before which he is convicted may, if it thinks fit, require him to give security to the satisfaction of the Court for his future good behaviour; and for that purpose may, if it thinks fit, cause him to come or be brought before the Court.

Deportation.

17. (*a*) If a British subject required by an order under the last preceding Article of this Order, or under the law relating to Criminal Procedure for the time being in force, to give security for good behaviour or for keeping the peace, fails to do so, the Court making the order may, if it thinks fit, order that he be deported from Zanzibar to a place to be named by the Consul-General.

(*b*) The Court, on making an order of deportation, shall forthwith report to the Consul-General the order and the grounds thereof.

(*c*) Thereupon the person ordered to be deported shall, if the Consul-General thinks fit, be, as soon as practicable, and in the case of a person convicted, either after execution of the sentence, or while it is in course of execution, removed in custody, under the warrant of the Consul-General, to the place named in the warrant.

(*d*) The place shall be either Bombay or a place in some other part of Her Majesty's dominions out of the United Kingdom, the Government whereof consents to the reception therein of persons deported under this Order.

(*e*) The Court, on making an order of deportation, may, if it thinks fit, order the person to be deported to pay all or any part of the expenses of his deportation to be fixed by the Court in the order. Subject thereto the expenses of deportation shall be defrayed as the Secretary of State, with the concurrence of the Commissioners of Her Majesty's Treasury, directs.

(*f*) The Consul-General shall forthwith report to the Secretary of State every order of deportation made under this Order, and the grounds thereof, and the proceedings thereunder.

(*g*) If a person deported under this Order return to Zanzibar without permission in writing of the Consul-General or Secretary of State, he shall be punished with imprisonment for a term which may extend to two months, or with fine which may extend to 1,000 rupees, or with both.

(*h*) He shall also be liable to be forthwith again deported under the original or a new order and a fresh warrant of the Consul-General.

Criminal Appeals to Bombay

18. (*a*) Where a person entitled to appeal to the High Court of Bombay from any judgment or order passed in the exercise of criminal jurisdiction under this Order desires so to appeal, he shall present his petition of appeal to the Court which passed the judgment or order; and the petition shall with all practicable speed be transmitted by or through the Consul-General

to the High Court, with certified copies of the charge (if any) and proceedings, of all documentary evidence admitted or tendered, of the depositions, of the notes of the oral testimony, and of the judgment or order, and any argument on the petition of appeal that the appellant desires to submit to the High Court.

19. The Court against whose judgment or order the appeal is preferred shall postpone the execution of the sentence pending the appeal; and shall, if necessary, commit the person convicted to prison for safe custody, or detain him in prison for safe custody, or shall admit him to bail, and may take security, by recognizance, deposit of money, or otherwise, for his payment of any fine.

Process of Removal or Deportation.

20. (*a*) Where, under this Order, a person is to be sent, or removed, or deported, from Zanzibar, he shall, by warrant of the Consul-General, under his hand and seal, be detained, if necessary, in custody, or in prison, until a fit opportunity for his removal or deportation occurs, and then be put on board one of Her Majesty's vessels of war, or if none is available, then on board some other British or other fit vessel.

(*b*) The warrant of the Consul-General shall be sufficient authority to the person to whom it is directed or delivered for execution, and to the Commander or master of the vessel, to receive and detain the person therein named, in the manner therein prescribed, and to send or remove and carry him to the place therein named, according to the warrant.

(*c*) In case of sending or removal for any purpose other than deportation, the warrant of the Consul-General shall be issued in duplicate, and the person executing it shall, as soon as practicable after his arrival at the place therein named, deliver, according to the warrant, with one of the duplicates of the warrant, to a constable or proper officer of the police or keeper of a prison, or other proper authority or person there, the person named in the warrant, to be produced on the order of the proper Court or authority there, or to be otherwise dealt with according to law.

Zanzibar Order in Council of 2nd March 1889, published in the "London Gazette" of 8th March 1889, p. 1331.

WHEREAS by Treaty, grant, usage, sufferance, and other lawful means Her Majesty the Queen has power and jurisdiction in relation to Her Majesty's subjects and others within the dominions of His Highness the Sultan of Zanzibar:

Now, therefore, Her Majesty, by virtue and in exercise of the power in this behalf by the Foreign Jurisdiction Acts, 1843 to 1878, or otherwise in Her Majesty vested, is pleased by and with the advice of Her Privy Council to order, and it is hereby ordered as follows:—

1. This Order shall be construed as one with the Zanzibar Order in Council of 1884 (herein referred to as the "Principal Order"), as amended by any subsequent Order in Council, and may be cited as "The Zanzibar Order in Council, 1889."

2. Where it is shewn by evidence on oath, to the satisfaction of the Consul-General, that any British subject or British-protected person is disaffected to Her Majesty's Government, or has committed, or is about to commit, an offence against the Principal Order, or is otherwise conducting himself so as to be dangerous to peace and good order in Zanzibar, or is endeavouring to excite enmity between the Sultan or people of Zanzibar and Her Majesty, or intriguing against Her Majesty's power and authority in Zanzibar, the Consul-General may, if he thinks fit, by order under his hand and official seal, prohibit that person from being in Zanzibar, within the limits specified in such order, during any time therein specified, not exceeding two years.

(2) If the person named in the order of prohibition fails to obey, or acts in contravention of, the order—

(i) He shall be guilty of an offence against this order, and, on conviction thereof, shall be liable to imprisonment for any time not exceeding two years, without prejudice to the operation of the order of prohibition;

(ii) Whether the offender has been convicted of, or imprisoned for, that offence or not, the Consul-General may, if he thinks fit, by order under his hand and official seal, authorize and direct that he be taken into custody, and be removed in custody to some place named in the order of removal, being a place to which a person can under the Principal Order be deported beyond the limits specified in the order of prohibition

(iii) The offender shall be taken into custody and removed accordingly, and in such removal force may be used if necessary; and he shall be discharged from custody at the place named in the order of removal

(3) In any case in which the Consul General can, under this Order, make an order of prohibition, he may, if he thinks fit, in lieu of such order, make and execute an order of deportation in like manner and with all the like consequences, as an order of deportation can under the Principal Order be made and executed in the case of a person who, after conviction of an offence, has failed to give security required for good behaviour

(4) An appeal shall not lie against an order of prohibition, or removal, or deportation made under this Order.

(5) The Consul-General, by order under his hand and official seal, may, from time to time, vary any order of prohibition (not extending the duration thereof), and may revoke any order of prohibition or removal.

(6) The Consul-General shall forthwith report to the Secretary of State every order made by him under this Article, and the grounds thereof, and the proceedings thereunder.

3. This Order shall come into operation as from the date hereof.

The Consul-General shall, so soon as any copy of this Order, or statement of the effect thereof, has been transmitted to him by a Secretary of State, exhibit in a conspicuous place in his Consular office a transcript or print of such copy or statement respectively, sealed with his seal, and shall supply printed or written copies thereof at such reasonable price as he directs.

And the Most Honourable the Marquis of Salisbury and the Right Honourable Viscount Cross, two of her Majesty's Principal Secretaries of State, and the Lords Commissioners of the Admiralty, are to give the necessary directions herein as to them may respectively appertain.

ACTS OF THE LEGISLATIVE COUNCIL OF INDIA.

ACT No. VI OF 1864.

PASSED BY THE GOVERNOR-GENERAL IN COUNCIL.

(*Received the assent of the Governor-General in Council on the 18th February* 1864.)

(As amended by Act III. of 1895.)

AN ACT *to authorize the punishment of Whipping in certain cases.*

Preamble.—Whereas it is expedient that in certain cases offenders should be liable under the provisions of the Indian Penal Code to the punishment of whipping; It is enacted as follows:—

Sect. 1. In addition to the punishments described in Section 53 of the Indian Penal Code, offenders are also liable to whipping under the provisions of the said Code.

Sect. 2 (*a*) *Offences punishable with Whipping in lieu of any other Punishment prescribed by Penal Code.*—Whoever commits any of the following offences may be punished with whipping, in lieu of any punishment to which he may for such offence be liable under the Indian Penal Code, that is to say:—

Group A.

(1) Theft, as defined in Section 378 of the said Code.

(2) Theft in a building, tent, or vessel, as defined in Section 380 of the said Code.

(3) Theft by a clerk or servant, as defined in Section 381 of the said Code.

(4) Theft after preparation for causing death or hurt, as defined in Section 382 of the said Code.

Group B.

(5) Extortion by threat, as defined in Section 388 of the said Code.

(6) Putting a person in fear of accusation in order to commit extortion, as defined in Section 389 of the said Code.

Group C.

(7) Dishonestly receiving stolen property, as defined in Section 411 of the said Code.

(8) Dishonestly receiving property stolen in the commission of a dacoity, as defined in Section 412 of the said Code.

Group D.

(9) Lurking house-trespass, or house-breaking, as defined in Sections 443 and 445 of the said Code, in order to the committing of any offence punishable with whipping under this section.

(10) Lurking house-trespass by night, or house-breaking by night, as defined in Sections 444 and 446 of the said Code, in order to the committing of any offence punishable with whipping under this section (Act III. of 1895).

(*a*) Sections 2, 3, 4 here printed were substituted for original sections 2, 3, 4 by Act III of 1895, and the explanation added to Sect. 5 by the same Act. Added matter is shown in Italics, &c.

Notes.

The word "punishment" means the total of punishments capable of being awarded under the Penal Code; consequently where an offence is punishable with imprisonment and fine, an accused person cannot be punished with whipping and fine; *Emp.* v. *Dagadu*, *I. L. R.* 16 *Bom.* 357.

A sentence of whipping cannot be passed on a person convicted of an *attempt* to commit house-breaking by night with intent to commit theft; *Reg.* v. *Yella valad Parshu*, 3 *Bom. H. C. Rep. C C.* 37; nor for an attempt to commit an offence mentioned in this section.

Sect. 3. *On Second Conviction of any Offence mentioned in last Section, whipping may be added to other Punishment.*—Whoever, having been previously convicted of any one of the offences specified in the last preceding section, shall again be convicted of the same offence *or of any offence included in the same group of offences* (Act III. of 1895) may be punished with whipping, in lieu of, or in addition to, any other punishment, to which he may for such offence be liable under the Indian Penal Code.

Notes.

When an accused person is liable to punishment under this section, the charge must state the liability, as in a charge of a previous conviction entailing a liability to enhanced punishment under Section 75 of the Penal Code; *Reg.* v. *Tukaram Dowlat*, *B R 1st August* 1871 See also *Badiya* v. *Reg.*, *I. L. R.* 5 *Mad* 158, where, however, the necessity for stating the liability in the charge is extended to every case under the Act; but it seems to be doubtful whether it is necessary, except as a matter of practice enjoined by a High Court, to state such liability in cases where the punishment is in *substitution* for that provided in the Penal Code, because the working of this Act shews that the provisions thereof are to be read as if they were contained in the Code itself; see the preamble and Section 1.

Before flogging is given as an additional punishment, there ought to be a plea of guilty to the former conviction, or else formal evidence thereof, and proof of the identity of the prisoner; *Reg.* v. *Nuzee Nushyo*, 15 *W R. Cr.* 52; and *Reg.* v. *Shaik Ramzan*, *ib.* 53.

The second offence must have been *committed after* conviction for the former one; *Reg.* v. *Surya Krishna*, 3 *Bom. H. C. Rep. C. C.* 38. Before the amendment of this section the second conviction had to be for the same offence as the first; *Reg.* v *Babaji Bapu*, 4 *Bom. H C. Rep C. C.* 5; and even now the second conviction must be for an offence included in the same group as the first. A conviction of theft on the first occasion, and one of house-breaking by night with intent to commit theft on the second, did not come within the terms "again convicted of the same offence"; *Madras H. C. Rulings*, 21*st March* 1868, 3 *Madras Jurist*, 244; nor a conviction of dishonestly receiving stolen property, after one of theft; *Emp* v. *Partab*, *I. L. R.* 1 *All.* 606. Nor would either of these cases come within the terms of the amended section. But a conviction of theft in a dwelling after one of simple theft, though not within the terms of the old section (*Reg.* v. *Changia Shamia*, 7 *Bom. H. C. Rep. C. C.* 68) would clearly be within the amended section. A person who is convicted at one time on two or more charges of the same offence, not having, previously to that time, been convicted of the same offence, does not come within the meaning of the words "previously convicted" used in this section. It is therefore illegal to sentence him to whip-

ping for one of these offences is *addition* to imprisonment or fine for the other or others, but it is not illegal to sentence him to *one* whipping *in lieu* of all other punishment, if the offence of which he is convicted be one of those enumerated in Section 2. Where, however, a person who has been previously convicted within the meaning of this section is convicted at one time on two or more charges of the same offence as that of which he had been previously convicted, he can only receive *one* sentence of whipping, *in addition to* any other punishment to which he may be liable, *Nasser v. Chunder*, 9 B. R. Cr. 41 see also *Reg v. Uday Pudmanck*, 12 W. R. Cr. 68; *Rutton Bewa v. Buhur*, 14 W. R. Cr. 7.

This section applies to juveniles as well as to adult offenders; *Reg v. Kasa*, 7 Bom. H. C. Rep. Cr. C. 70.

Sect. 4. *Offences punishable in case of Second Conviction, with Whipping, in addition to other Punishment.* Whoever, having been previously convicted of any one of the following offences, shall be again convicted of the same offence, *or of any other offence included in the same group of offences* (Act III of 1895), may be punished with whipping in addition to any other punishment to which he may be liable under the Indian Penal Code, that is to say:—

Group A

(1) Giving or fabricating false evidence, in such manner as to be punishable under Section 195 of the Indian Penal Code.

(2) Giving or fabricating false evidence with intent to procure conviction of a capital offence, as defined in Section 194 of the said Code.

(3) Giving or fabricating false evidence, with intent to procure conviction of an offence punishable with transportation or imprisonment, as defined in Section 195 of the said Code.

Group B

(4) Falsely charging any person with having committed an unnatural offence, as defined in Sections 211 and 377 of the said Code.

Group C

(5) Assaulting or using criminal force to any woman with intent to outrage her modesty, as defined in Section 354 of the said Code.

(6) Rape, as defined in Section 375 of the said Code.

(7) Unnatural offences, as defined in Section 377 of the said Code.

Group D.

(8) Robbery or dacoity, as defined in Sections 390 and 391 of the said Code.

(9) Attempting to commit robbery, as defined in Section 393 of the said Code.

(10) Voluntarily causing hurt in committing robbery, as defined in Section 394 of the said Code.

Group E

(11) Habitually receiving or dealing in stolen property, as defined in Section 413 of the said Code.

Group F.

(12) Forgery, as defined in Section 463 of the said Code.

(13) Forgery of a document, as defined in Section 466 of the said Code.

(14) Forgery of a document, as defined in Section 467 of the said Code.

(15) Forgery for the purpose of cheating, as defined in Section 468 of the said Code.

(16) Forgery for the purpose of harming the reputation of any person, as defined in Section 469 of the said Code.

Group G.

(17) Lurking house-trespass or house-breaking, as defined in Sections 443 and 445 of the said Code, in order to the committing of any offence punishable with whipping under this section.

(18) Lurking house-trespass by night, or house-breaking by night, as defined in sections 444 and 446 of the said Code, in order to the committing of any offence punishable with whipping under this section. (Act III. of 1895.)

Sect. 5. *Juvenile Offenders.*—Any juvenile offender who commits any offence which is not by the Indian Penal Code punishable with death, may, whether for a first or any other offence, be punished with whipping, in lieu of any other punishment to which he may for such offence be liable under the said Code.

Explanation.—In this section the expression 'juvenile offender' means an offender who in the opinion of the Court is under sixteen years of age, the decision of the Court on such matter being final and conclusive. (Act III of 1895.)

Notes.

This section is not meant to supersede Sections 3 and 4, but to be applied in the proper cases alternatively with those sections. Sections 2, 3, and 4, apply to juvenile offenders as well as to adults; *Reg.* v. *Jeykison Girdhar*, *B. R 2nd October* 1873. This section only applies to offences under the Penal Code, and not to offences under a special law; *In re Dayal Kasiram*, *B. R. 16th August* 1883.

Sect. 6. *Frontier Districts and Wild Tracts.*—Whenever any local Government shall, by notification in the Official Gazette, have declared the provisions of this section to be in force in any frontier district, or any wild tract of country within the jurisdiction of such local Government, any person who shall in such district, or tract of country, after such notification, as aforesaid, commit any of the offences specified in Section 4 of this Act, may be punished with whipping in lieu of any other punishment to which he may be liable under the Indian Penal Code.

Note.

The remainder of the Act has been repealed by Acts X. of 1872 and X. of 1882, and the provisions now in force as to the mode of inflicting the punishment of whipping will be found in the Criminal Procedure Code, 1882, Sections 390 to 396.

ACT No. XIV. OF 1866.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor-General on the 23rd March* 1866.)

AN ACT *to amend the law for the management of the Post Office, for the regulation of the Duties of Postage, and for the punishment of Offences against the Post Office.*

Preamble.—Whereas it is expedient to amend the law for the management of the Post Office, for the regulation of the duties of postage, and for the punishment of offences against the Post Office; It is enacted as follows:—

PART I.—*Preliminary.*

1. *Commencement of Act—Short Title.*—This Act may be cited as "The Indian Post Office Act, 1866."

5. *Exclusive privilege of carrying Letters vested in the Government of India.*—Wheresoever, within British India, posts or postal communications are or shall be established by the Government of India, the said Government shall have the exclusive privilege of conveying by post, from one place to another, all letters, except in the following cases, and shall also have the exclusive privilege of performing all the incidental services of receiving, collecting, sending, despatching, and delivering all letters, except in the following cases, that is to say:—

(1) Letters sent by a private friend in his way, journey, or travel, so as such letters be delivered by such friend to the person to whom they shall be directed, without hire, reward, or other profit or advantage, for receiving, carrying, or delivering the same.

(2) Letter solely concerning the affairs of the sender or receiver thereof sent by a messenger on purpose.

(3) Letters solely concerning goods or other property, sent either by sea or land, to be delivered with the goods or property which such letters concern, without hire, reward, or other profit or advantage, for receiving, carrying, or delivering such letters. But nothing herein contained shall authorize any person to make a collection of such excepted letters, for the purpose of sending them in the manner hereby authorised.

6. *Persons expressly forbidden to collect, carry, or deliver Letters.*—Wheresoever, within British India, posts or postal communications are or shall be established by the Government of India, the following persons are expressly forbidden to collect, carry, tender, or deliver any letter or letters, or to receive any letter for the purpose of carrying or delivering the same, although they shall not receive hire or reward for so doing, that is to say—

(1) Common carriers of passengers or goods, and their drivers, servants or agents, except letters solely concerning goods in their carriages.

(2) Owners and commanders of ships, steam-boats, or other vessels passing on any river or canal, or to or from any port in British India, and their servants or agents, except letters solely concerning goods on board.

PART VII.—*Offences against the Post Office.*

42. *Penalty for sending dangerous substance by Post.*—No person shall knowingly post, or send, or tender, or deliver in order to be sent by the

post, any letter, parcel or packet containing any explosive or other dangerous material or substance; and any person contravening this prohibition shall be punished for every such offence with a fine not exceeding two hundred Rupees.

43. *Penalty for making false Certificate in order to defraud the Post Office.*—Every person who shall, for the purpose of defrauding the Post Office Revenue, wilfully certify by writing on any official or other letter or packet delivered at any Post Office for conveyance by post, that which is not true in respect of such letter or packet, or in respect of the whole of its contents, or shall knowingly send or deliver, or attempt to send or deliver, for conveyance by post, any letter or packet with any such false certificate thereon; and every person who shall knowingly send, or permit to be sent by post, under colour or pretence of an official communication, any letter, paper, writing, or other enclosure of private nature, shall, for every such offence, be punished with a fine not exceeding five hundred Rupees.

44. *Penalty for detaining Mails or opening Mail-bags.*—It shall not be lawful for any person, unless acting by express order of the Government, to detain, except for a criminal offence, a Post Office messenger whilst carrying the mails, or to detain any carriage or horse upon which the mails are being carried, or on any pretence to open a packet or mail-bag or box in transit from one Post Office to another, and every person who shall be guilty of any of the offences mentioned in this section, shall be punished with a fine not exceeding five hundred Rupees.

45. *Penalty for retaining letters, &c., delivered by mistake.*—Every person who shall fraudulently retain, or wilfully secrete, or make away with, or keep or detain, or, being required to deliver up by an officer of the Post Office, shall neglect or refuse to deliver up a post letter or other article which ought to have been delivered to any other person, or a mail-bag, box or packet containing a letter or other article which shall have been sent by the post, shall be punished, on conviction before a Criminal Court, with imprisonment of either description as defined in the Indian Penal Code, for a term not exceeding two years, and shall also be liable to fine.

46. *Clause 1. Penalty for conveying Letter in Breach of Privilege.*—Every person who shall convey, otherwise than by the post, a letter not excepted from the said exclusive privilege conferred on the Government of India by section 5 of this Act shall, for every letter so conveyed, forfeit a sum not exceeding fifty Rupees.

Clause 2. Penalty for performing, otherwise than by the Post, any services incidental to conveying Letters.—Every person who shall perform, otherwise than by the post, any services incidental to conveying letters from place to place, whether by receiving, taking up, ordering, collecting, carrying, tendering or delivering a letter or letters not excepted from the said exclusive privilege, shall forfeit for every such letter a sum not exceeding fifty Rupees.

Clause 3. Penalty for making Clubbed Packet or tendering or delivering Letter to be sent therein.—Every person who shall make a collection of letters for the purpose of transmitting them through the post in a clubbed packet, and every person who shall knowingly tender or deliver a letter to be sent in a clubbed packet, shall forfeit for every such letter a sum not exceeding fifty Rupees.

Clause 4. Penalty for sending Letter in breach of privilege, or delivering Letter to be so sent.—Every person who shall send a letter not excepted from

the said exclusive privilege, otherwise than by the post, or shall either tender or deliver a letter not so excepted, in order to be sent otherwise than by the post, shall forfeit for every such letter a sum not exceeding fifty Rupees.

Clause 5 Penalty for collecting excepted Letters to send them otherwise than by Post.—Every person who shall make a collection of excepted letters for the purpose of sending them otherwise than by the post, shall forfeit for every such letter a sum not exceeding fifty Rupees.

Clause 6. Penalty for breach of Provisions of Section 6.—Every person who shall carry, receive, tender or deliver a letter, or collect letters contrary to the provisions of Section 6 of this Act, shall forfeit for every such letter a sum not exceeding fifty Rupees.

Clause 7 Penalty for practice of acts mentioned in this section.—Every person who shall be in the practice of committing any of the acts mentioned in this section, shall, for every week during which the practice shall be continued, forfeit a further sum not exceeding five hundred Rupees.

47. *Penalty for neglect on the part of persons employed to carry Mails.*—Every person employed to convey or deliver any mail-bag or box, or any letter or other article sent by post, who shall be guilty, while so employed, of drunkenness, carelessness, or other misconduct, whereby the safety of any such bag, box or letter or other article shall be endangered; or who shall loiter or make delay in the conveyance or delivery of any such bag, box, letter or other article, or who shall not use proper care and diligence safely to convey or deliver any such bag, letter or other article, shall be liable to a fine not exceeding fifty Rupees, and any person employed to deliver a letter or other article sent by the post, who shall not duly deliver the same, shall, within a reasonable time not exceeding twenty-four hours, report the fact at the Post Office where he received such letter or other article, and return the same, and if any such person shall wilfully make a false report, he shall be liable to a fine not exceeding fifty Rupees

48. *Stealing or opening letters, &c., by persons employed in the Post Office.* See *ante*, p. 709

49. *Fraudulently altering marks on letters, &c.* See *ante*, p. 711.

50 *Incorrectly preparing, or altering or secreting documents.* See *ante*, p. 712.

51. *Sending letters on which postage has not been paid or charged.* See *ante*, p. 713

52. *Penalty for abetting or concealing Offences under this Act.*—Whoever abets within the meaning of the Indian Penal Code or conceals any offence made punishable by this Act, shall be punished with the punishment provided for such offence

53. *Any person charged with Offence punishable with fine only may be summarily convicted.*—Any person, whether a European British subject or not, who shall be guilty of any offence for which according to the provisions of this Act he shall be liable to a fine only, shall be punishable for such offence by any Criminal Court upon summary conviction.

54. *Conviction to be quashed on merits only Form of Conviction.* No conviction, order or judgment of any Criminal Court, shall be quashed for error of form or procedure, but only on the merits; and it shall not be necessary to state on the face of the conviction, order or judgment, the evidence on which

it proceeds, but the depositions taken or a copy of them shall be returned with the conviction, order or judgment, and if no jurisdction appears on the face of the conviction, order or judgment, but the depositions taken supply that defect, the conviction, order or judgment shall be aided by what so appears in such depositions.

55. *Magistrate may refer Charge to his Assistant.*—A Magistrate may refer for trial and decision any charge of an offence hereby made punishable by fine only, to any of his Assistants or to any Deputy Magistrate lawfully appointed to exercise the powers of a Covenanted Assistant, and in such case every such Assistant or Deputy Magistrate may exercise all the powers vested in a Magistrate, subject to all the rules applicable to criminal cases deputed to such Assistants or Magistrates acting judicially.

56. *Fines, how levied.*—All fines imposed under the authority of this Act, for offences punishable by fine only by any Criminal Court or by any Assistant to a Magistrate or Deputy Magistrate, may, in case of non-payment thereof, be levied by distress and sale of the goods and chattels of the offender, by warrant under the hand of any of the above-named officers. In case any such fine shall not be forthwith paid, any such officer may order the offender to be apprehended and detained in safe custody until the return can be conveniently made to such warrant of distress, unless the offender shall give security to the satisfaction of such officer for his appearance at such place and time as shall be appointed for the return of the warrant of distress, and such officer may take security by way of recognizance or otherwise. If upon the return of such warrant it shall appear that no sufficient distress can be had whereon to levy such fine, and the same shall not be forthwith paid, or in case it shall appear to the satisfaction of such officer, by the confession of the party or otherwise, that he has not sufficient goods and chattels whereupon such fine or sum of money could be levied if a warrant of distress were issued, any such officer, by warrant under his hand, may commit the offender to prison, there to be imprisoned only, or to be imprisoned and kept to hard labour, according to the discretion of such officer, for any term not exceeding two calendar months where the amount of the fine shall not exceed fifty Rupees, and for any term not exceeding four calendar months where the amount shall not exceed one hundred Rupees, and for any term not exceeding six calendar months in any other case; the commitment to be determinable in each of the cases aforesaid on payment of the amount.

57. *Share of Fine to Informer.*—A share not exceeding one moiety of every fine imposed and recovered under this Act may be awarded to the informer.

58. *No proceedings for recovery of Fines to be taken without an Order.*—No proceedings shall be taken for the recovery of any fine imposed under the authority of this Act, for offences punishable by fine only, without an order of Government, or an order in writing under the hand of the Director-General of the Post Office, or of a Postmaster-General, or other officer specially invested with the powers of a Postmaster-General.

59. *Post Office Servants committing Offences in allied States.*—If any public servant who shall be employed in the Post Office Department, or shall be appointed a vendor of postage-stamps, or entrusted by the Government of India or any Local Government with the sale of postage-stamps within the domi-

nions of any foreign prince or state in India in alliance with Her Majesty, in which a post shall be established by the Government of India, shall, within the dominions of such prince or state, commit any act hereby prohibited, or omit to do any act hereby required to be done by any person similarly employed, appointed or entrusted as aforesaid within British India; such public servant shall be guilty of an offence, and, on conviction thereof, shall be punished in the same manner as if such act had been done or omitted within British India; and every such person may be tried, convicted and punished either by fine or otherwise, according to the nature of the offence, by any Court or officer duly empowered by the Governor-General of India in Council, to take cognizance of offences committed in such dominions by public servants, or by any Court or Magistrate, or other competent officer in any part of British India, in the same manner as if the offence had been committed in such part

60. *Letters, &c., suspected to contain contraband articles, or writings in contravention of this Act, how to be dealt with.*—If any officer in charge of a Post Office shall suspect that any letter or other article lying for delivery at his office contains any contraband article, or any article on which duty is owing to Government, or that any letter or other article lying for delivery at the Post Office contains any writing or enclosure in contravention of the provisions of Sections 14, 16, or 43 of this Act, it shall be lawful for such officer to summon the person to whom the letter or other article is directed to attend at the Post Office, by himself or agent, within forty eight hours after the arrival thereof at that Post Office, and to open the same in the presence of the person to whom it is directed or of that person's agent, and if that person shall not so attend by himself or agent, then to open it in the absence of that person: Provided that, if the officer in charge be under the rank of a Postmaster, he shall call in two respectable persons as witnesses before he shall open a letter or other article in the absence of the person to whom it is addressed: Provided also that in all cases the opened letter or other article shall be subsequently delivered to the persons to whom it is addressed, unless it be required for ulterior proceedings, and that the opening of the same, and the circumstances connected therewith, shall be immediately reported to the Postmaster-General: It shall also be lawful for any officer in charge of a Post Office to refuse to forward any parcel through the Post Office by sea to any foreign port, or to any place not on the continent of India, unless such parcel be accompanied by a Custom House Pass.

61. *Property sent by the Post to be laid in the Postmaster-General.*—Whenever an offence shall be committed in respect of any mail bag or box, or any letter or other article sent by the post it shall be lawful to lay, in the charge to be preferred against the offender, the property of such mail-bag, box, letter or other article in the Postmaster General of the presidency, and it shall not be necessary in the charge to allege, or to prove upon the trial or otherwise, that such mail bag, box, letter or other article was of any value; and in any charge to be preferred against any person employed under the Post Office for any offence committed against this Act, it shall be lawful to state that such offender was employed under the Post Office at the time of committing the offence, without stating further the nature or particulars of his employment.

ACT No. XV. OF 1872.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor-General on the 18th July* 1872)

(*as Amended by Act II. of* 1891).

AN ACT *to consolidate and amend the law relating to the solemnization in India of the marriages of Christians.*

Preamble.—Whereas it is expedient to consolidate and amend the law relating to the solemnization in India of the marriages of persons professing the Christian religion; It is hereby enacted as follows:—

Preliminary.

1. *Short title.*—This Act may be called "The Indian Christian Marriage Act, 1872."

PART VII.—*Penalties.*

66. *False oath, notice or certificate for procuring marriage.*—Whoever, for the purpose of procuring any marriage or licence of marriage, intentionally,

(*a*) where an oath or declaration is required by this Act, or by any rule or regulation of a Church according to the rites and ceremonies of which a marriage is to be solemnized, such Church being the Church of England, Scotland or Rome, makes a false oath or declaration, or,

(*b*) where a notice or certificate is required by this Act, signs a false notice or certificate,

shall be deemed to have committed the offence punishable under Section 193 of the Indian Penal Code, with imprisonment of either description for a term which may extend to three years, and, at the discretion of the Court, with fine.

67. *Forbidding, by false personation, issue of certificate by Marriage Registrar.*—Whoever forbids the issue, by a Marriage Registrar, of a certificate, by falsely representing himself to be a person whose consent to the marriage is required by law, knowing or believing such representation to be false, or not having reason to believe it to be true, shall be deemed guilty of the offence described in Section 205 of the Indian Penal Code.

68. *Solemnizing marriage without due authority.*—Whoever not being authorized by Section 5 of this Act to solemnize marriages, knowingly solemnizes, or professes to solemnize, in the absence of a Marriage Registrar of the district in which the ceremony takes place, a marriage between persons, one or both of whom is or are a Christian or Christians, shall be punished with imprisonment which may extend to ten years, or (in lieu of a sentence of imprisonment for seven years or upwards) with transportation for a term of not less than seven years and not exceeding ten years, or, if the offender be an European or American, with penal servitude according to the provisions of Act No XXIV of 1855 (*to substitute penal servitude for the punishment of transportation in respect of Europeans and Americans convicts*), and shall also be liable to fine.

69. *Solemnizing marriage out of proper time, or without witness.*—Whoever knowingly and wilfully solemnizes a marriage between persons, one or both of whom is or are a Christian or Christians, at any time other than between the hours of six in the morning and seven in the evening, or in the absence

of at least two credible witnesses other than the person solemnizing the marriage, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine

Saving of marriages solemnized under special license —This section does not apply to marriages solemnized under special licenses granted by the Anglican Bishop of the Diocese or by his Commissary, nor to marriages performed between the hours of seven in the evening and six in the morning by a Clergyman of the Church of Rome, when he has received the general or special license in that behalf mentioned in Section 10. Nor does this section apply to marriages solemnized by a Clergyman of the Church of Scotland according to the rules, rites, ceremonies and customs of the Church of Scotland

70 *Solemnizing without notice, or within fourteen days after notice, marriage with minor* — Any Minister of Religion licensed to solemnize marriages under this Act who, without a notice in writing, or, when one of the parties to the marriage is a minor and the required consent of the parents or guardians to such marriage has not been obtained, within fourteen days after the receipt by him of notice of such marriage knowingly and wilfully solemnizes a marriage under Part III, shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

71. A Marriage Registrar under this Act who commits any of the following offences—(1) knowingly and wilfully issues any certificate for marriage, or solemnizes any marriage without publishing the notice of such marriage as directed by this Act (2) after the expiration of two months after copy of the notice has been entered as required by Section 40 in respect of any marriage solemnizes such marriage (3) solemnizes, without an order of a competent Court authorizing him to do so any marriage when one of the parties is a minor before the expiration of fourteen days after the receipt of the notice of such marriage or without sending, by the post or otherwise, a copy of such notice to the Senior Marriage Registrar of the District if there be more Marriage Registrars of the District than one, and if he himself be not the Senior Marriage Registrar, (4) issues any certificate the issue of which has been prohibited as in this Act provided, by any person authorized to prohibit the issue thereof shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine.

72 *Issuing certificate after expiry of notice, or, in case of minor, within fourteen days after notice* – Any Marriage Registrar knowingly and wilfully issuing any certificate for marriage after the expiration of two months after the notice has been entered by him as aforesaid, knowingly and wilfully issuing, without the order of a competent Court authorizing him so to do, any certificate for marriage, where one of the parties intending marriage is a minor, before the expiration of fourteen days after the entry of such notice, or any certificate the issue of which has been forbidden as aforesaid by any person authorized in this behalf shall be deemed to have committed an offence under Section 166 of the Indian Penal Code.

73. *Persons authorized to solemnize marriage (other than Clergy of Churches of England, Scotland, or Rome, issuing certificates, &c., improperly.*—Whoever being authorized under this Act to solemnize a marriage, and not being a Clergyman of the Church of England, solemnizing a marriage after due publication of banns, or under a license from the Anglican Bishop of the Diocese or a Surrogate duly authorized in that behalf, or not being a Clergyman of the Church of Scotland, solemnizing a marriage according to the

rules, rites, ceremonies, and customs of that Church, or, not being a Clergyman of the Church of Rome, solemnizing a marriage according to the rites, rules, ceremonies, and customs of that Church, knowingly and wilfully issues any certificate for marriage under this Act, or solemnizes any marriage between such persons as aforesaid, without publishing, or causing to be affixed, the notice of such marriage as directed in Part III. of this Act, or after the expiration of two months after the certificate has been issued by him; or knowingly and wilfully issues any certificate for marriage, or solemnizes a marriage between such persons when one of the persons intending marriage is a minor, before the expiration of fourteen days after the receipt of notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Marriage Registrar, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar of the District; or knowingly and wilfully issues any certificate the issue of which has been forbidden, under this Act, by any person authorized to forbid the issue; or knowingly and wilfully solemnizes any marriage forbidden by any person authorized to forbid the same, shall be punished with imprisonment for a term which may extend to four years, and shall also be liable to fine.

74. *Unlicensed person granting certificate, pretending to be licensed—Refusal to grant certificates, &c.*—Whoever, not being licensed to grant a certificate of marriage under Part VI. of this Act, grants such certificate, intending thereby to make it appear that he is licensed, shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine.

Whoever being licensed to grant certificates of marriage under Part VI. of this Act, without just cause, refuses, neglects, or omits, to perform any of the duties imposed upon him by that Part, shall be punished with fine which may extend to one hundred Rupees.

75. *Destroying or falsifying register-books.*—Whoever, by himself or another, wilfully destroys or injures any register-book or the counterfoil certificates thereof, or any part thereof, or any authenticated extract therefrom, or falsely makes or counterfeits any part of such register book or counterfoil certificates, or wilfully inserts any false entry in any such register-books or counterfoil certificate or authenticated extract, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.

76. *Limitation of prosecutions under Act.*—The prosecution for every offence punishable under this Act shall be commenced within two years after the offence is committed.

ACT No. X. OF 1873.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor-General on the 8th April* 1873.)

AN ACT *to consolidate the law relating to Judicial Oaths and for other purposes.*

Preamble.—Whereas it is expedient to consolidate the law relating to judicial oaths, affirmations, and declarations, and to repeal the law relating to official oaths, affirmations, and declarations; It is hereby enacted as follows:—

I.—*Preliminary.*

1. *Short title* - This Act may be called "The Indian Oaths Act, 1873": It extends to the whole of British India, and, so far as regards subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty, and it shall come into force on the first day of May 1873.

2. *Repeal of enactments*.—The enactments specified in the schedule hereto annexed are repealed to the extent mentioned in the third column thereof.

3 *Saving of certain oaths and affirmations* Nothing herein contained applies to proceedings before Courts Martial, or to oaths, affirmations or declarations prescribed by any law which under the provisions of the Indian Councils Act, 1861, the Governor-General in Council has not power to repeal

II — *Authority to administer Oaths and Affirmations.*

4. *Authority to administer oaths and affirmations* The following Courts and persons are authorized to administer by themselves or by an officer empowered by them in this behalf oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law : All Courts and persons having by law or consent of parties authority to receive evidence (2) the Commanding Officer of any military station occupied by troops in the service of Her Majesty provided, (1) that the oath or affirmation be administered within the limits of the station and (2) that the oath or affirmation be such as a Justice of Peace is competent to administer in British India

III —*Persons by whom Oaths or Affirmations must be made.*

5. *Oaths or affirmations to be made by witnesses, interpreters, jurors*.—Oaths or affirmations shall be made by the following persons :—(a) all witnesses, that is to say all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence (b) interpreters of questions put to and evidence given by, witnesses, and jurors Nothing herein contained shall render it lawful to administer, in a criminal proceeding an oath or affirmation to the accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties

6 *Affirmations by Natives or by persons objecting to oaths*.—Where the witness, interpreter, or juror is a Hindu or Muhammadan, or has an objection to making an oath, he shall, instead of making an oath, make an affirmation In every other case the witness, interpreter, or juror shall make an oath.

IV.—*Forms of Oaths and Affirmations.*

7. *Forms of oaths and affirmations*.—All oaths and affirmations made under Section 5 shall be administered according to such forms as the High Court may from time to time prescribe. And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use.

Explanation.—As regards oaths and affirmations administered in the Court of the Recorder of Rangoon and the Court of Small Causes of Rangoon, the Recorder of Rangoon shall be deemed to be the High Court within the meaning of this section.

8. *Power of Court to tender certain oaths.*—If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.

9. *Court may ask party or witness whether he will make oath proposed by opposite party.*—If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in Section 8, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation: Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

10. *Administration of oath, if accepted.*—If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a Commission to any person to administer it, and authorize him to take the evidence for the person to be sworn or affirmed and return it to the Court.

11. *Evidence conclusive as against person offering to be bound.*—The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated.

12. *Procedure in case of refusal to make oath.*—If the party or witness refuses to make the oath or solemn affirmation referred to in Section 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal.

V.—*Miscellaneous.*

13. *Proceedings and evidence not invalidated by omission of oath or irregularity.*—No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of a witness to state the truth.

14. *Persons giving evidence bound to state the truth.*—Every person giving evidence on any subject before any Court or person hereby authorized to administer oaths and affirmations shall be bound to state the truth on such subject.

15. *Amendment of Penal Code, Sections 178 and 181.*—The Indian Penal Code, Sections 178 and 181, shall be construed as if, after the word "oath," the words "or affirmation" were inserted.

61. *Official oaths abolished.*—Subject to the provisions of Sections 3 and 5, no person appointed to any office shall, before entering on the execution of the duties of his office, be required to make any oath, or to make or subscribe any affirmation or declaration whatever.

ACT No. I. OF 1876.

AN ACT *to amend the law relating to Telegraphs in India.*

Preamble.—Whereas it is expedient to amend the law relating to Telegraphs in India: It is hereby enacted as follows:—

I.—*Preliminary.*

1. *Short title; Local extent; Commencement.*—This Act may be called "The Indian Telegraph Act, 1876": It extends to the whole of British India, and so far as regards subjects of Her Majesty to the dominions of Princes and States in India in alliance with Her Majesty; and it shall come into force at once.

2. *Repeal of Acts; Saving of existing licenses and rules.*—Act No. XXXIV. of 1854 (*for regulating the establishment and management of Electric Telegraphs in India*) and Act No VIII. of 1860 (*for regulating the establishment and management of Electric Telegraphs in India*) are hereby repealed; but all licenses granted, declarations made, and rules framed under either of the said Acts and now in force shall be deemed to have been respectively granted, made, and framed under this Act.

3. *Interpretation-clause.* "*Telegraph*", "*Telegraph Officer*"; "*Message.*"—In this Act "Telegraph" means an electric or magnetic Telegraph; "Telegraph Officer" means any person employed either permanently or temporarily in connection with a telegraph established or maintained and worked by the Government, or by a company or person licensed under this Act and "Message" means any communication sent by telegraph, or given to a telegraph officer to be sent by telegraph, or to be delivered.

II.—*Privileges and powers of Government*

Exclusive privilege of establishing telegraphs. Proviso as to licenses.—Within British India, the Governor-General in Council shall have the exclusive privilege of establishing lines of telegraph Provided that the Governor-General in Council may grant a license to any person or company to establish or to maintain a line of telegraph within any part of British India, which license shall be revocable on the breach of any of the conditions therein contained.

5. *Power to take possession of telegraphs established by license.*—On the occurrence of any public emergency, or in the interest of the public safety, the Governor-General in Council or the Local Government may take temporary possession of any line of telegraph established or maintained by any company or person licensed under this Act, or may order that any message to or from any person, or relating to any specified subject, shall be intercepted or communicated to the Government or any officer thereof mentioned in such order. If any doubt arises as to the existence of a public emergency, or whether any act done under this section was in the interest of the public safety, a certificate signed by a Secretary to the Government of India or to the Local Government shall be conclusive evidence on the point.

6 *Power to establish telegraphs on land of railway company.*—Any railway company, on being required so to do by the Governor-General in Council, shall permit the Government to establish upon the land of such company, whether within or without the railway fence as the Governor-General in Council may in each case determine, a line of telegraph, and shall give every reasonable facility for establishing, maintaining, and using the same.

7. *Power to frame rules for the conduct of Government telegraphs.*—The Governor-General in Council may, from time to time, frame rules consistent with this Act for the conduct of telegraphs heretofore or hereafter established by Government, and may therein prescribe the regulations, conditions, and restrictions according to which all messages and signals shall be transmitted by such telegraphs.

8. *Power to frame rules for telegraphs established by license, and to declare Act applicable to telegraphs established within British India by foreign Powers.*—The Governor-General in Council may, from time to time, by notification in the *Gazette of India*, (*a*) prescribe rules for the conduct of any telegraph established or maintained by any company or person licensed under this Act; (*b*) declare what portions of this Act shall be applicable to such telegraph and to persons using the same, or employed in connection therewith; (*c*) declare that this Act, or such portions thereof as may be specified in the notification, shall be applicable to any telegraph established or to be established within British India by any foreign Prince or State with the consent of the Government of India, and to persons using such telegraph or employed in connection therewith; all rules prescribed under this section shall have the force of law.

9. *Government not responsible for loss or damage.*—The Government of India shall not be responsible for any loss or damage which may occur in consequence of any telegraph officer failing to transmit with accuracy or to deliver any message given to him for transmission or delivery; and no such officer shall be responsible for any such loss or damage, unless he causes the same negligently, maliciously, or fraudulently.

III.—*Penalties.*

10. *Penalty for establishing or maintaining unlicensed telegraphs.*—Whoever, otherwise than under a license duly granted as aforesaid, establishes, or after revocation of such license maintains, a line of telegraph within British India, shall be liable to a fine not exceeding one thousand rupees, and for every week during which such line shall be maintained, shall be liable to a further fine not exceeding five hundred rupees.

11. *For using or working such telegraphs.*—Whoever, knowing, or having reason to believe that a telegraph has been established or is maintained in contravention of this Act, uses such telegraph for the purpose of sending or receiving messages, or performs any service incidental thereto, shall for every such offence be liable to a fine not exceeding fifty rupees.

12. *For opposing establishment, &c., of telegraphs on railway land.*—Every railway company and every officer of a railway company, neglecting or refusing to comply with the provisions of section 6, shall be liable to a fine not exceeding one thousand rupees for every day during which such neglect or refusal continues.

13. *For intruding into signal-room, &c.*—Whoever, without permission of some competent authority, enters the signal-room of a telegraph office of the Government or of a company or person licensed under this Act, and whoever enters a fenced enclosure round such a telegraph office in contravention of any rule or notice not to do so, and whoever refuses to quit such room or enclosure on being requested to do so by any officer or servant employed therein, and whoever wilfully obstructs or impedes any such officer or servant in the performance of his duty, shall be liable to a fine not exceeding five hundred rupees.

14. *For unlawfully learning the contents of messages.*—Whoever does any of the acts mentioned in section 13 with the intention of unlawfully learning the contents of any message, or for any other unlawful purpose, shall (in addition to the fine to which he is liable under section 13) be liable to imprisonment for a term which may extend to a year.

15. *Damaging telegraphs, &c.* See *ante*, p. 713.

16. *Power to employ additional police in place where mischief to telegraphs is repeatedly committed.*—Whenever it appears to the Director-General of Telegraphs that any act causing or likely to cause wrongful damage to any telegraph is repeatedly or maliciously committed in any place, and that the employment of an additional police force in such place is thereby rendered necessary, the Local Government may, on the application of the said Director-General, send such additional force to such place, and employ the same therein so long as such necessity continues, and the inhabitants of such place shall be charged with the cost of such additional police force, and the Local Government may by order in each case define the limits of any place for the purposes of this section, and the Magistrate of the District, after inquiry, if necessary, shall, subject to the orders of the Local Government, assess the proportion in which such cost is to be paid by the said inhabitants according to his judgment of their respective means

All monies payable under this section shall be recoverable either under the warrant of a Magistrate by distress and sale of the goods of the defaulter within the local limits of such Magistrate's jurisdiction, or by suit in any competent Court, and shall be applied to the maintenance of the police force, or otherwise, as the Governor-General in Council may from time to time direct

17. *Omitting to transmit or deliver messages.* See *ante*, p. 714.

18. *For offering bribes to telegraph officers.*—Every telegraph officer shall be deemed a public servant within the meaning of sections 161, 162, 163, 164, and 165 of the Indian Penal Code. And in the definition of legal remuneration contained in the said section 161, the word "Government" shall, for the purposes of this Act, be deemed to include a person or company licensed under this Act.

19. *For misconduct.*—Any telegraph officer guilty of any act of drunkenness, carelessness, or other misconduct, whereby the transmission or delivery of any message is endangered, or who loiters or makes delay in the transmission or delivery of any message, shall be liable to imprisonment for a term not exceeding three months, or to a fine not exceeding one hundred rupees, or to both.

20. *Sending messages without payment.* See *ante*, p. 715.

21. *Sending fabricated messages.* See *ante*, p. 715.

22. *Retaining messages delivered by mistake.*—See *ante*, p. 716.

23. *Abetment of, and attempts to commit, offences.*—Whoever abets within the meaning of the Indian Penal Code, any offence under this Act, and whoever attempts to commit any such offences shall be punishable with the punishment herein provided for such offence.

ACT No. XXI. OF 1879.

An Act to provide for the trial of offences committed in places beyond British India and for the Extradition of Criminals.

(As modified up to 1st May 1896.)

Preamble.—Whereas by treaty, capitulation, agreement, grant, usage, sufferance and other lawful means the Governor-General of India in Council has power and jurisdiction within divers places beyond the limits of British India; and whereas such power and jurisdiction have, from time to time, been delegated to Political Agents and others acting under the authority of the Governor General in Council; and whereas doubts having arisen how far the exercise of such power and jurisdiction, and the delegation thereof, were controlled by and dependent on the laws of British India, the Foreign Jurisdiction and Extradition Act, 1872, was passed to remove such doubts, and also to consolidate and amend the law relating to the exercise and delegation of such power and jurisdiction, and to offences committed by British subjects beyond the limits of British India, and to the extradition of criminals; and whereas it is expedient to repeal that Act and re-enact it with the amendments hereinafter appearing; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Sect. 1. *Short title—Extent—Commencement*—This Act may be called "The Foreign Jurisdiction and Extradition Act, 1879":

It extends to the whole of British India;

to all Native Indian subjects of Her Majesty beyond the limits of British India; and

to all European British subjects within the dominions of Princes and States in India in alliance with Her Majesty;

and it shall come into force on the passing thereof

But nothing contained in this Act shall affect the provisions of any law or treaty for the time being in force as to the extradition of offenders; and the procedure provided by any such law or treaty shall be followed in every case to which it applies.

Sect. 2. *Repeal.*—The Foreign Jurisdiction and Extradition Act, 1872, is repealed; but all existing appointments, delegations, certificates, requisitions and rules made, and all existing notifications, summonses, warrants, orders and directions issued, under that Act shall, in so far as they are consistent herewith, be deemed to have been respectively made and issued hereunder.

Sect. (3a). *Interpretation-clause—"Political Agent"—"European British subject."*—In this Act, unless there is something repugnant in the subject or context,—

"Political Agent*" means and includes—

(1) the principal officer representing the British Indian Government in any territory or place beyond the limits of British India;

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*This definition of "Political Agent" is incorporated in the Criminal Procedure Code, 1882, as Sect. 190.

Note (a).—Sections 3, 11, 12 and 13 are here printed as amended by Act V of 1896, the added matter being shown in brackets. Sections 12A, 12B, 12C and 17A were added by the same Act.

(2) (any officer of the Government of India or of any local Government) appointed by the Governor-General in Council, or (the Local Government), to exercise all or any of the powers of a Political Agent under this Act for any place not forming part of British India (amended by Act V of 1896); and

"European British subject" means a European British subject as defined in the Code of Criminal Procedure, 1882.

CHAPTER II.

POWERS OF BRITISH OFFICERS IN PLACES BEYOND BRITISH INDIA.

Sect. 4. *Exercise of powers of Governor-General*.—The Governor-General in Council may exercise any power or jurisdiction which he, for the time being, has within any country or place beyond the limits of British India, and may delegate the same to any servant of the British Indian Government in such manner and to such extent as the Governor-General in Council from time to time thinks fit.

Sect. 5. *Notification of exercise or delegation of such powers*.—A notification in the *Gazette of India* of the exercise by the Governor-General in Council of any such power or jurisdiction and of the delegation thereof by him to any person or class of persons, and of the rules of procedure or other conditions to which such persons are to conform, and of the local area within which their powers are to be exercised, shall be conclusive proof of the truth of the matters stated in the notification.

Sect. 6. *Appointment powers and jurisdiction of Justices of the Peace*.—The Governor-General in Council may appoint any European British subject, either by name or by virtue of his office, to be a Justice of the Peace (in or for any such country or place) (Act XII of 1891) and every such Justice of the Peace shall have in proceedings against European British subjects, or persons accused of having committed offences conjointly with such subjects, all the powers conferred by the Code of Criminal Procedure on Magistrates of the first class who are Justices of the Peace and European British subjects.

The Governor-General in Council may direct to what Court having jurisdiction over European British subjects any such Justice of the Peace is to commit for trial.

Sect. 7. *Confirmation of acts of Political Agents and Justices*.—All Political Agents and all Justices of the Peace appointed before the twenty-fifth day of April 1872, by the Governor-General in Council or the Governor in Council of the Presidency of Fort St George or Bombay, in or for any such country or place as aforesaid shall be deemed to be and to have been appointed, and to have had jurisdiction, under the provisions of this Act.

Sect. 8. *Extension of criminal law of British India to British subjects out of British India*.—The law relating to offences and to criminal procedure for the time being in force in British India shall, subject as to procedure to such modifications as the Governor-General in Council from time to time directs, extend—

(*a*) to all European British subjects in the dominions of Princes and States in India in alliance with Her Majesty; and

(*b*) to all Native Indian subjects of Her Majesty in any place beyond the limits of British India.

CHAPTER III.

INQUIRIES IN BRITISH INDIA INTO CRIMES COMMITTED BY BRITISH SUBJECTS IN PLACES BEYOND BRITISH INDIA.

This Chapter is repealed by the Criminal Procedure Code, 1882, *and the two sections which it contains are incorporated in that Act in the following form as sects.* 188 *and* 189.

Sect. 188, Cr. P. C. *Liability of British subjects for offences committed out of British India.*—When a European British subject commits an offence in the dominions of a Prince or State in India in alliance with Her Majesty, or

when a Native Indian subject of Her Majesty commits an offence at any place beyond the limits of British India,

he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found:

Provided that no charge as to any such offence shall be inquired into in British India unless the Political Agent, if there be such for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge is one which ought to be inquired into in British India:

Provided also that any proceedings taken against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence had been committed in British India, shall be a bar against further proceedings against him under the Foreign Jurisdiction and Extradition Act, 1879, in respect of the same offence at any place beyond the limits of British India.

Sect. 189, Cr. P. C. *Power to direct copies of depositions and exhibits to be received in evidence.*—Whenever any such offence as is referred to in section 188 is being inquired into or tried, the Local Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before the Political Agent or a judicial officer in or for the place in which such offence is alleged to have been committed shall be received as evidence by the Court holding such inquiry or trial in any case in which such Court might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate.

CHAPTER IV.

EXTRADITION.

Sect. 11. *Arrest and removal of persons other than European British subjects escaping into British India.*—When an offence has been committed or is supposed to have been committed in any State against the law of such State by a person not being a European British subject, and such person escapes into or is in British India, the Political Agent for such State may issue a warrant for his arrest and delivery at a place and to a person to be named in the warrant—

If such Political Agent thinks that the offence is one which ought to be inquired into in such State:

and if the act said to have been done would, if done in British India have constituted an offence against any of the sections of the Indian Pena

Code mentioned in the schedule hereto annexed, or under any other section of the said Code, or any other law, which may, from time to time, be specified by the Governor-General in Council by a notification in the *Gazette of India*.

(The act of desertion from any body of Imperial Service Troops shall be deemed to be an offence in respect of which the Political Agent for the State to which such troops belong may issue a warrant under this section.) (Act V. of 1896.)

Sect. 12. *Direction and execution of warrant.*—Such warrant may be directed to the Magistrate of any district in which the accused person is believed to be, and shall be executed in the manner provided by the law for the time being in force with reference to the execution of warrants; and the accused person, when arrested, shall (unless released on bail in accordance with the provisions of the next following section) be forwarded to the place and delivered to the officer named in the warrant. (Amended per Act V. of 1896.)

12A. *Power to Political Agent to direct security to be taken and procedure thereon.*—A Political Agent issuing a warrant for the arrest of any person under section 11 may in his discretion direct by endorsement thereon that, if such person executes a bond with sufficient sureties for his attendance before the officer mentioned in the warrant at a specified time, the Magistrate to whom the warrant is directed shall take such security and release such person from custody.

The endorsement shall state (*a*) the number of sureties (if any), (*b*) the amount in which they and the person for whose arrest the warrant is issued are to be respectively bound, and (*c*) the time and place at which he is to attend before the officer mentioned in the warrant.

Whenever security is taken under this section, the Magistrate shall certify the fact to the Political Agent by whom the warrant was issued, and shall return the bond. (Act V. of 1896.)

12B. *Arrest on breach of bond to appear.*—If the person bound by any bond executed under the last foregoing section to appear before the officer mentioned therein does not so appear, the Magistrate may, on being satisfied as to his default, issue a warrant directing that he be re-arrested and delivered over to such officer. (Act V. of 1896.)

12C. *Application of sections 513 and 514, Act X. 1882.*—In the case of every bond required to be executed or which may have been executed in accordance with the foregoing provisions, the powers conferred by sections 513 and 514 of the Code of Criminal Procedure, 1882, on the Court which has required the execution of or has taken a bond may be exercised by the Magistrate. (Act V. of 1896.)

Sect. 13. *Powers of Political Agent.*—Such Political Agent may either dispose of the case himself, or, if he is generally or specially directed to do so by the Governor General in Council, or by the Governor of the Presidency of Fort St. George in Council or by the Governor of the Presidency of Bombay in Council, may give over the person so forwarded, whether he be a Native Indian subject of Her Majesty or not, to be tried by the ordinary Courts of the State in which the offence was committed (or in the case of a deserter, by a duly constituted Military Court). (Act V. of 1896.)

Sect. 14. *Requisition for extradition.*—Whenever a requisition is made to the Governor-General in Council or any Local Government by or by the authority of the persons for the time being administering the executive

government of any part of the dominions of Her Majesty, or the territory of any Foreign Prince or State, that any person accused of having committed an offence in such dominions or territory should be given up, the Governor-General in Council or such Local Government, as the case may be, may issue an order to any Magistrate who would have had jurisdiction to inquire into the offence if it had been committed within the local limits of his jurisdiction, directing him to inquire into the truth of such accusation.

The Magistrate so directed shall issue a summons or warrant for the arrest of such person, according as the offence named appears to be one for which a summons or warrant would ordinarily issue; and shall inquire into the truth of such accusation, and shall report thereon to the Government by which he was directed to hold the said inquiry. If upon receipt of such report, such Government is of opinion that the accused person ought to be given up to the persons making such requisition, it may issue a warrant for the custody and removal of such accused person and for his delivery at a place and to a person to be named in the warrant.

The provisions of Section ten * shall apply to inquiries held under this section.

Sect 15. *Power of Magistrate in certain cases to issue warrant for arrest.*—Whenever any person accused or suspected of having committed an offence out of British India is within the local limits of the jurisdiction of a Magistrate in British India, and it appears to such Magistrate that the Political Agent for any State could, under the provisions of Section eleven, issue a warrant for the arrest of such person or that the persons, for the time being administering the executive government of any part of the dominions of Her Majesty or the territory of any Foreign Prince or State could demand his surrender, such Magistrate may, if he thinks fit, issue a warrant for the arrest of such person, on such information or complaint and such evidence as would, in his opinion, justify the issue of such a warrant if the offence had been committed within the local limits of his jurisdiction.

Any Magistrate issuing a warrant under this section shall, when the offence appears or is alleged to have been committed in a State for which there is a Political Agent, send immediate information of his proceedings to such Agent, and in other cases shall at once report his proceedings to the Local Government.

Sect. 16. *Person arrested to be released if not proceeded against.*—No person arrested on a warrant issued by a Magistrate under Section fifteen shall be detained more than two months from the date of his arrest, unless within such period the Magistrate receives a warrant under section eleven from the Political Agent for any State for the delivery of such person, or an order with reference to him under section fourteen from the Governor-General in Council or Local Government, or such person is in accordance with law delivered up to some Foreign Prince or State.

At any time before the receipt of such a warrant or order, the Magistrate, if he thinks fit, may, and the Magistrate, if so directed by the Local Government, shall, discharge the accused person.

Sect. 17. *Bail.*—The provisions of the Code of Criminal Procedure 1882 in respect of bail shall apply in the case of any person arrested under section fifteen in the same manner as if such person were accused of committing in British India the offence with which he is charged.

* Now Sect. 189, Cr. P. C. 1882.

17A. *Detention of person arrested under section* 54, *clause seventhly, Act X*, 1882.—Notwithstanding anything in the Code of Criminal Procedure, 1882, any person arrested without an order from a Magistrate and without a warrant, in pursuance of the provisions of section 54, clause *seventhly*, of the said Code, may, under the orders of a Magistrate within the local limits of whose jurisdiction such arrest was made, be detained in the same manner and subject to the same restrictions as a person arrested on a warrant issued by such Magistrate under section 15 of this Act.

CHAPTER V.

MISCELLANEOUS.

Sect. 18. *Power to make rules*.—The Governor General in Council may, from time to time, make rules to provide for—

(1) the confinement, diet and prison-discipline of British subjects, European or Native, imprisoned by Political Agents under this Act;

(2) the removal of accused persons under this Act, and their control and maintenance until such time as they are handed over to the persons named in the warrant as entitled to receive them; and

(3) generally to carry out the purposes of this Act.

Sect. 19. *Execution of commissions*.—The testimony of any witness may be obtained in relation to any criminal matter pending in any Court or tribunal in the territory of any Foreign Prince or State in like manner as it may be obtained in relation to any civil matter under the Code of Civil Procedure, Chapter XXV, and the provisions of that chapter shall be construed as if the term "suit" included a proceeding against a criminal.

Provided that nothing in this section shall apply in the case of any criminal matter of a political character.

THE SCHEDULE.

Sections of the Indian Penal Code referred to in Section eleven.

Sections 206, 208 and 224. Sections 230 to 263, both inclusive; Sections 292 to 304, both inclusive. Sections 307, 310 and 311. Sections 312 to 317, both inclusive. Sections 323 to 334, both inclusive. Sections 47 and 348; Sections 360 to 373, both inclusive. Sections 375 to 377, both inclusive; Sections 378 to 414, both inclusive. Sections 435 to 440, both inclusive; Sections 443 to 446, both inclusive. Sections 464 to 468, both inclusive; Sections 471 to 477, both inclusive.

ACT No. IV. OF 1889.

As amended by ACT IX *of* 1891.

Received the assent of the Governor-General on the 1st March 1889.

AN ACT *to amend the Law relating to Fraudulent Marks on Merchandise.*

WHEREAS it is expedient to amend the law relating to fraudulent marks on merchandise, It is hereby enacted as follows:—

1. *Title, extent and commencement*.—(1) This Act may be called the Indian Merchandise Marks Act, 1889.

(2) It extends to the whole of British India.

(3) It shall come into force on the first day of April 1889.

2. *Definitions.*—In this Act, unless there is something repugnant in the subject or context,—

(1) "trade mark" has the meaning assigned to that expression in Section 478 of the Indian Penal Code as amended by this Act:

(2) "trade description" means any description, statement, or other indication, direct or indirect,—

(*a*) as to the number, quantity, measure, gauge or weight of any goods, or

(*b*) as to the place or country in which, or the time at which, any goods were made or produced, or

(*c*) as to the mode of manufacturing or producing any goods, or

(*d*) as to the material of which any goods are composed, or

(*e*) as to any goods being the subject of an existing patent, privilege or copyright:

and the use of any numeral, word or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters shall be deemed to be a trade description within the meaning of this Act:

(3) "false trade description" means a trade description which is untrue in a material respect as regards the goods to which it is applied, and includes every alteration of a trade description, whether by way of addition, effacement, or otherwise, where that alteration makes the description untrue in a material respect, and the fact that a trade description is a trade mark or part of a trade mark shall not prevent such trade description being a false trade description within the meaning of this Act.

(4) "goods" means anything which is the subject of trade or manufacture: and

(5) "name" includes any abbreviation of a name.

Amendment of the Indian Penal Code.

3. *Substitution of new sections for Sections 478 to 489 of the Indian Penal Code.*—For that part of Chapter XVIII of the Indian Penal Code which relates to Trade and Property Marks, the following shall be substituted namely:—

Of Trade, Property and other Marks.

"478. *Trade Mark.*—A mark used for denoting that goods are the manufacture or merchandise of a particular person is called a trade mark and for the purposes of this Code the expression 'trade mark' includes any trade mark which is registered in the register of trade marks kept under the Patents, Designs and Trade Marks Act, 1883, and any trade mark which, either with or without registration, is protected by law in any British possession or foreign State to which the provisions of the one hundred and third section of the Patents, Designs and Trade Marks Act, 1883, are under order in Council, for the time being applicable.

"479. *Property Mark.*—A mark used for denoting that moveable property belongs to a particular person is called a property mark.

"480. *Using a false Trade Mark.*—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, in a manner reasonably calculated to cause it to be believed that the goods so marked, or any goods contained in any such receptacle so marked are the manufacture or merchandise of a person whose manufacture or merchandise they are not, is said to use a false trade mark.

"481 *Using a false Property Mark.*—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, in a manner reasonably calculated to cause it to be believed that the property or goods so marked, or any property or goods contained in any such receptacle so marked, belong to a person to whom they do not belong, is said to use a false property mark.

"482. *Punishment for using a false Trade Mark or Property Mark.*—Whoever uses any false trade mark or any false property mark shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

"483. *Counterfeiting a Trade Mark or Property Mark used by another.*—Whoever counterfeits any trade mark 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

"484 *Counterfeiting a Mark used by a Public Servant.*—Whoever 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 property is of a particular quality or has passed through a particular office, or that it is entitled to 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. *Making or Possession of any Instrument for counterfeiting a Trade Mark or Property Mark*—Whoever makes or has in his possession any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, or has in his possession a trade mark or property mark for the purpose of denoting that any goods are the manufacture or merchandise of a person whose manufacture or merchandise 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. *Selling Goods marked with a counterfeit Trade Mark or Property Mark.*—Whoever sells, or exposes or has in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade mark or property mark affixed to or impressed upon the same or to or upon any case, package or other receptacle in which such goods are contained, shall, unless he proves—

(a) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the mark, and

(*b*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(*c*) that otherwise he had acted innocently,

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

"487. *Making a false Mark upon any Receptacle containing Goods.*—Whoever makes any false mark upon any case, package or other receptacle containing goods, in a manner reasonably calculated to cause any public servant or any other person to believe that such 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 receptacle are of a nature or quality different from the real nature or quality thereof, shall, unless he proves that he acted without intent to defraud, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

"488. *Punishment for making use of any such false Mark.*—Whoever makes use of any such false mark in any manner prohibited by the last foregoing section shall, unless he proves that he acted without intent to defraud, be punished as if he had committed an offence against that section.

"489. *Tampering with Property Mark with Intent to cause Injury.*—Whoever removes, destroys, defaces or adds to 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.

Trade Description.

4. *Provisions supplemental to the Definition of false Trade Description.*—(1) The provisions of this Act respecting the application of a false trade description to goods or respecting goods to which a false trade description is applied, shall extend to the application to goods of any such numerals, words or marks, or arrangement or combination thereof, whether including a trade mark or not, as are or is reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are, and to goods having such numerals, words or marks or arrangement or combination, applied thereto.

(2) The provisions of this Act respecting the application of a false trade description to goods, or respecting goods to which a false trade description is applied, shall extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and for the purpose of this enactment the expression "false name or initials" means as applied to any goods any name or initials—

(*a*) not being a trade mark, or part of a trade mark, and

(*b*) being identical with, or a colourable imitation of, the name or initials of a person carrying on business in connection with goods of the same description and not having authorized the use of such name or initials.

(3) A trade description which denotes or implies that there are contained in any goods to which it is applied more yards, feet or inches than there are

contained therein standard yards, standard feet or standard inches is a false trade description.

5. *Application of Trade Descriptions.*—(1) A person shall be deemed to apply a trade description to goods who—

(*a*) applies it to the goods themselves, or

(*b*) applies it to any covering, label, reel or other thing in or with which the goods are sold or are exposed or had in possession for sale or any purpose of trade or manufacture, or

(*c*) places, encloses or annexes any goods which are sold, or are exposed or had in possession for sale or any purpose of trade or manufacture, in, with or to any covering, label, reel or other thing to which a trade description has been applied, or

(*d*) uses a trade description in any manner reasonably calculated to lead to the belief that the goods in connexion with which it is used are designated or described by that trade description.

(2) A trade description shall be deemed to be applied whether it is woven, impressed or otherwise worked into or annexed or affixed to the goods or any covering, label, reel or other thing.

(3) The expression "covering" includes any stopper, cask, bottle, vessel, box, cover, capsule, case, frame or wrapper, and the expression "label" includes any band or ticket.

6. *Penalty for applying a false Trade Description.* If a person applies a false trade description to goods, he shall, subject to the provisions of this Act, and unless he proves that he acted without intent to defraud, be punished with imprisonment for a term which may extend to three months or with fine which may extend to two hundred rupees, and in the case of a second or subsequent conviction, with imprisonment which may extend to one year, or with fine, or with both.

7. *Penalty for selling Goods to which a false Trade Description is applied.*—If a person sells, or exposes or has in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, he shall, unless he proves—

(*a*) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade description, and

(*b*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things, or

(*c*) that otherwise he had acted innocently,

be punished with imprisonment for a term which may extend to three months or with fine which may extend to two hundred rupees, and in case of a second or subsequent conviction, with imprisonment which may extend to one year, or with fine, or with both.

Unintentional Contravention of the Law relating to Marks and Descriptions.

8. *Unintentional Contravention of the Law relating to Marks and Descriptions.*—Where a person is accused under section 482 of the Indian Penal Code of using a false trade mark or property mark by reason of his having applied a mark to any goods, property or receptacle in the manner mentioned in section 480 or section 481 of that Code, as the case may be, or

under section 6 of this Act of applying to goods any false trade description, or under section 485 of the Indian Penal Code of making any die, plate or other instrument for the purpose of counterfeiting a trade mark or property mark, and proves—

(*a*) that in the ordinary course of his business he is employed, on behalf of other persons, to apply trade marks or property marks, or trade descriptions, or, as the case may be, to make dies, plates or other instruments for making, or being used in making, trade marks or property marks, and that in the case which is the subject of the charge he was so employed and was not interested in the goods or other thing by way of profit or commission dependent on the sale thereof, and

(*b*) that he took reasonable precautions against committing the offence charged, and

(*c*) that he had, at the time of the commission of the alleged offence, no reason to suspect the genuineness of the mark or description, and

(*d*) that, on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons on whose behalf the mark or description was applied,

he shall be acquitted.

Forfeiture of Goods.

9. *Forfeiture of Goods.*—(1) When a person is convicted under section 482 of the Indian Penal Code of using a false trade mark, under section 486 of that Code of selling, or exposing, or having in possession for sale or any purpose of trade or manufacture, any goods or things with a counterfeit trade mark applied thereto, or under section 487 or section 488 of that Code of making, or making use of, a false mark, or under section 6 or Section 7 of this Act of applying a false trade description to goods or of selling, or exposing or having in possession for sale or any purpose of trade or manufacture, any goods or things to which a false trade description is applied, or is acquitted on proof of the matter or matters specified in section 486 of the Indian Penal Code or section 7 or section 8 of this Act, the Court convicting or acquitting him may direct the forfeiture to Her Majesty of all goods and things by means of, or in relation to, which the offence has been committed or, but for such proof as aforesaid, would have been committed.

(2) When a forfeiture is directed on a conviction and an appeal lies against the conviction, an appeal shall lie against the forfeiture also.

(3) When a forfeiture is directed on an acquittal and the goods or things to which the direction relates are of value exceeding fifty rupees, an appeal against the forfeiture may be preferred, within thirty days from the date of the direction, to the Court to which in appealable cases appeals lie from sentences of the Court which directed the forfeiture.

Amendment of the Sea Customs Act, 1878.

10. *Amendment of Section 18, Act VIII of 1878.*—(1) For clause (*d*) of section 18 of the Sea Customs Act, 1878, the following shall be substituted, namely :

"(*d*) goods having applied thereto a counterfeit trade mark within the meaning of the Indian Penal Code, or a false trade description within the meaning of the Indian Merchandise Marks Act, 1889:

(*e*) goods made or produced beyond the limits of the United Kingdom and British India and having applied thereto any name or trade mark being, or purporting to be, or being a colourable imitation of, the name or trade mark of any person who is a manufacturer, dealer or trader in the United Kingdom or in British India, unless—

(i) the name or trade mark is, as to every application thereof, accompanied by a definite indication of the goods having been made or produced in a place beyond the limits of the United Kingdom and British India, and

(ii) the country in which that place is situated is in that indication indicated in letters as large and conspicuous as any letter in the name or trade mark, and in the same language and character as the name or trade mark:"

(2) To section 18 of the Sea Customs Act, 1878, as amended by sub-section (1), the following shall be added, namely

"(*f*) piece-goods, such as are ordinarily sold by length or by the piece, which—

(i) have not conspicuously stamped in English numerals on each piece the length thereof in standard yards, or in standard yards and a fraction of such a yard, according to the real length of the piece, and

(ii) have been manufactured beyond the limits of India, or,

(iii) having been manufactured within those limits, have been manufactured beyond the limits of British India in premises which, if they were in British India, would be a factory as defined in the Indian Factories Act, 1881."

11. *Addition of a section after Section* 19, *Act VIII of* 1878.—The following shall be added after section 19 of the Sea Customs Act, 1878, namely:—

"19A. (1) Before detaining any such goods as are or may be, specified in or under section 18 or section 19 as the case may be, or taking any further proceedings with a view to the confiscation thereof under this Act, the Chief Customs officer or other officer appointed by the Local Government in this behalf may require the regulations under this section, whether as to information, security, conditions or other matters, to be complied with, and may satisfy himself in accordance with those regulations that the goods are such as are prohibited to be imported.

(2) The Governor-General in Council may make regulations, either general or special, respecting the detention and confiscation of goods the importation of which is prohibited, and the conditions, if any, to be fulfilled before such detention and confiscation, and may by such regulations determine the information, notices and security to be given, and the evidence requisite for any of the purposes of this section and the mode of verification of such evidence.

(3) Where there is on any goods a name which is identical with, or a colourable imitation of, the name of a place in the United Kingdom or British India, that name, unless accompanied in equally large and conspicuous letters, and in the same language and character, by the name of the country in which such place is situate, shall be treated for the purposes of sections 18 and 19 as if it were the name of a place in the United Kingdom or British India.

(4) Such regulations may apply to all goods the importation of which is prohibited by section 18 or under section 19, or different regulations may be made respecting different classes of such goods or of offences in relation to such goods.

(5) The regulations may provide for the informant reimbursing any public officer and the Secretary of State for India in Council all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention.

(6) All regulations under this section shall be published in the Gazette of India and in the Calcutta, Fort St. George, Bombay and Burma Gazettes"

Stamping of Length of Piece Goods manufactured in British India.

12. *Stamping of Length of Piece Goods manufactured in British India.*—(1) Piece goods, such as are ordinarily sold by length or by the piece, which have been manufactured in premises which are a factory as defined in the Indian Factories Act, 1881, shall not be removed from those premises without having conspicuously stamped in English numerals on each piece the length thereof in standard yards, or in standard yards and a fraction of such a yard, according to the real length of the piece.

(2) If any person removes or attempts to remove any such piece goods from any such premises without the length of each piece being stamped in the manner mentioned in Sub-section (1), every such piece, and everything used for the packing or removal thereof, shall be forfeited to Her Majesty, and such person shall be punished with fine which may extend to one thousand rupees.

Supplemental Provisions.

13. *Evidence of origin of Goods imported by Sea.*—In the case of goods brought into British India by sea, evidence of the port of shipment shall, in a prosecution for an offence against this Act or section 18 of the Sea Customs Act, 1878, as amended by this Act, be *prima facie* evidence of the place or country in which the goods were made or produced.

14. *Costs of Defence or Prosecution.*—(1) On any such prosecution as is mentioned in the last foregoing section, or on any prosecution for an offence against any of the sections of the Indian Penal Code, as amended by this Act, which relate to trade, property and other marks, the Court may order costs to be paid to the defendant by the prosecutor or to the prosecutor by the defendant, having regard to the information given by and the conduct of the defendant and prosecutor respectively.

(2) Such costs shall, on application to the Court, be recoverable as if they were a fine.

15. *Limitation of Prosecution.*—No such prosecution as is mentioned in the last foregoing section shall be commenced after the expiration of three

years next after the commission of the offence, or one year after the first discovery thereof by the prosecutor, whichever expiration first happens.

16. *Authority of the Governor-General in Council to issue Instructions as to Administration of this Act.*—(1) The Governor-General in Council may, by notification in the Gazette of India and in local official Gazettes, issue instructions for observance by Criminal Courts in giving effect to any of the provisions of this Act

(2) Instructions under sub-section (1) may provide, among other matters for the limits of variation as regards number, quantity, measure, gauge or weight which are to be recognized by Criminal Courts as permissible in the case of any goods.

17. *Implied Warranty on sale of marked Goods* —On the sale or in the contract for the sale of any goods to which a trade mark or mark or trade description has been applied, the seller shall be deemed to warrant that the mark is a genuine mark and not counterfeit or falsely used, or that the trade description is not a false trade description within the meaning of this Act, unless the contrary is expressed in some writing signed by or on behalf of the seller and delivered at the time of the sale or contract to and accepted by the buyer

18. *Saving* —(1) Nothing in the Act shall exempt any person from any suit or other proceeding which might, but for anything in this Act, be brought against him

(2) Nothing in this Act shall entitle any person to refuse to make a complete discovery or to answer any question or interrogatory in any suit or other proceeding, but such discovery or answer shall not be admissible in evidence against such person in any such prosecution as is mentioned in section 14.

(3) Nothing in this Act shall be construed so as to render liable to any prosecution or punishment any servant of a master resident in British India who in good faith acts in obedience to the instructions of such master, and on demand made by or on behalf of the prosecutor, has given full information as to his master and as to the instructions which he has received from his master.

19 *Definition of Piece-goods* —For the purposes of section 18 of this Act, and clause (*f*) of section 18 of the Sea Customs Act, 1878, as amended by this Act, the Governor-General in Council may, by notification in the *Gazette of India*, declare what classes of goods are included in the expression "piece-goods, such as are ordinarily sold by length or by the piece."

20. *Determination of character of goods by sampling* —(1) The Governor-General in Council may make rules, for the purposes of this Act, to provide, with respect to any goods which purport or are alleged to be of uniform number, quantity, measure, gauge or weight, for the number of samples to be selected and tested and for the selection of the samples.

(2) With respect to any goods for the selection and testing of samples of which provision is not made in any rules for the time being in force under sub-section (1), the court or officer of customs, as the case may be, having occasion to ascertain the number, quantity, measure, gauge or weight of the goods, shall, by order in writing, determine the number of samples to be selected and tested and the manner in which the samples are to be selected.

(3) The average of the results of the testing in pursuance of rules under sub-section (1) or of an order under sub-section (2) shall be *prima facie* evidence of the number, quantity, measure, gauge or weight, as the case may be, of the goods.

(4) If a person having any claim to, or in relation to, any goods of which samples have been selected and tested in pursuance of rules under sub section (1), or of an order under sub-section (2), desires that any further samples of the goods be selected and tested, they shall, on his written application and on the payment in advance by him to the court or officer of customs, as the case may be, of such sums for defraying the cost of the further selection and testing as the court or officer may from time to time require, be selected and tested to such extent as may be permitted by rules to be made by the Governor-General in Council in this behalf or as, in the case of goods with respect to which provision is not made in such rules, the court or officer of customs may determine in the circumstances to be reasonable, the samples being selected in manner prescribed under sub-section (1), or in sub section (2), as the case may be.

(5) The average of the results of the testing referred to in sub-section (3) and of the further testing under sub section (4) shall be conclusive proof of the number, quantity, measure, gauge or weight, as the case may be, of the goods

(6) Rules under this section shall be made after previous publication.

21. *Information as to commission of Offences*.—An officer of the Government whose duty it is to take part in the enforcement of this Act shall not be compelled in any court to say whence he got any information as to the commission of any offence against this Act.

22. *Punishment of abetment in India of acts done out of India*.—If any person, being within British India, abets the commission, without British India, of any act which, if committed in British India, would under this Act, or under any section of that part of Chapter XVIII. of the Indian Penal Code which relates to trade, property and other marks, be an offence, he may be tried for such abetment in any place in British India in which he may be found, and be punished therefor with the punishment to which he would be liable if he had himself committed in that place the act which he abetted.

THE SEA CUSTOMS ACT, 1878, SECTS. 18 AND 19, AS AMENDED BY THE INDIAN MERCHANDISE MARKS ACT, 1889, AND ACT IX. OF 1891.

18. *Prohibitions of importation of goods*.—No goods specified in the following clauses shall be brought, whether by land or sea, into British India :—

(*a*) any book printed in infringement of any law in force in British India on the subject of copyright, when the proprietor of such copyright, or his agent, has given to the Chief Customs-Authority a notice in writing that such copyright subsists, and a statement of the date on which it will expire:

(*b*) counterfeit coin, or coin which purports to be Queen's coin of India or to be coin made under the Native Coinage Act, 1876, but which is not of the established standard in weight or fineness:

(*c*) any obscene book, pamphlet, paper, drawing, painting, representation, figure or article:

(*d*) goods having applied thereto a counterfeit trade mark within the meaning of the Indian Penal Code, or a false trade description within the meaning of the Indian Merchandise Marks Act, 1889:

(*e*) goods made or produced beyond the limits of the United Kingdom and British India having applied thereto any name or trade mark being, or purporting to be, or being a colourable imitation of, the name or trade mark of any person who is a manufacturer, dealer or trader in the United Kingdom or in British India unless—

(i) the name or trade mark is, as to every application thereof, accompanied by a definite indication of the goods having been made or produced in a place beyond the limits of the United Kingdom and British India, and

(ii) the country in which that place is situated is in that indication indicated in letters as large and conspicuous as any letter in the name or trade mark, and in the same language and character as the name or trade mark.

(*f*) piece goods, such as are ordinarily sold by length or by the piece which—

(i) have not conspicuously stamped in English numerals on each piece the length thereof in standard yards, or in standard yards and a fraction of such a yard, according to the real length of the piece, and

(ii) have been manufactured beyond the limits of India, or

(iii) having been manufactured within those limits have been manufactured beyond the limits of British India in premises which, if they were in British India, would be a factory as defined in the Indian Factories Act, 1881.

19. *Power to make orders as to importation of goods.*—The Governor-General in Council may, from time to time, by notification in the *Gazette of India*, prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of British India or any specified part of British India.

19A. See *ante*, p. 773.

ORDER OF THE GOVERNMENT OF INDIA UNDER THE INDIAN MERCHANDISE MARKS ACT, 1889.

Calcutta, the 13th November 1891.

1474.—In exercise of the power conferred by section 16 of the Indian Merchandise Marks Act, IV. of 1889, and in supersession of all existing orders on the subject, the Governor-General in Council is pleased to direct that Criminal Courts in giving effect to the provisions of the Act in respect of trade descriptions of quantity, measure, or weight of the goods specified hereunder, shall observe the following instructions:—

I.—A trade description of length stamped on *grey*, *white*, or *coloured cotton piece goods* shall not be deemed to be false in a material respect unless—

(a) where a single length is stamped, the description exceeds the actual length by more than—

4 inches in pieces stamped, as 10 yards long and under;
5 ditto ditto as above 10 yards and up to 23 yards long;
7 ditto ditto ditto 23 ditto 36 ditto;
9 ditto ditto ditto 36 ditto 47 ditto;
18 ditto ditto ditto 47 yards long:

Provided that the average length of the goods in question shall not be less than the stamped length;

(b) where a maximum and a minimum length are stamped, the described maximum length is greater than the actual length by more than—

9 inches in piece goods under 35 yards long;
18 ditto ditto 35 yards and up to 47 yards long;
36 ditto ditto above 47 yards long:

Provided that no such piece shall measure less than the minimum stamped length.

II.—A trade description of width stamped on *grey*, *white* or *coloured cotton piece-goods* shall not be deemed to be false in a material respect unless the description exceeds the actual width by—

half an inch in pieces stamped as 40 inches or less in width;
three-quarters of an inch in pieces stamped as over 40 inches or under 59 inches in width;
one inch in pieces stamped as 59 inches or more in width:

Provided that the average width of the goods in question shall not be less than the stamped width.

III.—A trade description of count or number, length or weight applied to *grey* or *bleached cotton yarn* shall not be deemed to be false in a material respect unless—

(a) the described count of number is greater or less than the actual count or number by more than 5 per cent., provided that the average count of the whole of the yarn in question is not greater or less than the described count; or

(b) the average length of the whole number of hanks in a bundle is less than 840 yards; or

(c) in a bundle of yarn of any count under 5, described as being 10 lbs. in weight, the number of knots of twenty hanks each is not half of, the number of knots of ten hanks each is not the same as, and the number of knots of five hanks is not double, the described count or number of the yarn; or

(d) in a bundle of yarn any count under 50 described as being 5 lbs. in weight, the number of knots of twenty hanks each is not a quarter of the described count or number of the yarn; or

(*e*) in a bundle of yarn of any count from 50 upwards, the number of knots of twenty hanks each is not half, or the number of knots of forty hanks each is not a quarter when the described weight is 10 lbs., and is not a quarter or an eighth, as the case may be, when the described weight is 5 lbs. of the count or number of the yarn; or

(*f*) in the case of *bleached yarn* the described weight exceeds the actual weight by more than—

7½	per cent	in counts	from 1 to 8;	
5	ditto	ditto	from above 8	to 18;
4	ditto	ditto	ditto 18	to 30;
2½	ditto	ditto	ditto 30	to 80.

IV.—A trade description of count or number applied to a bundle of *dyed cotton yarn* shall be accepted as indicating length only, the hank being taken to measure 840 yards, and it shall be deemed to be false in a material respect if the average length of the hanks in a bundle is less than 819 yards.

V.—A trade description of length, applied to *thread of any kind* (of cotton, wool, flax, or silk) shall not be deemed to be false in a material respect unless it exceeds the actual length by more than 1 per cent.

VI.—The dimensions of goods on which their length or width is stamped shall be determined by measurement in imperial yards of 36 inches.

(Signed) C. J. LYALL,
Secretary to the Government of India.

ACT No. IX OF 1895.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor General on the 7th March*, 1895.)

AN ACT *to confer on Presidency Magistrates and District Magistrates certain powers and authority in relation to the surrender of fugitive criminals.*

WHEREAS by the Extradition Act 1870 it is, among other things, enacted that the said Act, when applied by Order in Council, shall, unless it is otherwise provided by such order, extend to every British possession, but with the following among other modifications, namely —

No warrant of a Secretary of State shall be required, and all powers, vested in or acts authorized or required to be done under the said Act by the Police Magistrate and the Secretary of State, or either of them, in relation to the surrender of a fugitive criminal, may be done by the Governor of the British possession alone

And whereas by the said Act it is also enacted that, if by any law or ordinance made before or after the passing of the said Act by the Legislature of any British possession provision is made for carrying into effect within such possession the surrender of fugitive criminals who are in or are suspected of being in such possession, Her Majesty may, by the Order in Council applying the said Act in the case of any foreign State, or by any subsequent order, either—

suspend the operation within any such British possession of the said Act or any part thereof, so far as it relates to such foreign State, and so long as such law or ordinance continues in force there, and no longer,

or direct that such law or ordinance, or any part thereof, shall have effect in such British possession, with or without modifications and alterations, as if it were part of the said Act;

And whereas the said Extradition Act, 1870, was amended by the Extradition Act, 1873, which enacted that that Act was to be construed as one with the said Act of 1870, and that the said two Acts might be cited together as the Extradition Acts, 1870 and 1873,

And whereas it is expedient to provide for the more convenient administration in British India of the said Extradition Acts, 1870 and 1873, by conferring on Presidency Magistrates and District Magistrates the like powers and authorities in relation to the surrender of fugitive criminals as are by the said Acts vested in Police Magistrates and Justices of the Peace in the United Kingdom,

It is hereby enacted as follows:—

1. (1) *Title and commencement*.—This Act may be called the Extradition (India) Act 1895, and

(2) It shall come into force on such date as the Governor General in Council may, by notification in the *Gazette of India*, appoint in this behalf

Provided that no such date shall be appointed until after Her Majesty has been pleased by Order in Council to direct that this Act shall have effect in British India as if it were part of the Extradition Act, 1870, and such Order has been published in the *Gazette of India*.

2. *Powers of Police Magistrates and Justices of Peace under Imperial Acts conferred on Presidency and District Magistrates*.—All powers vested in, and acts authorized or required to be done by, a Police Magistrate or any Justice of the Peace in relation to the surrender of fugitive criminals in the United Kingdom under the Extradition Acts, 1870 and 1873, are hereby vested in, and may in British India be exercised and done by, any Presidency Magistrate or District Magistrate in relation to the surrender of fugitive criminals under the said Acts.

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