

Tagore Law Lectures—1902

THE PRINCIPLES
OF THE
LAW OF CRIMES
IN
BRITISH INDIA

TABLE OF CONTENTS.

LECTURE I—	PAGE
Introduction	1
LECTURE II—	
Capacity to Commit Crimes ...	20
LECTURE III—	
Inchoate Crimes—I. Attempts ...	46
LECTURE IV—	
Inchoate Crimes—II. Abetment .	88
LECTURE V—	
<i>Mens Rea</i>	168
LECTURE VI—	
Words used in the Code to denote <i>Mens Rea</i>	194
LECTURE VII—	
Conditions of Non-Imputability ...	216
LECTURE VIII—	
Conditions of Non-Imputability (<i>contd.</i>) Insanity—General	271
LECTURE IX—	
Conditions of Non-Inputability (<i>contd.</i>) Insanity (<i>contd.</i>)—Drunkenness ...	305
LECTURE X—	
Consent—Compulsion—Trifles ...	324
LECTURE XI—	
Possession in Criminal Law ...	348
LECTURE XII—	
Right of Private Defence... ..	382
LECTURE XIII—	
The Trial	428
INDEX	445

INDEX OF CASES CITED.

	A	PAGE
Abani Bhusan	118
Abbas Ali	208
Abhi Missir v. Lachmi Narayan	139
Allen v. Flood	128
Ahmed Ally	441
Ambika Lal	401, 408
Amrita Govinda	144
Amritalal Hazra	131
Anderson v. Gorrie	241
Armory v. Delamire	367
Arnold	280, 316
Ashruf Ali	369
B		
Baboolan Hijrah	327
Babu Ray	208
Bahal	418
Bajinath Dhanuk...	...	406
Bailey	232, 236
Baku	94
Baldeo Sahay	71, 77
Banks	164
Barindra Kumar Ghose	105, 119, 121
Barrat	337
Barronet's Case	233
Barrow	335
Barton	291
Biddall v. Maitland	397
Bellingham	312
Bennett	336
Bhai Lal Chowdhury	424
Bhawoo Jivaji v. Mulji Dayal	425
Bhola Mahto	425

viii INDEX OF CASES CITED.

	PAGE
Birjoo Singh v. Khub Lall	403
Birmingham & Gloucester Railway Co. ...	24, 26, 29
Bisu Haldar	415
Blake	115
Bond	440
Bridges v. Hawkesworth	366
Britt v. Robinson	440
Brixey	298, 299, 300
Brojendra Kishore v. Clarke	249
Brown	53
Browne v. Dawson	396
Burton	298
C	
Calder v Halket	244, 250, 252, 256, 257
Case	335
Cave v. Mountain	256
Cartwright v. Green	358
Chandi Pershad v. Abdur Rahman	82
Chandullah Sheikh	398, 399, 407
Charles Stewart	69
Chedambaram Pillai	118
Cheesman	51, 80, 81, 83
Chhatardhari	140
Clarke v. Brojendra Kishore... ..	253
Collins	53, 55, 59, 81
Collins v. Thomas	398
Commonwealth v. Presby.	185
Cooper v. Slade	438
Cope	120
Coverdale v. Charlton	380
Cruse	133, 140, 320
Curtis	44
D	
Dada Maruti	168
Dalip	48
Davies	298

ix INDEX OF CASES CITED.

	PAGE
Dawkins v. Lord Rokeby	244, 246
Day	332
Dayal Bauri	71, 111
De Kromme	94
Devji Govindji	343
Dharam Rai	149
Dhundi	71, 78, 85
Dilgazi	314, 315
Dodd	53
Dorasamy Pillai	417
Downes	43
Dr. Grenville v. The College of Physicians	244, 246
Dudley	287, 341, 344, 345
Duffield	120
Dugdale	67
Duthibeva	209
E	
Earl of Sommerset	163
Elwes v. Brigg Gas Co.	365
F	
Faiyaz Hossain	97
Flattery	332, 335
Fletcher	337
Floyd v. Barker	256
Fong Kun (Khun) Chinaman	369
Fox	164
Fray v. Blackburn	241
Fretwell	97
G	
Ganouri Lal	409
Gardener	24
Garnett, v. Ferrand	256, 257
Ghatu Paramanick	314
Gill	104, 106, 131
Glasgow Corporation v. Lorimer	381

	PAGE
Goodall	56, 68
Gopal v. Foolmani ... ..	... 97
Gorachand Gopi ... ..	... 148
Great North of England Railway	23, 25, 29
Gwinn v. Pool	248, 256
H	
Hadfield	300, 310, 312
Hammond v. Howell ... ..	... 256
Hansa Pathak v. Banshi Lal Dass ... ..	... 141
Haradhan	205, 208
Hardy's Trial	114, 116
Harris ... ..	... 205
Haynes	290, 297
Hill ... ..	... 370
Hodges ... ..	... 122
Hodgson	201, 203
Hood ... ..	... 421
Houlden v. Smith	248, 249, 256, 258
Howell ... ..	... 152
Hoye v. Bush ... ..	... 420
Hughes ... ..	... 44
I	
Idu Mondal ... ..	... 418
Ings ... ..	... 437
J	
Jagarnath Mandhata ... ..	... 419
Jagjiban Ghosh ... ..	... 131
Jairam Mahton	399, 406
Jamsheer Sirdar ... ..	... 392
Janki ... ..	... 94
Janki Prasad ... ..	... 422
Jeffery ... ..	... 44
Jeolall ... ..	... 406
Jivanand ... ..	... 208
Jogendra Nath Mukerjee ... ..	... 421

	PAGE
Kabiruddin ... ..	... 407
Kader Nasyer Shah ... ..	... 303
Kali Churn ... ..	... 96
Kali Charan Mukerjee ... ..	... 369
Kalil Munda ... ..	... 118
Kally Churn Sahoo ... ..	... 376
Kalyan Singh	68, 71, 85
Kasi Nath Bania ... ..	... 396
Kedar Nath Chatterjee ... ..	... 208
Kemp v. Neville ... ..	... 255
Keshwar Lal Shaha v. Girish Chandra Dutt ... ..	... 137
Khadim ... ..	... 96
Khaja Noorul Hossein v. Tonnere ... ..	... 96
Killykytara ... ..	... 343
Kitabdi Mondal ... ..	... 212
Kola Lalang ... ..	... 440
Krause ... ..	... 164
Kudum ... ..	... 98
L	
Lakshman Dagdu	298, 300, 303
Lalit Mohan Chakravarti ... ..	... 132
Latif Khan	45, 96
Leathem ... ..	... 128
Lolit Mohan Ser ... ..	... 207
Longhurst ... ..	... 209
Lord Advocate v. Lord Blantyre ... ..	... 378
Lothar v. Earl Rudnor ... ..	... 248
Lukhiri Agradanini ... ..	... 268
M	
MacCrea	71, 82
McNaghten	273, 275, 281, 282, 293, 295, 303, 307, 308, 310, 312, 314
Macnaghten ... ..	... 346
Ma Pherson	52-55, 67, 81, 83
Madame Cailauxe ... ..	... 274
Madhab Chandra ... ..	... 438

	PAGE
Maganlal	343
Mahomed Ali Khan v. Khaja Abdul Gunny ...	375
Mana Singh	406
Manchar	239
Mangobind Muchi	418
Manindra Chandra Ghose	137
Manley	154, 155
Manning	122, 123, 439
Mathura Das	158
Meakin	321
Meghraj v. Zakir	242
Merry v. Green	358
Metcalfe v. Hodson	256, 257
Metropolitan Saloon Omnibus Co. v. Howkins ...	32
Misselbrook	44
Mitchell	206
Mitto Singh	400
Moah	206
Moghal Steam Ship Co. v. McGregor ...	99, 110, 127
Mohar Sheikh	398
Mohini Mohan Roy v. Promoda Nath Roy ...	379
Mohit	94
Moizuddin	405
Mono Mohan Ghose v. Mathura Mohan Roy ...	376
Moore	321
Morley	42
Morris Run Coal Co. v. Barclay Coal Co. ...	130
Most	163
Mulchay	105
Musammat Nironi	138, 140
N	
Nabi Buksh	210
Nanda Coomar	438
Narsingh Pattabhai	404
Nibaran Chandra Ray	136, 149, 440
Nichol	332
Nichollis	42
Nidamarti Nagabhushanam	212

	PAGE
Nimchand	94
Nobokisto Ghose	441
Noni Gopal Gupta	123, 124
O	
O'Shay	336
Oxford	294, 312, 313
P	
Pachkauri	400
Patience	420
Pearks, Gauston and Tee, Ltd. v. Southern Counties Daries Company, Ltd.	30
People v. Willey	322
People v. Clough	326
Peterson	71, 76
Pharmaceutical Society v. London and Provincial Supply Association	27, 29
Pigman v. State	321
Plummer	123
Poomalai Udayan	424
Prag Dutt	386
Prasanna Kumar Patra v. Udaysant	210, 236
Prince	179, 187, 228, 230
Pukot Kotu	423
Pulin Behary Das	105, 106, 118, 124, 260
R	
Radhamoni Debi v. Collector of Khulna	380
Raisat Ali	68, 71, 78, 83
Rakhmaji	417
Ram Lal	97
Ramnandan Prasad	400
Ramranjan Roy	137, 143
Ram Satan	71, 76, 83, 86
Ramsarem	68
Ransford	67
Ransford	164

	PAGE
Razai Mian	302
Rees	43
Riazuddin	147
Ring	53, 55, 57, 66, 81
Riston	202
Robrt	67
Rose	384
Rowlands	126, 128
Royal Aquarium v. Parkinson ...	244-45, 250
Rupa	385
S	
Sabapati	208
Sabed Ali	149
Sachee <i>alias</i> Sachee Bolor	398
Sara Hobson	437
Saunder	157
Scofield	69
Scott v. Mathew Browne & Co. Ltd. ...	397
Secretary of State v. Krishnomoni ...	377
Shamran	206
Shepherd	44
Shib Chandra Manal	145
Silajit Mahto	400
Sleep	181
Smith	44
Sohan	392, 393
South Hethon Coal Co., Ltd. v. North-Eastern New Association Ltd.	31
South Wales Miners Federation v. Glamorgan Coal Co.	128
Spooner v. Juddow	251
Sri Churn Chango	210, 236
State v. Goodenow	239
Sterne	438
Sukaroo Kabiraj... ..	334
Sutton	69
Syed Hussain	234

	T	PAGE
Taaffe v. Lord Downes		256, 258
Taylor		75, 85, 93
Teyon v. Ramlal... ..		251
Thacoordass Nundee v. Shunkur Roy ...		259
Thomas v. Churton		241
Thompson		360
Thornote Madatnel Poker		45
Timmal		393
Tirumal Reddi		91, 124
Tolson	179, 181, 228-230,	237
Toshack		206, 208
Tozer v. Child		256, 257
Trylokhonath Chowdhury		164
Tulsiram		417
Tyler		28
U		
Umi		98
Upendra Nath Dass		393
V		
Venkata Sami		300
Vothal Narain Joshi		207
Voughan		312, 313
W		
Waddington		127
Wajid Hossain		393
White		274
William Stewart and Ana Dicken ...		151
Windsor		202
Wright		326
Z		
Zoolfikar		319

LECTURE I.

INTRODUCTION.

THE subject of these lectures is the Principles of the Law of Crimes in British India. I shall first endeavour to explain to you what Crimes are. In common parlance we apply the word to acts that we consider worthy of serious condemnation. In legal phraseology Crime means any act which the law of the country visits with punishment, and in this sense it is synonymous with the word 'Offence.' In other words it is an act committed or omitted in violation of public law forbidding or commanding it.

Crime
defined

According to Bentham, 'if the question relates to a system of laws already established, offences are whatever the legislature has prohibited for good or for bad reasons. If the question relates to a theoretical research for the discovery of the best possible laws according to the principles of utility, we give the name of offence to every act which we think ought to be prohibited by reason of some evil which it produces or tends to produce.'

In British India, where the whole criminal law is codified, Crime means an act punishable by the Indian Penal Code or other penal statutes. This, though a simple and perfectly accurate definition, is of very little help in bringing home to you a true conception of the essential attributes of a Crime. I shall, therefore, endeavour to explain to you the elementary ideas involved in the word and enumerate the peculiarities that distinguish it from Civil injuries.

Wrongs.

There are certain acts which the large majority of civilised people look upon with disapprobation, as tending to reduce the sum total of human happiness, which is the ultimate aim of all laws. These we call Wrongs, such, for instance, as lying, gambling, cheating, stealing, homicide, etc. The evil tendencies of these acts widely differ in degree. Some of them are not considered sufficiently serious for law's notice. These we only disapprove. We call them mere moral Wrongs. Moral Wrongs are checked to a great extent by social laws and laws of religion. There are other more serious wrongs which the law takes notice of, either—

- (a) for punishment, *i.e.*, infliction of pain upon the wrong-doer, or,
- (b) for indemnification, *i.e.*, for making good the loss to the person injured by the Wrong.

Crimes and Civil injuries distinguished

Wrongs dealt with under the first head are called Crimes, those under the second head are called Civil injuries.

According to Blackstone, Crimes are public wrongs and affect the whole community; Civil injuries are private wrongs and concern individuals. Public and private wrongs are, however, not exclusive of one another, for what concerns individuals must necessarily concern the community of which the individual is a unit, and similarly everything that affects or concerns the community, must also concern and affect the individuals that form that community.

According to Austin, an offence which is pursued at the discretion of the injured party and his representatives, is a Civil injury; an offence which

is pursued by the Sovereign and his subordinates is a Crime. This is a distinction not of substance but of procedure, and so far as the Indian Criminal Law is concerned, there are a number of offences which cannot be pursued except by the injured party. These lie on the border-line between Crimes and Civil injuries. For the true basic distinction between Crimes and Civil injuries we must look to the principles upon which civilised communities have selected some wrongs for retributive and others for remedial justice. I do not think in any country any principles were definitely laid down before making the selection, but this itself does not negative the existence of the principles. We often act in accordance with principles without being conscious that we are so acting. The general agreement of civilised countries, as shown by the result of the selection, strongly points to the existence of common principles leading to common results. It is only by a process of analytical reasoning that we can get at these principles.

In this world the interests of individuals often clash. Every right vested in one imposes a corresponding obligation on others. These others sometimes comprise the rest of the world and sometimes particular individuals only. Every obligation is a fetter and a restraint. Human mind is ordinarily so constituted as to be impatient of all such fetters. It is not, therefore, enough for the legislature only to define rights and lay down bounds within which they are to be confined, but it is also necessary to provide checks on this tendency to transgress. This tendency is sometimes weak

and sometimes strong, and accordingly the checks provided by the legislature vary in their strength also.

The strongest check is the infliction of pain or punishment as it is generally called. This again varies in severity according to the value of the right to be protected and the amount of misery that the violation of the right involves, as also according to the strength of the tendency to be counteracted, which again varies according to the advantage to be gained by the transgression, and according to the nature and temperament of the people against whom the law is directed.

In Civil cases the punishment—I am using the word in its widest sense—is of the mildest nature and the law is satisfied with restitution or compensation in full and only penalises the wrongdoer by mulcting him in costs. Punishment in its true sense and as understood in Criminal Law is, however, reserved for the more serious transgressions, specially those the effect of which goes beyond the individual and extends to society at large. In these cases full restitution to the wronged individual and to society is often impossible and the law instead of proceeding on remedial lines punishes the offender partly as a measure of prevention and partly of retribution. Punishment, however, to be effective as a measure of prevention deals with deliberate acts directed by an evil mind, and thereby aims at the eradication of the evil will. Where there is no evil will, the act, injurious though it be, does not evoke the feeling of resentment nor calls for vengeance from society or individual. In such cases society feels no concern

and the individual is more anxious for restitution than retribution.

From what I have said above it follows that Crimes are comparatively graver wrongs than Civil injuries. They are graver because they constitute greater interference with the happiness of others, and affect the well-being not only of particular individuals but of the whole community considered in its social aggregate capacity. They are graver because the impulse to commit them is often very strong, or because the advantage to be gained by the wrongful act and the facility with which it can be accomplished are often so great or the risk of detection so small, that human nature inclined to take the shortest cut to happiness is likely to be tempted often to commit such wrongs. They are graver also because they are ordinarily deliberate acts directed by an evil mind and hurtful to society by the bad example they set. Being graver wrongs they are singled out for punishment with the object partly of making an example of the criminal, partly of deterring him from repeating the same act, partly of reforming him by eradicating the evil will, and partly of satisfying society's feeling of vengeance which the act is supposed to evoke. Civil injuries, on the other hand, are the less serious wrongs, the effect of which is supposed to be confined mainly to individuals, and in which none of the graver elements which mark out a criminal act are present. Sometimes a criminal act, which is essentially a personal wrong, is selected for punishment, not because of its gravity or of its effect on society, but because the injury to individual

is of a nature that damage cannot be assessed on any reasonable basis or the pain caused to the individual wronged is wholly disproportionate to any pecuniary loss suffered by him. Once the selection of wrongful acts for punishment is made, or in other words once an act is labelled as a Crime certain subsidiary distinctions follow. In Criminal cases having regard to the severity of the sanction the defendant is treated with greater indulgence than in Civil cases. The procedure as well as the rules of evidence are modified in order to reduce to a minimum the risk of an innocent person being punished. The accused in a criminal case is not called upon to prove anything. He is not bound to make any statement to the Court, he is not compellable to answer any question or to give any explanation. It is left to the prosecution to prove the existence of all the facts necessary to constitute the offence charged, and lastly, if there is any reasonable doubt regarding the guilt of a person charged with a Crime, the benefit of it is always given to the accused. It is said that it is better that ten guilty men should escape than that one innocent man should suffer. The continental law is slightly less indulgent to the accused than the English law, in so far as it allows an accused person to be interrogated but the general principle holds good. Crimes and Civil injuries are generally dealt with in different tribunals.

As I have said before, in the case of a Civil injury, the only object aimed at is to indemnify the individual wronged and to put him as far as practicable in the position he was, before the wrong was done. Consequently in all civil suits the

injured party alone or his successors can pursue the wrong-doer and parties may always by mutual consent settle their differences, whereas in criminal cases generally the State alone, as the protector of the rights of its subjects, pursues the offender and often does so in spite of the injured party. There are exceptions to the rule, but what I have said is correct with regard to a large majority of cases.

I have already told you that an act to be criminal must ordinarily be an act done with malice or criminal intent. This is called the condition of criminality, or according to some jurists, the state of imputability, and it includes both positive and negative states of the mind, such as intention, will, knowledge, negligence, rashness, heedlessness, etc. It may be said generally that there is no Crime without an evil intent. The same act is either a Crime or a Civil injury according as it is done with or without such an evil intent.

The following illustration taken from Section 378 of the Indian Penal Code will bring out the distinction more clearly. *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* removes it dishonestly, *i.e.*, with the intention of causing wrongful gain to himself or wrongful loss to the owner, he commits theft and may be sentenced under Section 379, Indian Penal Code, to imprisonment for three years. But if *A* does the same act in good faith believing that the ring belonging to *Z* is his own and takes it out of *Z*'s possession, *A* not taking dishonestly commits no Crime, but commits a Civil wrong for which he may be

Malice.

When an act constitutes a serious menace to the peace and happiness of Society and at the same time causes an infringement of individual rights, not altogether light or trivial, it affords grounds for Civil action and is also punishable as a Crime. When, however, its effect upon Society is inappreciable in comparison to the loss it entails upon a particular individual, it is merely treated as a Civil injury. When, on the other hand, the effect of such an act upon Society is great and upon individuals inappreciable, it is treated merely as a Crime.

Even when a wrong is treated as one against Society and is pursued with the object of *punishing* the wrong-doer the injury to the individual is not always ignored, and we have in Sections 517, 545 and 546 of the Criminal Procedure Code a recognition of the individual wrong even in Crimes. Section 545 provides that a Criminal Court may, when passing judgment, order the whole or any part of a fine recovered from an accused person to be applied—

- (a) in defraying expenses properly incurred in the prosecution;
- (b) in compensation for the injury caused by the offence committed where substantial compensation is, in the opinion of the Court, recoverable by Civil suit.

Section 517 provides for making restitution to any person deprived of any property by means of a Criminal offence. Section 546 provides that any compensation so awarded is to be taken into account in assessing damages in a Civil suit. These represent attempts to combine retributive with

remedial justice and are founded on sound reason and common sense.

A case of defamation is a good example of an act which is both a Civil injury and a Crime. Such an act is not only a serious menace to the peace and well being of Society, but is a serious wrong to the person defamed. The Criminal Court will, to protect Society, punish the offender and the Civil Court with equal readiness will decree money compensation. In a Civil Court the amount of damage will be assessed with reference to the position of the party defamed and the amount of loss which he has suffered in consequence of the libel. These considerations will, however, play a very unimportant part in determining the amount of imprisonment or fine to be inflicted on the accused by a Criminal Court. There the more important consideration would be the intelligence of the accused person, the extent of his appreciation of the gravity of the wrongful act, the motive for the act and other considerations connected more intimately with the accused and his mental condition than with the complainant.

As an example of an act in which the wrong to an individual plays a very minor part and the really serious wrong is the injury to Society, I may refer to offences against public tranquillity. It is almost impossible in those cases to reduce to pounds shillings and pence the injury to individual, and justice proceeding on remedial lines will be wholly unsuited to meet cases of this nature.

On the other hand as an example of a Civil injury, pure and simple, we may take an ordinary case of a breach of contract. *A* borrows money from *B* promising to pay within a year. *A* fails

to keep his promise. This gives rise to a Civil injury for which *B* can obtain adequate compensation in a Civil action. Although it may be said that *A*'s action is also injurious to Society at large as setting a bad example, which, if generally followed, may become a matter of public concern, but in vast majority of such cases the breach of promise by the debtor would be found to be due to his inability to pay and would not be attributable to any evil intent. It would be wrong to treat such an act as a crime, because, in the first place, money compensation is an adequate remedy which will fully indemnify the individual wronged, and the costs generally allowed against the unsuccessful party in a Civil action will cause sufficient pain to deter *A* from making such a breach in the future if he can help it. There may, however, be cases of mere Civil injury, which it may be necessary to punish as a Crime, either because the inconvenience caused is so great that money compensation is not adequate, or if adequate is obtainable under conditions so harassing as to be prohibitive, or because the chances of detection are so small that unless punished as a Crime great many others may be tempted to act in the same way and take the risk, or because the evil has become so widespread as to become a matter of public concern. You will find in Sections 490, 491 and 492 of the Indian Penal Code, examples of Crimes which in reality are mere instances of breach of contract. The principles, which I have tried to deduce from the usual classification of wrongs into Crimes and Civil injuries, are not, however, of universal application and exceptions will perhaps readily occur to you.

It may also be pointed out that "the penal law of ancient communities is not the law of Crimes; it is the law of Wrongs. The person injured proceeds against the wrong-doer by an ordinary Civil action and recovers compensation in the shape of money damages if he succeeds." (In the passage I have quoted the word 'wrong' is used in its technical legal sense in which it is equivalent with tort, but I have, in these lectures, used the expression in a broader sense.) In support of this view we may cite the ancient practice of compounding murder by payment of "blood-money" to the heirs of the person killed. In Muhammadan countries in which the Muhammadan law is strictly followed even now a homicide may be purged by payment of 'blood-money' to the relations of the deceased provided they agree.

The idea that all Crimes are wrongs against the State or aggregate community, and that it is the proper function of the State to pursue Crimes without reference to the person wronged, is a conception of comparatively modern growth and with reference to modern criminal jurisprudence, it would be perfectly correct to say that in all serious offences it is the State that prosecutes the offender irrespective of the wishes of the individual injured and is also entitled to drop the prosecution at its will. Upon an examination of the Code of Criminal Procedure, you will observe that the proportion of compoundable offences, to those that are non-compoundable, is very small, and the right of 'compounding' is limited to comparatively minor offences in which individual injury is more largely involved. (S. 345 Cr. P. C.)

ESSENTIALS OF A CRIME.

Essentials
of Crime.

Having tried to explain the principal points of difference between a Civil injury and a Crime, I shall now proceed to deal with the elements necessary to constitute a Crime. The following elements must be present in every Crime :—

- (1) A human being under a legal obligation to act in a particular way and a fit subject for the infliction of appropriate punishment ;
- (2) An evil intent on the part of such a human being ;
- (3) An act committed or omitted in furtherance of such an intent ;
- (4) An injury to another human being or to Society at large by such act.

Examples are not wanting in old legal institutions of punishment inflicted on animals for injury done. This is by no means to be wondered. Criminal law in its earlier stages was largely dominated by the idea of retribution. This was in accordance with human nature. When a child falls on the ground and hurts itself, you often kick the ground to console it. Its sentiments of vengeance is thereby satisfied. The feeling is not wholly confined to children. The story of Llewelyn and his dog is an instance in point. In that stage of development when Society has not taken away from the individual the right to punish injuries done to himself, punishment will not be, from the very nature of things, always confined to human beings. There will also be a stage when Society has just stepped

into the place of the individual, when it will do for the individual what the individual was doing for himself, and we read of laws for the punishment of animals and even of inanimate things.

We read of Jewish laws in which Moses gave the command "If an ox gore a man or a woman that they die, then the ox shall be surely stoned and his flesh shall not be eaten ; but the owner of the ox shall be quit." The mediæval lawgivers of Europe carried these commands into laws and administered them with all the ceremonials of a modern Law Court. The following few instances taken from Baring Gould's Curiosities of olden Times might interest the student of legal history :—

Bar
Gould
'Curio-
of old
Times.

'A bull has caused the death of a man, the brute is seized and imprisoned ; a lawyer is appointed to plead for the criminal, another is counsel for the prosecution, witnesses are bound over, the case is heard, sentence is given by the judge declaring the bull guilty of *deliberate and wilful murder* and accordingly it must suffer the penalty of hanging or burning.'

'The first time an ass is found in a cultivated field not belonging to its master, one of its ears is cropped. If it commits the same offence again, it loses the second ear.'

Here are a few concrete instances with dates :—

"A.D. 1266.—A pig was burned near Paris for having devoured a child.

"A.D. 1386.—A judge condemned a sow to be mutilated in its legs and head and then

to be hung, for having lacerated and kicked a child. It was executed in the Square, dressed in man's clothes.

"A.D. 1389.—A horse was tried at Dijon on information given by Magistrates of Montbar and condemned to death for having kicked a man."

Even an appeal on behalf of the delinquent beast was not an uncommon thing in those days.

A human being.

In Athens an axe or stone that killed any one by accident was cast beyond the border, and the English law was only repealed in comparatively recent years (1846) 9 & 10 Vict., C. 62, which made a cart-wheel, a tree or a beast, that killed a man forfeit to the State for the benefit of the poor.

In the course of development of legal and juristic ideas these primitive methods have disappeared. Even now vicious animals are destroyed, but the action is preventive and not punitive. When an animal causes an injury we hold the owner of the animal responsible civilly or criminally for such injury. The punishment is not for what the animal has done, but for the omission on the part of the owner to take proper care of his own property and thereby to prevent mischief to others.

A human being 'under a legal obligation to act' and 'capable of being punished' would, by the first restriction, exclude an outlaw who is placed outside the protection and restriction of law. Happily outlawry as an institution has ceased to exist. The second restriction excludes corporations from the operation of the Criminal law. You may punish individuals forming the corporation

but that is a different matter. A corporation as such has neither a 'soul to be damned nor a body to be kicked.' A corporation may, however, be punished, for *quasi*-criminal acts, with a fine. These are more of the nature of Civil wrongs but classified as Crimes on grounds of policy. To meet these exceptions I have used the expression '*a fit subject for the infliction of appropriate punishment.*' I shall deal with this subject more fully later on.

The next and by far the most important essential of a Crime is *mens rea* or a criminal design.

In dealing with the difference between a Civil injury and a Crime I have just touched upon this point, but it deserves to be treated at great detail as it really is the corner stone of the whole Criminal Jurisprudence. Austin quoting from Feurbach says, "the application of a Criminal law supposes that the will of the party was determined positively or negatively; that this determination was the cause of a criminal fact. The reference of the fact as effect, to the determination of the will as cause, settles and fixes the legal character of the latter." *Actus non facit reum nisi mens sit rea* (the act itself does not make a man guilty unless his intentions were so) is a well-known legal maxim from which follows the other proposition *actus me invito factus non set meus actus* (an act done by me against my will is not my act). It is this requisite of a Crime that introduces the question of will, intention, motive, malice and various other states of mind. It also brings in questions of compulsion, mistake, insanity, drunkenness, infancy, idiocy and other conditions of mind

precluding imputability or what is more commonly called criminal responsibility and which you will find are provided for in Chapter IV of the Indian Penal Code.

When you have got a human being and an evil intent, these two are not sufficient to constitute a Crime. The law does not punish a mere criminal intent. "The thought of man," said Brian, C.J., "is not triable, for the Devil himself knoweth not the thought of man." The criminal intent must manifest itself in some voluntary act or omission. An omission to be punishable must be in breach of a legal duty.

If one allows his wife or young children to die of starvation he commits a crime, because the law casts on individuals the obligation to maintain their wives and young children.

If you examine omissions that are not punishable and those that are, you will, I am sure, be startled at what you would consider a great anomaly. It seems to me that jurists and lawyers have taken an unduly restricted view of our duty to our fellowmen.

Your neighbour, for instance, is dying of starvation. Your granary is full. There is no law that requires you to help him out of your plenty. You are standing on the bank of a tank. A woman is filling her pitcher. All on a sudden she gets an epileptic fit. You may, with a clean legal conscience, allow her to die. You need not raise your little finger to save her.

With the growth of humanitarian ideas the conception of one's duty to others will, I am sure, gradually expand. Saadi, the great Persian poet,

gave vent to his conception in the following words:—

"If you see a blind man proceeding towards
a well,

If you are silent you commit a crime."

This was in the 13th century, and we must confess that we have moved rather slowly in this direction since. The world has become old and the answer is still the same—"Am I my brothers' keeper?"

Given, a human being, an evil intent and an act in furtherance of such intent you require an injury to another human being or to Society at large of the nature I have already discussed, to complete a criminal offence.

When an offence is committed it leads to the arrest of the offender, his trial and ultimate punishment. What acts constitute an offence and their appropriate punishment are matters dealt with in the substantive penal law, the trial and the determination of punishment in any particular case are matters concerning the law of Procedure. The principles of the law of Crimes mainly arise in connection with the substantive law. The substantive law of Crimes in India is to be found in the Indian Penal Code and the law of Procedure, in the Criminal Procedure Code and in the Evidence Act. There are some special laws which I need not notice here. For the sake of brevity I shall hereafter refer to the Indian Penal Code simply as the Code.

LECTURE II.

I. CAPACITY TO COMMIT CRIMES.

I have told you in my introductory lecture that for a crime you first require a human being under a legal obligation to act in a particular way, a fit subject for the infliction of appropriate punishment. I have also told you that the last restriction would exclude corporations. They would also be excluded by the condition that *mens rea* is essential to constitute a crime. The question of the capacity of a corporation to commit a crime and its liability to be punished for a criminal act may be conveniently discussed at this stage. The liability of individual members of a corporate body to be punished for individual part taken in committing an offence is quite distinct from this question. Strictly speaking a corporation cannot be guilty of a crime, because in the first place a corporation as such cannot have a guilty mind. You cannot attribute malice to a body corporate. There is also the further difficulty that imprisonment which is the ordinary punishment for a crime cannot be enforced against a corporation. It would be atrocious to send a man to jail because he was the member of a corporate body which by majority did a criminal act, although possibly that particular member may have disapproved of the action. There are, however, a large class of cases partaking more of the nature of mere civil injury, which for reasons of policy and administrative convenience have been classed as offences and singled out for punishment. These are cases where certain acts are absolutely forbidden whether done

Corporation.

Individual liability.

Imputability.

Punishment.

Quasi-Criminal Cases.

with good or evil intention, and cases where the wrong is not sufficiently serious to call for imprisonment or any other kind of corporal punishment.

The Code does not define a "Corporation," but only lays down that the word 'person' includes any company or association or body of persons whether incorporated or not (Section 11). A corporation is an artificial or juridical person established for preserving in perpetual succession certain rights which if conferred on natural person only would fail in process of time. It is composed of individuals united under a common name the members of which succeed each other, so that the body continues to be the same notwithstanding the change of the individuals who compose it, and is for certain purposes considered a natural person. A corporation viewed in reference to its capacity for crime is a collection of persons or a single individual endowed by law with a separate existence as an artificial being.

Corporal defined.

When I say that a corporation cannot have a *mens rea* I do not mean to suggest that individual members of a corporation cannot entertain a criminal intent, but that only makes its individual members indictable.

From what I have stated above regarding the non-existence of *mens rea*, it follows that a corporation as such could not be guilty of treason or of felony or of perjury or offence against the person or of riot or malicious wrong. In an American case, Weston, C.J., stated the law thus: "A corporation is created by law for certain beneficial purposes. It can neither commit a crime nor misdemeanour by any positive or

Cannot commit treason felony.

affirmative act, or incite others to do so, as a corporation. While assembled at a corporate meeting, a majority may by vote, entered upon their records, require an agent to commit a battery; but if he does, it cannot be regarded as a corporate act for which the corporation can be indicted. It would be stepping aside altogether from their corporeal powers. If indictable as a corporation for an offence thus indicated by them, the innocent dissenting minority would become equally amenable to punishment with the guilty majority. Such only as take part in the measure should be prosecuted either as principals, or as aiding and abetting, or procuring an offence to be committed, according to its character or magnitude.' In an anonymous case Lord Holt is reported to have laid down generally that a corporation as such is not indictable at all. There are, however, modern cases which go to negative the proposition so broadly laid down and as I have stated before there are *quasi*-criminal offences the essence of which is not the existence of a criminal intent as the existence of an injury to the public or individual. Generally it may be stated that where an offence is punishable by imprisonment or corporal punishment you cannot hold a corporation liable for such an offence. It is obvious that you can neither hang nor imprison nor transport nor whip nor send to reformatory, a corporation. You may only punish a corporation by levying a fine. It may be urged that where an offence can be punished at the option of the Court by fine only, the mere existence of a power to punish otherwise than by infliction of a fine, should not make it impossible to punish a corporation in such

Earlier cases.

cases. It may be answered as to this argument that the existence of power to imprison implies a capacity in the offender to suffer imprisonment. The matter, however, may be based on a broader principle, namely, that where an offence is punishable by imprisonment it is an indication that it is strictly a criminal offence. Generally offences punishable with imprisonment involve a *mens rea*. The offences of which a corporation may be indicted are generally offences against municipal laws or offences of a *quasi*-criminal nature not involving *mens rea*. In such cases very often penalty is inflicted not by way of punishment but by way of compensation for the breach of a duty imposed by a statute. It has been held, for instance, that indictment will lie against a corporation for not repairing a road, a bridge, or a wharf, where by statute or prescription it is bound so to do, or for disobedience to an order of Justices for the construction of works in pursuance of a statute. In England in *R. vs. Great North of England Railway* (9 Q.B., p. 315), it was ruled that an indictment lay at common law against an incorporated Railway Company for cutting through and obstructing a high way in a manner not conformable to the powers conferred on it by Acts.

It was at one time thought that a corporation is indictable only for non-feasance but is not indictable for mere misfeasance. The case mentioned above overthrows the distinction, and it seems now to be settled that a charge of trespass or of a nuisance would lie against a corporation.

Non-feasance
and Misfeasance

It was held in a number of English cases that a corporation aggregate may be indicted by their corporate name for breaches of public duty

Later cases

whether in the nature of non-feasance, such as the non-repair of highways or bridges, which it is their duty to repair, or of misfeasance, such as the obstruction of a highway in a manner not authorised by the Act of Parliament. A corporation may also be indicted by its corporate name and fined for a libel published by its orders.

I shall now draw your attention to some of the more important English cases bearing on this point :—

(1) In *Reg. vs. Birmingham and Gloucester Railway Company* (1842, 3 Q.B., p. 223), the indictment was for disobedience of an order of Justices whereby the defendants were directed to make certain arches pursuant to certain provisions contained in the statute; it was argued on the authority of a dictum of Lord Holt in an anonymous case (12 Mod. p. 559), that a corporation is not indictable but the particular members of it are. Patterson J. reviewed the earlier cases and held that a corporation may be indicted for breach of a duty imposed upon it by law, though not for a felony, or for crimes involving personal violence, as for riots or assaults. Reference was made to *Reg. vs. Gardner* (1 Cowp. 79), in which an objection that a corporation could not be rated to the poor, because the remedy by imprisonment upon failure of distress was impossible, was considered by the Court to be of no weight, though it was conceded that there might be some difficulty in enforcing the remedy. It was pointed out that the proper mode of proceeding against a corporation to enforce the remedy by indictment, is by distress infinite to compel appearance.

(2) In *Reg. vs. The Great North of England Railway Company* (1846, 9 Q.B., p. 315), the defendant company was charged with having cut through a carriage road with the railway, and of having carried the road over the railway by a bridge not satisfying the statutory provisions. Here again it was argued on the dictum of Holt, C.J., that a corporation was not indictable. The points urged were—

- (a) that a corporation may be indicted for a non-feasance but not for a misfeasance;
- (b) that the remedy against a corporation was unnecessary as individual members of it could be made liable.

On the first point Lord Denman, C.J., in delivering the judgment of the Court, observed—

“The question is, whether an indictment will lie at common law against a corporation for misfeasance, it being admitted, in conformity with undisputed decisions, that an indictment may be maintained against a corporation for non-feasance. All the preliminary difficulties, as to the service and execution of processes, the mode of appearing and pleading, and enforcing judgment, are by this admission swept away. But the argument is, that for a wrongful act a corporation is not amenable to an indictment, though for a wrongful omission it undoubtedly is; assuming in the first place, that there is a plain and obvious distinction between the two species of offence. No assumption can be more unfounded. Many occurrences may be easily conceived, full of

annoyance and danger to the public, and involving blame in some individual or some corporation, of which the most acute person could not clearly define the cause, or ascribe them with more correctness to mere negligence in providing safeguards or to an act rendered improper by nothing but the want of safeguards. If *A* is authorised to make a bridge with parapets, but makes it without them, does the offence consist in the construction of the unsecured bridge, or in the neglect to secure it? But, if the distinction were always easily discoverable, why should a corporation be liable for the one species of offence and not for the other? The startling incongruity of allowing the exemption is one strong argument against it. The law is often entangled in technical embarrassments; but there is none here. It is as easy to charge one person, or a body corporate, with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission."

Regarding the case of *R. vs. Birmingham and Gloucester Railway Company*, the learned Judge pointed out that though that was a case of non-feasance only, the Court did not intend to lay down that non-feasance was the only disobedience to the law for which a corporation was punishable by indictment.

With reference to the second contention that this remedy is not required, because the individuals who concur in voting the order, or in executing the work, may be made answerable for it by criminal proceedings, the learned Judge pointed out with great force that 'the public would

know nothing of the former; and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury, and that therefore there would be no effectual means of checking an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it.'

(3) In *Pharmaceutical Society vs. London and Provincial Supply Association* (5 App. Cas., 857) the offence charged was that of keeping an open shop for the sale of poisons against the terms of the statute which prohibited the exposure for sale of medical poisons except by properly qualified 'persons.' The shop belonged to the defendant corporation. The principal share-holder was not a person holding a certificate, and therefore not a person authorised to exercise the business of pharmaceutical chemists. The actual sale was, however, conducted by a duly registered pharmaceutical chemist. This, it was contended, did not affect the case, the offence charged being that of keeping an open shop for the sale of poisons and it was argued that the corporation was a person within the meaning of the statute. The case came ultimately before the House of Lords, and it was there laid down that whether the word 'person' used in a statute included a corporation or not depended upon the context and the subject-matter, and that having regard to the aims and objects of that particular statute, it must be held that the word 'person' was not meant to include an artificial person. Judgment was accordingly entered against the plaintiff. "In such a question of

construction," said Lord Selborne, "it does seem to me to be best to remember the principle, that the liberty of the subject ought not to be held to be abridged any further than the words of the statute, considered with a proper regard to its objects, may require." This was subsequently made clear and in Section 2 of the Interpretation Act of 1889 (52 and 53 Vict., C. 63) it was laid down that in the construction of every enactment relating to an offence punishable on indictment or on summary conviction, the expression 'person' shall, unless the contrary intention appears, include a body corporate. No such saving words are used in Section 11 of the Indian Penal Code, but I apprehend that in construing the various sections of the Indian Penal Code the principle of interpretation laid down by Lord Selborne would be followed.

(4) In the case of *R. vs. Tyler* (1891, 2 Q.B., p. 588) Lord Justice Bowen gave strong reasons for overruling the contention that no criminal proceedings can be taken against a company. He thought it was contrary to sound sense and reason that such a technical objection should succeed. 'Where, for instance,' said the learned Judge, 'a statute creates a duty upon individual persons, it would be a strange result if the duty could be evaded by those persons forming themselves into a joint stock company. The point becomes still more incapable of argument where the statute prescribes the duty in the company itself. How can disobedience to the enactment by the company be otherwise dealt with? The directors or officers of the company, who are really responsible

for the neglect of the company to comply with the statutory requirements, might not be struck at by the statute, and there would be no way of enforcing the law against a disobedient company, unless there were in such cases a remedy by way of indictment. It may, therefore, I think, be taken that where a duty is imposed upon a company in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence which can be visited upon the company by means of an indictment.' In support of his views the learned Judge relied on the ruling of Patterson J. in *R. vs. Birmingham and Gloucester Railway Company*, but as regards the *dictum* in that case that the liability in the case of a corporation was limited to cases of non-feasance only, the learned Judge preferred to follow the decision in *R. vs. Great North of England Railway Company*, to which I have already referred.

The learned Judge also referred to the ruling of Cockburn, C.J., in *Pharmaceutical Society vs. London and Provincial Supply Association* (5 App. Cas., 857), where it was pointed out that although a corporation cannot be indicted for treason or felony, it was established by the case of *Reg. vs. Birmingham and Gloucester Railway Company*, that an incorporated company might be indicted for non-feasance in omitting to perform a duty imposed by the statute—such as that of making arches to connect lands severed by the defendants' railway. It was also pointed out in the same case that *Reg. vs. Great North of England Railway*

Company, was an authority for holding that an incorporated company could be indicted for misfeasance—as in cutting through and obstructing a highway, though they could not be indicted for treason or felony, or offences against the person. Upon a review of all the previous cases the learned Judge thought it was sound common sense and good law that in the ordinary case of a duty imposed by statute, if the breach of the statute is a disobedience to the law punishable in the case of a private person by indictment, the offending corporation cannot escape from the consequences which would follow in the case of an individual by showing that they are a corporation.

(5) The next case of importance is that of *Pearks, Gauston and Tee, Ltd., vs. Southern Counties Dairies Company, Ltd.* (1902, 2 K.B., page 1).

The prosecution was against a joint stock company under The Sale of Food and Drugs Act, 1875. Section 6 of that Act makes it an offence for any person to sell to the prejudice of the purchasers any article of food or any drug which is not of the nature substance and quality of the article demanded by such purchaser, under a penalty not exceeding £20. Channel J. said—"By the general principles of criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea*, and therefore, in ordinary cases, a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence committed by his servants. But there are exceptions to this

rule in the case of *quasi*-criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine, and the reason for this is, that the legislature has thought it so important to prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he had any *mens rea* or not, and whether or not he intended to commit a breach of the law. Where the act is of this character then the master, who, in fact, has done the forbidden thing through his servant, is responsible and is liable to a penalty. There is no reason why he should not be, because the very object of the legislature was to forbid the thing absolutely. It seems to me that exactly the same principle applies in the case of a corporation. If it does the act which is forbidden it is liable. Therefore, when a question arises, as in the present case, one has to consider whether the matter is one which is absolutely forbidden, or whether it is simply a new offence which has been created to which the ordinary principle as to *mens rea* applies."

The right of a corporation to maintain an action for libel was discussed in *South Hethon Coal Co., Ltd., vs. North-Eastern New Association, Ltd.* (1 Q.B., 1894, p. 133). The case is of importance as a libel gives rise both to Civil and Criminal action. It was there contended *inter alia* that no action would lie by the plaintiffs who were a corporation, With reference to this

Right to
maintain
action.

objection Lopez, L.J., laid down the law as follows :—

Action for libel.

“ With regard to the first point I am of opinion that, although a corporation cannot maintain an action for libel in respect of anything reflecting upon them personally, yet they can maintain an action for a libel reflecting on the management of their trade or business, and this without alleging or proving special damage. The words complained of, in order to entitle a corporation or company to sue for libel or slander, must injuriously affect the corporation or company as distinct from the individuals who compose it. A corporation or company could not sue in respect of a charge of murder, or incest, or adultery, because it could not commit these crimes. Nor could it sue in respect of a charge of corruption or of an assault, because a corporation cannot be guilty of corruption or of an assault, although the individuals composing it may be. The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position.” Pollock, C.B., in *Metropolitan Saloon Omnibus Co. vs. Hawkins*, said that a corporation at common law can sue in respect of a libel, there is no doubt. It would be monstrous if a corporation could maintain no action for slander of title through which they lost a great deal of money. It could not sue in respect of an imputation of murder, or incest, or adultery, because it could not commit those crimes. Nor could it sue in respect of a charge of corruption, although the individuals composing it may. But it would be very odd if a corporation had no means

of protecting itself against wrong; and, if its property is injured by slander, it has no means of redress except by action.’ Cases of this nature are expressly provided for in Expl. 2 of Section 499 of the Code which lays down that it may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

II. ACTS—OMISSIONS.

Every movement of our body is an act. The striking of a blow is an act. The winking of the eye is an act. A mere expression of the face is an act.

‘ Act ’ defined.

“ An action,” says Sir Fitz James Stephen, “ is a motion or more commonly a group of related motions of different parts of the body. Actions may be either involuntary or voluntary, and an involuntary action may be further subdivided according as it is or is not accompanied by consciousness.”

“ Instances of involuntary actions are to be found not only in such motions as the beating of the heart and the heaving of the chest but in many conscious acts—coughing for instance, the motions which a man makes to save himself from falling and an infinite number of others. Many acts are involuntary and unconscious, though as far as others are concerned, they have all the effects of conscious acts, as, for instance, the struggles of a person in a fit of epilepsy. The classification of such actions belongs more properly to physiology than to law. For legal purposes it is enough to say that no involuntary action, whatever effect

Involuntary actions.

it may produce, amounts to a crime by the law of England. I do not know indeed that it has ever been suggested that a person who in his sleep set fire to a house or caused the death of another would be guilty of arson or murder."

Voluntary
action de-
fined.

"Such being the nature of an action," continues the learned author, "a *voluntary action* is a motion or group of motions accompanied or preceded by volition and directed towards some object."

Mercier's
criticism.

Mr. Mercier, in his work on criminal responsibility, criticises this definition at some length.

He thinks that the notion of a voluntary act is unduly restricted, if it is held of necessity to include movement. "If a lady is coming out of a door as I am going along a corridor, and I stop to allow her to pass; the arrest of my movement is as much a voluntary act as is the movement by which I start to continue my journey. In customary phrase, the arrest of my movement would be called act of ordinary courtesy, and in this case the custom would, I think, be correct. I take a piece of cabbage on my fork, and as I am conveying it to my mouth, I see a caterpillar on it, and arrest the movement. The arrest of the movement is a voluntary act, as much as the movement itself. My neighbour at the table asks me: 'What are you *doing* that for?' The form of his question is correct. In arresting the movement I do something. In other words, I act."

The criticism so far seems plausible, but is certainly not unanswerable. *Arrest and suppression of movement themselves involve some*

counter movements, perhaps too quick to be noticed by others, or even for the actor to be conscious of, which bring about a cessation of movement and are in this way included in the definition of Sir Fitz James Stephen. In such cases like the driver of a railway engine we apply the brake to bring about the result. Arrest and suppression of movement are clearly distinguishable from mere abstention or cessation of movement. The learned author's arguments are largely based on naccuracy of language which so often deceives us.

Mr. Mercier would include an intentional abstention from movement in the definition of a voluntary act. "When a person," says he, "in order to commit suicide stands in front of an advancing train he executes a voluntary act by merely standing and abstaining from movement." It is hardly necessary to have recourse to such special pleading. We may either hold the man responsible for going and staying at such a place of danger or on the impossible assumption that he was forcibly taken there, and all he did was not to move out of the place, we may punish him, not for the act but for the omission, for the protection of one's own life is a legal duty.

The Indian Penal Code recognises this distinction between acts and omissions, but wisely refrains from defining either.

Indian
Penal Code

I say "wisely," for an attempt to define with scientific precision elementary ideas often lead to failure, and what is still worse, to confusion.

In distinguishing between an act and an omission you must not lay too much stress upon mere

Act and
omission dis-
tinguished.

forms of expressions commonly used. We often say "you *acted* wisely in not going out." As a matter of fact 'not going out' was not an act but an omission. When we say of a jailor that he starves his prisoners, we apparently charge him with a positive act, but in reality we attribute to him a mere omission to supply food.

I do not think it necessary to dwell at greater length upon the meaning of an act, as I think, every one has a pretty accurate idea of what an act is, and these metaphysical discussions only serve to introduce doubts and difficulties which, but for these discussions, would perhaps not arise at all.

You will observe that in every language acts are often taken along with their consequences and given a separate name. I take up a loaded gun and pull the trigger which causes an explosion—I fire. The explosion *impels* the bullet—I shoot. The bullet comes in contact with another's body and causes loss of life—I kill. These different names are given to the same act but with reference to different consequences. This process enables us to express a number of ideas in a single word and tends to brevity of language.

An omission is the negation of an act. Consequences are referable to an act as result of universal human experience. Apart from the debated question as to whether beyond the invariable sequence, there is any causal connection between an act and what we call its consequences, as a matter of fact, we do, in our minds, believe in the existence of such a connection and act on such a belief, and all laws are based upon

* Omission defined.

that conception. The same thing cannot be said of omissions. When a jailor omits to supply his prisoners with food and the prisoners die of starvation, the jailor does no more cause death than the person who sees a blind man proceeding towards a precipice and does nothing to warn him. Nor is the case different from that of a surgeon who omits to apply a bandage to a bleeding man who dies in consequence. Strictly speaking it cannot be said in either of the last two cases that omission to warn or to apply a bandage was the cause of death. The more correct view of the matter seems to be this: that death could have been prevented and was not. You will, however, find, on an examination of the Indian Penal Code, that *causing* of a consequence has been sometimes loosely attributed to omissions, where what really took place was abstention from prevention of such a consequence.

An omission to be punishable must be an illegal omission or one in breach of a legal duty. This principle is incorporated in Section 32 of the Indian Penal Code which provides that in every part of the Code, except where a contrary intention appears from the context, words, which refer to acts done, extend also to *illegal* omission.

Sec. 32,
I. P. C.

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. (Section 43).

Illegal omissions.

I shall now explain what are *illegal* omissions or omissions in breach of a legal duty by a few familiar instances—

- (a) A jailor starves to death the prisoners in his charge. He is guilty of murder.
- (b) A physician in charge of a hospital omits to prescribe for a patient in his ward. The physician is responsible for the consequence of his omission.
- (c) A station master omits to put up a danger signal with the intention of bringing about a collision in order that it may lead to loss of human life. The other necessary elements of Section 299, Indian Penal Code, being present, he is guilty of murder.

Legal duty.

The important question, to ask in connection with omissions, is what are *illegal* omissions, or omissions in breach of a legal duty. Now a legal duty may be contractual, it may be statutory or it may be founded on rules of justice, equity and good conscience.

Personal laws of Hindus and Muhammadans in India.

In India we have a large body of what are called personal laws. But the personal law of the Hindus and Muhammadans are not administered by the British Courts, except in matters relating to succession, inheritance, marriage, or caste or any religious usage or institution and even then in the absence of any legislative enactment abolishing or altering it. In other matters the personal law of the parties is administered under similar conditions only in so far as it is consistent with

justice, equity and good conscience. A question may arise as to what extent criminal law will recognize the personal law of an accused person to determine his legal obligations. Such recognition would lead to anomalies and undesirable consequences. There would be, to a dangerous extent, an element of uncertainty which cannot be overlooked. The rules of equity, to which, as I have said, such law must conform, are said to "vary with the length of the Lord Chancellor's foot." Should criminal responsibility be judged by such an uncertain standard? To illustrate the above I may refer to the provision of the Muhammadan law which throws upon a rich relation the obligation to maintain a poor and helpless kinsman. I have never heard it suggested that an omission to supply maintenance in such a case is to be considered an illegal omission. In fact the Muhammadan law in this respect is not binding even on the Muhammadans. We cannot, however, altogether avoid reference to personal law in framing a Code of Penal Laws for in certain matters rights are regulated by the personal law of the parties. The Chapter dealing with offences relating to marriage will illustrate this. Marriage, though giving rise to numerous rights and obligations of a purely secular character is still looked upon by the largest majority of the human race as a *quasi*-religious institution. In numerous other cases also personal law has an indirect bearing. For instance, in all cases where a question of title to property is involved, directly or indirectly, we have often

to refer to personal law in determining such a question.

Apart, however, from personal and statutory laws there are obligations which the penal law has to recognise for the well-being of the human race. The source of this kind of obligation must be traced to the law that exists in the *breast* of the Judges. This law is of very common application in the pursuit of civil wrongs and the law of crimes does not exclude them. This has been enforced frequently in English and American Courts specially in cases of neglect by mothers to provide suitable food and clothing for their children, and it has been laid down that generally in all cases where a grown up person has taken charge of a human creature, helpless either from infancy, simplicity, lunacy or other infirmity, and has been afterwards guilty of wicked negligence, the law will not allow a breach of such obligation to go unpunished. It may be suggested that, in most of these cases, the obligation arises from an implied contract, but this is by no means clear. In English and American Courts the question of illegal omission has been discussed more frequently in connection with the duty of parents to their children and also of others on whom has devolved the duty of maintaining weak and helpless persons. Although these cases would, more properly, be dealt with in connection with offences affecting life, they may be usefully discussed at this stage in illustrating to you the distinction between omissions that are not illegal and those that are.

Bishop in his criminal law states the American law on the subject in these words:—

“If a man neglects to supply his legitimate child with suitable food and clothing, or suitably to provide for his apprentice whom he is under a legal obligation to maintain, and the child or apprentice dies of the neglect, he commits a felonious homicide. But his wife, if she does the same thing, even towards her own offspring, does not incur the guilt: because the law casts the duty of maintenance on him alone, not at all on her, who stands in this respect in no other relation to him than a mere servant. Again, the law imposes on a man no duty to maintain his brother. Therefore if one has abiding in his house a brother who is an idiot, and who through his neglect perishes from want, he is not in law responsible for the homicide; because omission, without a duty, will not create an indictable offence, yet if, however, voluntarily he has taken upon himself the obligation to maintain the brother, he is answerable should death follow from his gross neglect of it, amounting to a wicked mind.”

I do not, however, think that a mother can refuse to suckle her new born babe. The Indian Law at any rate takes very serious view of such cases, for the preservation of the human race is still considered to be an important part of the policy of the State in every civilized country,

A number of decided cases both of English and American Courts may be cited in support of these propositions.

In most systems of law a distinction is made as regards the liability to maintain a child between the father and the mother. Under the Muhammadan law the latter has the right to the custody of a child up to a certain age, but the liability to provide maintenance is on the father.

There may, however, be cases in which a mother by her conduct may have assumed the responsibility of maintaining her child, and in such a case she cannot plead the absence of a legal duty. In *R. vs. Nicholls* (13 Cox, C. C., 75), an old woman was put upon her trial for the manslaughter of her grandson, an infant of tender years, who was said to have died from the neglect of the prisoner to supply him with proper nourishment. The woman was convicted.

In *R. vs. Morley* (8 Q. B. D., 571) the prisoner was one of the "peculiar people" who did not believe in doctors for effecting a cure in cases of illness but only in prayers and anointment. His little boy of eight years old was known to be suffering from confluent small-pox, and yet no medical aid was called in and the child died as the *post mortem* examination showed—of the disease. If the doctor had been sent for at once, the child's life might have been saved, but, on the other hand, it might not have been; and there being, therefore, no positive evidence that the death was caused or accelerated by the neglect to provide medical aid or attendance, it was held that the father could not be properly convicted of manslaughter. "It is not enough," said Lord Coleridge, "to show neglect of reasonable means for preserving or prolonging the child's life; but to convict of

manslaughter it must be shown that the neglect had the effect of shortening life. In order to sustain conviction affirmative proof is required."

"Under Section 37 of 31 and 32 Vict., C. 122," added Stephen J., "it may be, the prisoner could have been convicted of neglect of duty as a parent, but to convict of manslaughter you must show that he caused death or accelerated it."

In the earlier case of *R. vs. Downes* (1 Q. B. D., p. 25) where the facts were somewhat similar it was distinctly shown, and found by the jury that the child's death was caused by the neglect to provide medical aid, and, therefore, the conviction of manslaughter was upheld. "I agree with my Lord Coleridge," said Bramwell, B.,—"as to the difficulty which would have existed had it not been for the statute. But the statute imposes an absolute duty on parents, whatever their conscientious scruples may be. The prisoner wilfully—not maliciously but intentionally—disobeyed the law and death ensued in consequence. It is, therefore, manslaughter." The material words, it may be mentioned, in Section 37 of 31 and 32 Vict., Cl. 22, are as follows:—"When any parent shall wilfully neglect to provide adequate food, clothing, medical aid or lodging for his child, being in his custody, under the age of 14 years, whereby the health of such child shall have been or shall be likely to be seriously injured, he shall be guilty of an offence punishable on summary conviction." There is no such statutory provision in India and I hope we shall never require it.

In the case of *R. vs. Rees* a person's death was caused by alleged negligence on the part of a

fireman in charge of a fire escape, who was absent from his post when the alarm was given. It was held that there was not sufficient connection between the alleged neglect of the prisoner and the cause of death to warrant a conviction.

Vide also *R. vs. Hughes* (D. and B. 248); *R. vs. Smith* (11 Cox. C. C. 210); *R. vs. Misselbrook* (Sessions Paper C. C. C., July 1878).

In the case of *R. vs. Jeffery* the prisoner and deceased were not married but lived together as man and wife; the woman died through the alleged neglect of the prisoner. It was held by Hawkins J. that sufficient legal responsibility was made out, but upon the facts it was for the jury to say whether in their opinion death was caused or accelerated by gross and criminal neglect on the part of the prisoner.

In the case of *R. vs. Shepherd* (L. and C. 147) a girl of 18 was taken in labour at her step-father's house during his absence. The mother omitted to procure for her the assistance of a midwife in consequence of which the girl died. It was held that the mother was not legally bound to procure the aid of a midwife, and that she could not be convicted of manslaughter for not doing so. The case, however, appears to have turned to some extent on the fact that there was no evidence that the mother had money enough to pay for a midwife.

The case of *R. v. Curtis* (15 Cox C. C., 746) should be referred to as regards the responsibility of relieving officers in refusing medical assistance to destitute persons in case of urgent necessity.

There are certain omissions for which the Code specifically provides, *e.g.*—

- (1) Omission to produce documents to public servant by a person legally bound to produce. (Section 175).
- (2) Omission to give notice of information when legally bound to give it. (Section 176).
- (3) Omission to assist a public servant. (Section 187).
- (4) Omission to apprehend on the part of public servant. (Sections 221 and 222).

In other cases the question depends upon the applicability of Section 32 as explained by Section 43.

On the subject of omissions I may refer you to the cases of *Thornotte Madathel Poker* (1886, 1, Weir 495) and *Queen-Empress vs. Latif Khan* (20 Bom. 394). In the former case it has been held that the word 'omission' is used in the sense of intentional non-doing. According to Section 32, the word 'act' includes intentional doing as well as intentional non-doing. The omission or neglect must, it was said, be such as to have an active effect conducing to the result, as a link, in the chain of facts from which an intention to bring about the result may be inferred.

The latter case is not of much importance as it only lays down the law in terms of the section.

LECTURE III.

INCHOATE CRIMES.

ATTEMPTS.

Attempts

I have in my previous lecture discussed the general proposition that a crime is an act or an omission. I have told you that the law does not punish a mere evil intention or design unaccompanied by any overt act in furtherance of such a design. This indeed follows from what has been said before. You must not, however, think that criminal law only deals with the last proximate act that actually produces the evil consequence which determines its penal character. It often happens that the last proximate act has not been done or has failed to produce the contemplated evil consequence. No injury to the individual may have been caused and yet the act may be sufficiently harmful to society by reason of its close proximity to the contemplated offence to be classed as a crime. Thus, unlike civil law, criminal law takes notice of attempts to commit punishable wrongs and punishes them with more or less severity according to the nature of the act attempted. A distinction is drawn between an *attempt* and a *preparation*. The relative proximity between the act done and the evil consequence contemplated, largely determines the distinction. Whereas an attempt is punishable, a preparation is not. This distinction is based on sound reason. In the first place a preparation, apart from its motive, would generally be a harmless act. It would be impossible in most cases to show that the preparation was directed to a wrongful end or was done with

Distin-
guished from
preparation.

an evil motive or intent, and it is not the policy of law to create offences that in most cases it would be impossible to bring home to the culprit or which may lead to harassment of innocent persons. Besides a mere preparation would not ordinarily affect the sense of security of the individual intended to be wronged, nor would society be disturbed and its sense of vengeance roused by what to all outward appearances would be an innocent act. Take a case of murder. In many cases there will be first the stage of contemplation, and I have told you the law would not punish mere evil thoughts. Then would come the stage of preparation. For instance, the procuring of a gun or other deadly weapon. In most cases you will not suspect that your neighbour has procured the gun for any evil purpose, and no one would feel at all alarmed or even concerned about it. If such an act were made punishable, it would be impossible in ninety-nine out of hundred cases to prove that the object of it was murder. On the other hand, it will be possible to harass a man who has procured a gun for a perfectly legitimate purpose. The acts done up to this stage are not penal. The case will, however, be different where the man having procured the gun pursues his enemy with it, but fails to overtake him or is arrested before he is able to complete the offence or fires without effect. These would clearly be attempts and obviously none of the considerations which justify the exclusion of preparations from category of crimes will apply.

I have said that a preparation is *generally* not punished. There are, however, exceptional cases where the contemplated offence may be so grave

that it would be of the utmost importance to stop it at its earliest stage. Instances of such exceptional cases are to be found in Sections 122 and 126, Indian Penal Code, whereby preparing to wage war against the Sovereign or to commit depredation on the territories of any friendly power are made punishable. There are also other cases of mere preparations which are made punishable, although the mere gravity of the contemplated offence would perhaps not have been considered sufficient to justify a departure from so well established a doctrine, but for the fact that the preparations are of so peculiar a nature as to preclude the likelihood of their being meant for innocent purposes. The provisions against making or selling or being in possession of instruments for counterfeiting coins (Sections 233, 234, 235, Indian Penal Code) are instances of this kind.

You will also notice that there are a number of acts which we have come to regard as substantive offences which are in reality mere preparations to commit other offences. Possession of counterfeit coins, false weights and forged documents, etc., are nothing but preparations to cheat or commit other offences. The classification of these acts as crimes are based on one or other of the considerations I have enumerated above.

Having considered the matter generally, I shall now draw your attention to the difficulties that have arisen both in this country and in England in the application of the doctrine to facts of particular cases. It has not been always easy in practice to draw the line between preparations and attempts. The Indian Penal Code has not defined an attempt. This is probably due to the fact that

the word is not used in any technical sense. Even in the matter of differentiation between a preparation and an attempt a great deal has been left to be determined with reference to the general import of the word.

When a man merely purchases implements of burglary we never say he attempted to commit burglary, or when a man procures a *lathi* to beat another we never say that he attempted to cause hurt. Many difficulties would, I think, be solved if we asked the simple question "Is this an act that we will describe as an attempt in common parlance?"

The Code deals with attempts in three different ways. In some cases the commission of an offence and the attempt to commit it, are dealt with in the same section, the extent of punishment being the same for both. (See Sections 196, 198, 213, 239, 240, 241, 250, 251, 254, 385, 387, 389, 391, Indian Penal Code.)

The other way of dealing with attempts are exemplified by Sections 307, 308, 393. In these sections attempts for committing specific offences are dealt with side by side with the offences themselves but separately, and separate punishments are provided for the attempts from those of the offences attempted.

As for the cases not provided for in either of the two modes above mentioned you have the general Section 511, which has been placed somewhat illogically at the end of the Code. That section provides as follows:—

"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 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."

The language of the section seems to me somewhat redundant. The very essence of the idea of an attempt is something done towards the commission of the act attempted to be done, and in this view the words "and in such attempt does any act towards the commission of the offence" seem unnecessary. Could there be any attempt at all unless something had been done towards the commission of the offence attempted? And yet you will find when I come to discuss the Indian case law on the subject that in some reported cases, considerable stress has been laid on these words in determining whether certain acts are punishable under Section 511 or not. That the words are redundant seems also clear from the fact that in dealing with attempts in the two other modes mentioned above no such qualifying words are used. Can it be reasonably contended that the legislature intended to deal with a different and more limited class of attempts in Section 511? You will find similar restrictive words used in Section 309.

I shall quote two sections of the Code to enable you to realise more fully the difference of language used in the treatment of attempts in connection with different offences.

I have already quoted Section 511.

Section 393.—Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years and shall also be liable to fine.

Section 309.—Whoever attempts to commit suicide and *does any act towards the commission of such offence*, shall be punished with simple imprisonment for a term which may extend to one year, or with fine or with both.

Although, on the one hand, having regard to the extremely careful drafting of the Indian Penal Code, it is difficult to believe that the difference of language was the result of inadvertence, on the other hand, it is equally difficult to discover the reason for the difference. It seems clear that the omission of the words in italics would have made no difference in the law relating to attempts. They have probably been introduced out of abundance of caution to emphasise the difference between a preparation and an attempt in cases where such caution was thought more necessary than in others. This is not a very satisfactory explanation, but I can think of no other.

The difference between a preparation and an attempt is thus explained by Lord Blackburn in *Reg. vs. Cheesman* (1 L. & C. 140, 1862): "There is no doubt a difference between a preparation antecedent to an attempt 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 the crime.”

“The word attempt,” said Chief Justice Cockburn, “clearly conveys with it the idea that if the attempt had succeeded the offence charged would have been committed. An attempt must be to do that which if successful would amount to the felony charged.” (McPherson’s case, D. and B. 202).

Following this definition it was held in a Calcutta case, that where the accused had printed some forms similar to those used by a Coal Company, but had done nothing to forge the signature or seal of the Company he was held not guilty of an attempt to commit forgery; all that he did, consisted in mere preparation for the commission of the crime.

Neither of the two cases cover the whole ground of difference between preparation and attempt. They deal with two different aspects of the question. Lord Blackburn deals with cases where the offender had not gone through all the steps necessary to constitute the complete offence. For instance, it covers the case of an accused who pursued his enemy with a gun and was arrested before he got near enough to shoot. It ignores a case in which the offender has taken all the necessary steps to commit the complete offence, but has failed to produce the consequence without which the offence is not complete. It does not, for instance, apply to the case of the man who fires at his enemy, but misses either for his want of skill or because of a defect in the gun or because he had mistaken something else for his enemy. In all these cases there is no

question of any interruption at all. On the other hand, Chief Justice Cockburn’s definition fixes the mind more upon consequences than upon the acts. The principle laid down in *R. vs. McPherson* (D. & B., p. 197) was that a prisoner could not be properly convicted of breaking and entering a building and attempting to steal goods which were not there. Upon such a view of the meaning of an attempt it was held in *Queen vs. Collins* (9 Cox, C. C. 407) that if a person put his hand into the pocket of another with intent to steal what he can find there, and the pocket is empty, he cannot be convicted of an attempt to steal. The principle laid down in *Reg. vs. McPherson* and *R. vs. Collins* was applied in a subsequent case *R. vs. Dodd* (18 Law Times N. S. 89, 1868), wherein it was held that a person could not be convicted of an attempt to commit an offence which he could not actually commit. These cases were reviewed in *R. vs. Brown* (24 Q. B. D. 357) and Lord Coleridge declared that these cases were decided on a mistaken view of the law. Finally in *R. vs. Ring* (17 Cox, p. 491) a conviction for an attempt to steal from a woman by endeavouring to find her pocket was held good, although as in the case of *R. vs. Collins* there was nothing in the pocket, and it was clearly stated that *R. vs. Collins* was overruled. But though overruled, the case is still important; as I shall presently show, and I need make no apology in quoting a portion of Chief Justice Cockburn’s judgment:—

“We are all of opinion that this conviction cannot be sustained; and, in so holding, it is necessary

to observe that the judgment proceeds on the assumption that the question, whether there was anything in the pocket of the prosecutrix which might have been the subject of larceny, does not appear to have been left to the jury. The case was reserved for the opinion of the Court on the question, whether, supposing a person to put his hand into the pocket of another for the purpose of larceny, there being at the time nothing in the pocket, that is, an attempt to commit larceny? We are far from saying that, if the question whether there was anything in the pocket of the prosecutrix had been left to the jury, there was no evidence on which they might have found that there was, and in which case the conviction would have been affirmed. But, assuming that there was nothing in the pocket of the prosecutrix, the charge of attempting to commit larceny cannot be sustained. The case is governed by that of *Reg. vs. McPherson*, and we think that an attempt to commit a felony can only be made out *when, if no interruption had taken place, the attempt could have been carried out successfully, and the felony completed, of the attempt to commit which the party is charged.* In this case, if there is nothing in the pocket of the prosecutrix, in our opinion the attempt to commit larceny cannot be established. It may be illustrated by the case of a person going into a room, the door of which he finds open, for the purpose of stealing whatever property he may find there, and finding nothing in the room, in that case no larceny could be committed, and therefore no attempt to commit larceny could be committed. In the absence, therefore, of any finding by the

jury in the case, either directly or inferentially by their verdict, that there was any property in the pocket of the prosecutrix, we think that this conviction must be quashed."

Illustrations (a) and (b) to Section 511, Indian Penal Code, clearly show that the law in India is the same as that laid down in *Reg. vs. Ring*. The absurdity of the law as laid down in *R. vs. Collins* was thus commented upon by Butler, J., a learned American Judge. "It would be a novel and startling proposition that a known pick-pocket might pass around in a crowd in full view of a policeman, and even in the room of a police station, and thrust his hands into the pockets of those present, with intent to steal, and yet not be liable to arrest or punishment until the policeman has first ascertained that there was in fact money or valuables in some one of the pockets." Although *R. vs. Collins* was rightly overruled it cannot be said that the entire principle upon which that case was based has been abandoned. For instance, in *R. vs. McPherson* which laid down a principle similar to *R. vs. Collins*, the facts being also similar, Lord Bramwell strengthened his position by instancing the case of a person who mistaking a log of wood for an enemy fires at it intending to cause death, and he laid down that this will not amount to an attempt. Can it be said that *R. vs. Collins* and by parity of reasoning *R. vs. McPherson* being overruled the case of firing at a log of wood will constitute an attempt at murder. No case so far as I am aware has gone so far. On the other hand, I have never seen it suggested in any recent case that the principle of *R. vs. Collins* should be applied to

the case of a person who administers a drug to cause miscarriage, and it afterwards transpired that the woman was not pregnant at all. In *R. vs. Goodall* (2 Cox C. C. 41) it was decided that this amounted to an attempt. "The acutest understanding," says Bishop, "could not reconcile these two cases, the one for putting the hand into the pocket, but not finding there anything to be removed and the other for penetrating the womb and yet not discovering an embryo or foetus to be taken away."

To reconcile these inconsistencies other theories have been propounded, and it has been suggested as a doctrine of general application that an impossible attempt is not punishable, and that, therefore, it is not an offence to shoot at a shadow, to administer sugar mistaking it for arsenic or to try to kill a man by witchcraft. The impossibility must, however, be absolute not relative, so that the doctrine would not cover the case of an adequate dose of arsenic. It is also said that the means must be adapted to the end. The question still remains on what principle are these reservations based. It cannot be said that there is any want of evil intent in such cases. It is not the absence of *mens rea*. It is not also the absence of an overt act. Perhaps the doctrine may be defended on the same ground on which a mere criminal intent is not punishable, *viz.*, that such an act causes no alarm, no sense of insecurity to society—no consequence following the act which would in vast majority of cases remain undetected and unknown.

A differentiation has also been made between cases where the object is merely mistaken and

cases where the object is merely absent. The case of the empty pocket is said to belong to the former and of shooting at a shadow to the latter. The distinction seems to be without a difference. In both cases there is both mistake and the absence of the object. In the case of the shadow the man is absent and by mistake he is supposed to be present, and in the case of the empty pocket the money is absent, but the criminal thinks by mistake that money is there, though it is absent. It appears that till the time of *Feurback* it was considered that cases of impossible attempts were outside the scope of criminal attempts and that such attempts whether impossible owing to the absence of the object or owing to inadaptability of the means to the end were on the footing of mere preparations or of mere intention which has not led to any overt act. But *Feurback* in his anxiety to base his conclusions on clear logical grounds thought that the peasant who prayed to God to strike his neighbour dead in the belief that it was the surest means of effecting his object must be punishable. Too much insistence on the subjective elements of a crime would furnish adequate reasons for such a conclusion.

Although the decision in *R. vs. Ring* has the effect of removing this anomaly, we must discover some new principle upon which to exclude from the category of attempts the shooting at an enemy's big coat or striking a log of wood, and including in it the case of an attempt to steal property where none existed, or the case of attempted abortion in the case of a woman who was found not to be pregnant at

all. In the one case there was no man to kill and in the other no property to steal or no foetus to remove, and the same principle should therefore apply to both. I shall try to differentiate the principles to be applied to these two cases. The Indian Penal Code will not materially help you in finding out the point of distinction. Before coming to the point I shall analyse the ideas involved in an attempt.

An act or series of acts constitutes an attempt—

- (a) If the offender has completed all or at any rate all the more important steps necessary to constitute the offence, but the consequence which is the essential ingredient of the offence has not taken place.
- (b) If the offender has not completed all the steps necessary to constitute the offence, but has proceeded far enough to necessitate punishment for the protection of society.

Regarding (a) the non-production of the consequence may be due solely to want of skill on the part of the accused or it may be due to other causes operating on the offender personally or it may be due to causes in no way connected with the offender.

In all these cases attempt in the legal sense is complete.

Illustration.—*A* shoots at *B* intending to kill him, but misses his mark for want of skill or for any defect in the gun. It is clearly an attempt.

Illustration (a), Section 511.—*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.

Illustration (b), Section 511.—*A* makes an attempt to pick the pocket of *Z* by thrusting his hand into *Z*'s pocket. *A* fails in the attempt in consequence of *Z*'s having nothing in his pocket. *A* is guilty under this section.

These cases present no difficulty, and have been discussed before in connection with *Collin's* case.

Take, however, another case also falling in the same class to which I have already averted more than once.

A intending to kill *B* fires at *B*'s big coat hanging in his room mistaking it for *B*. Will *A* be guilty of an offence? So far as the language of Section 511 is concerned, it seems to me that if it covers the case of the pick-pocket in illustration (a) as it certainly does, it ought to cover this case also. And it may very justly be said that in the forum of conscience such a case is as bad as any other ordinary case of an attempted murder, and that any instinctive abhorrence at such a conviction may be overcome by passing a light sentence upon the offender. It seems to me, however, that in spite of the language of Section 511, which wholly ignores the objective element of an offence, there are grounds for distinguishing the present case from that of the

pick-pocket. True all the subjective elements of the contemplated offence are present there, but it will be well to remember that there are offences the gravity of which lies not so much in their subjective as in their objective elements, and in this class we may include the various offences grouped in the Indian Penal Code under the head of offences against the human body. The gradation between assault, hurt, grievous hurt and murder are all indications of the stress laid upon the objective element, *viz.*, the amount of injury inflicted upon the individual. In offences against property, such as theft, criminal misappropriation, criminal breach of trust, little or nothing turns upon the extent of the injury caused, *i.e.*, upon the amount of property taken. That shows that different principles have been adopted in determining the penal character of offences against human body and offences against property, and from this point of view a distinction based on principle may be drawn between the case of the pick-pocket and the person who shoots at his enemy's big coat based on the impossibility of the evil consequence happening in either case. But as I have said before the language of Section 511 does not recognise any such distinction and the words of the section applied literally may warrant the conviction for attempt at murder in the case above mentioned.

It may, however, be argued that the words "and in such attempt does any act towards the commission of the offences" are intended to exclude these cases, but this is far from being clear. I have not found this point of view clearly stated

anywhere and put it forward with certain amount of diffidence. The distinction, however, seems fairly deducible from reported cases and reconciles the apparent conflict between many of them.

There are, I must admit, cases to which the doctrine of attempt would be inapplicable on the basis of the distinction I have suggested, which, however, from the risk they involve and other considerations of the like nature, have been considered sufficiently serious to be punished. One of these cases is mentioned by Wharton, *viz.*, shooting at an empty carriage the offender supposing it to be occupied to which may be added the case of shooting at a coat hanging in a man's bed room. Cases of this kind may be treated as exceptions on the ground of the alarm that such acts will cause to the individual and to society at large, and the disturbance they are likely to cause to public peace. On similar reasoning and also on grounds of public policy the case of an attempted abortion where the woman was not pregnant at all, may be treated as an exception.

I have so far discussed cases of attempt where the offender has done all that he could to commit the offence attempted, but it has not been completed, because the consequence which is essential to constitute it has not accrued for reasons other than the act or will of the offender. I have told you such cases present no difficulty and on them no question of mere preparation arises. The cases where the difficulty arise are those belonging to the second of the two classes I have enumerated before, I mean cases where the offender has not gone through the whole series of acts necessary

to complete the offence apart from the resulting consequence. These cases have to be dealt with from various standpoints. The offender may have stopped of his own free-will abandoning the idea either as the result of penitence, or in view of the consequences that might befall him. In these cases whether the stage arrived at is that of preparation or attempt the law allows the offender a *locus pœnitentiæ*. If, however, the offender has desisted from proceeding further owing to the attempt being discovered, or the presence of police, the law will not excuse, for the evil will is still there.

You will observe that the question whether what the offender has done has reached merely the stage of preparation or has amounted to an attempt to commit the offence, arises only in the class of cases I am now discussing, namely, where the whole series of acts necessary to complete the offence has not been completed or gone through. It seems to me that in these cases the principle upon which the distinction is or should be based is either the possibility of the act, so far as it is completed, being meant for an innocent purpose or of the probability of the offender desisting of his own accord from committing the offence without external compulsion, mental or physical. I have said that the law allows the offender a *locus pœnitentiæ* in certain cases, and it may be stated as a general principle that so long as the steps taken leave room for a reasonable expectation that the offender may of his own free-will still desist from the contemplated attempt, he will be considered to be still on the stage of

preparation. Such an expectation may be based upon the remoteness of the act done from the last proximate act that would complete the offence.

To illustrate the above, suppose, *A* purchases a gun and it is proved that he had held out a threat that he will kill *B* with a gun and intended to do so. Still it is the stage of preparation only, for the purchase of a gun may be for quite an innocent purpose. Besides the purchase of a gun may be far removed both as regards time and space from the last act necessary to kill, or by the intervention of several other acts without which the accused could not effect his purpose. The intended victim may be miles off, and even if near it might take a long time to procure the powder and shot and other things necessary which alone could enable the accused to effect his purpose. You cannot say with any confidence that either he will walk the several miles or complete the rest of the process to accomplish his object. The probability of the man giving up his design is not negatived in such cases. This probability should, in every case, be a question of fact and cannot be determined by any rigid rules of general application. Suppose, however, having purchased the gun the man loads it, goes out with it, meets his victim and chases him, but is unable to overtake him, he must, I think, be held guilty of an attempt. His act will cause as much alarm as if he had fired and missed his aim. In all human probability he would have fired, if he could overtake his victim. This probability, along with the alarm that the act causes, takes it beyond the limits of a mere preparation.

Take again the case of a man who orders a machine from France at considerable cost, takes delivery of it and sets it up in a secluded place. (We had a recent instance here in Calcutta.) Following the principle laid down in several cases he will perhaps be said to be in the stage of preparation still. I would hesitate to accept such a decision for the nature of the preparation is such as to preclude the possibility (a) of a change in the intentions of the accused and (b) of the preparation being meant for an innocent purpose.

But if a man merely purchases a stamp paper with the intention of forging a document, even if the intention is proved, he should not be punished for his act only amounts to a preparation both because the presumption of innocence is not negatived and because of the remoteness and consequent probability of a change of intention. But as soon as he begins to write on the paper, the stage of preparation is exceeded, and it should be considered to be an attempt when the forgery is not completed. For in such a case, it is not reasonable to suppose that having commenced the writing he will not complete the document. But suppose a man is found to have commenced writing on a stamped paper a year ago and to have left the work unfinished, it would not be right to punish him, for his conduct is clear indication of a change of intention.

As regards the distinction between a preparation and an attempt it has been said that where there has been merely the procuring of means for the commission of an offence and there is a gap between this and the commencement of an act

that would, in all likelihood, lead to the offence, the mere procuring of means is not punishable as an attempt. This also is based mainly on the ground that in most cases of this kind the acts so far as they are accomplished may, to the outside world, look perfectly innocent, and partly on the ground that in the interval that must elapse between the preparation and the commencement of the acts leading up to the offence there may be a change in the mind of the wrong-doer. Where, therefore, both of these elements are excluded and where from the very nature of the preparation made it may be inferred that in all human probability the offender is not likely to desist from putting his intention into final execution, such an act, call it by any name, ought to be punished as an attempt. It is upon these considerations that whilst the man who procures poison to kill another is only considered to be at the stage of preparation the man, who purchases a die for counterfeiting the King's coin, has been held to be guilty of an attempt to counterfeit such coin. One of the reasons for thinking that such a person will not desist from final execution of his object is the secrecy with which the operation of coining can be carried on, and the comparative immunity from detection that the coiner enjoys, so that the motive of gain may be assumed to impel the man to further action in the same direction, in the absence specially of any serious impediment in his way. But if the intending coiner has only purchased the silver for preparing the coin that would only amount to the stage of preparation, for the purchase of silver is quite an innocent act

and the silver could be used in various other profitable ways. It is the violent presumption of an evil intent arising from the nature of the preparation that makes the possession of a die an attempt to counterfeit coin but not the possession of silver. It is not, therefore, the mere proximity to the completion of the intended offence in point of time or space, which may negative any reasonable expectation of a change of intention, that determines the line between the preparation and the attempt, but also the consideration arising from the act up to a particular stage being *per se* innocent. I venture to think, you will find in this somewhat lengthy discussion some help in understanding the principles which have guided courts in deciding the very difficult questions that have arisen in determining whether certain acts have amounted to an attempt or not.

I shall now give a few concrete instances taken mostly from reported decisions to illustrate the principles that I have attempted to elucidate.

ILLUSTRATIVE CASES.

(1) *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 is guilty of an attempt to commit theft. Section 511, illustration (a)., See also *Reg. vs. Ring* (17 Cox 491).

(2) *A* makes an attempt to pick the pocket of *Z* by thrusting his hand into *Z*'s pocket. *A* fails in the attempt in consequence of *Z*'s having nothing in his pocket. *A* is guilty of an attempt. Section 511, illustration (b). Also *Reg. vs. Ring*

(3) *A* writes and sends to *B* a letter inciting *B* to commit a felony. *B* does not read the letter. *A* has attempted to incite *B* to commit a felony. *R. vs. Ransford*, 31 I. J. (N. S.) 488.

(4) *A* procures dies for the purpose of coining bad money. *A* has attempted to coin bad money. (Robert's case, Dearsley, C. C. 539).

(5) *A* goes to Birmingham to buy dies to make bad money. *A* has not attempted to make bad money. (Per Jervis, C. J., in Robert's case, Dearsley 551).

(6) *A* procures indecent prints with intent to publish them. *A* has attempted to publish indecent prints (Semble). (*Dugdale vs. R.*, I. E. & B., 435; *R. vs. Dugdale*, Dear C. C. 64).

(7) *A* having in his possession indecent prints, forms an intent to publish them. *A* has not attempted to publish indecent prints. (Per Bramwell, B., in *R. vs. McPherson*, D. & B. 201).

(8) *A* mistaking a log of wood for *B* and intending to murder *B*, strikes the log of wood with an axe. *A* has not attempted to murder *B*. (Per Bramwell, B., in *R. vs. McPherson*, D. & B. 201).

(9) *A* attempts to suborn a witness *B*, though *B* was of such a high character as to make success impossible, or though the witness was incompetent, *A* has attempted. (Wharton, p. 210.)

(10) *A* administers to *B* a drug with the intent of producing abortion. The drug is found to be harmless. *A* has not attempted. (Wharton, p. 210.)

(11) *A* takes null oath before *B*, an incompetent officer. He has attempted. (Wharton, p. 210.)

(12) *A* intending to kill *B* shoots at an empty carriage supposing it to be occupied. *A* has attempted. (Wharton, p. 213.)

(13) *A* attempts to commit a miscarriage. It turns out the woman was not actually pregnant. *A* has attempted. *Reg. vs. Goodall* (2 Cox, C. C. 41).

(14) *A* shoots at a shadow *sufficiently near another person* as to put that person in peril. The attempt is made out. (Wharton, p. 213.)

(15) *A* in order to forge a document purporting to be executed by one *C* takes a deed writer to a place *G*, where it was represented that *C* will execute the document. Having gone to the place *G* he sends his servant to a stamp vendor who is induced by false representation to put on the stamp paper an endorsement to the effect that *C* was the purchaser of the stamp. At this stage the servant was arrested and this stopped further progress. Nothing as a fact was written on the blank form. Held not to be an attempt to commit forgery, but *semble* an attempt to fabricate false evidence (*R. vs. Ramsarem*, 4 N. W. P. 46).

16. *A* procures the printing of forms similar to those used by a company in forwarding accounts of goods supplied by it. *A* has done nothing towards forging the signature or seal of the company. Held this was no attempt to commit forgery (*R. vs. Raisat Ali*, 7 Cal. 352).

(17) *A* buys a stamp in the name of one *K* which the vendor endorses upon it and commences to write a bond out in *K*'s name. This is an attempt to commit forgery (*R. vs. Kalyan Singh*, 16 All. 409).

I shall shortly comment on some of these illustrations.

Illustrations (3), (9) and (11) show that where a person has done all that he can to bring about the commission of an offence the fact that by reason independent of his will the offence has not been committed, does not exculpate him.

Illustration (4) shows that although the acts so far as they are accomplished may merely amount to preparation, but if the nature of the act precludes the possibility of the preparation being directed towards an honest purpose, it may be punished as an attempt. In connection with this case you may, however, consult *R. vs. Sutton* (2 Strange 1074) in which a man was convicted for having in his custody and possession two iron stamps with intent to impress the sceptres on six pence and to colour and pass them off for half-guineas. The defendant was sentenced to pay a fine of 6s. 8d. and to stand in the Pillory at Charring Cross.

This case was followed in *Reg. vs. Scofield* (1784 Cald 397), but was not followed in *Reg. vs. Charles Stewart* (1814 R. and R. 288).

The cases are, however, not quite similar for whilst procuring is an act, mere possession is not and the criminal law does not ordinarily punish merely an existing state of things. It may be argued that the very fact that the possession of any instrument of counterfeiting coin is made punishable by the Code (Section 235), and so also the procuring thereof (Section 234) is an indication that these cases do not fall within the definition of an attempt and are, therefore, to be separately

provided for. On the other hand, it may be urged with equal force that the general doctrine relating to preparations is defective and fails to afford adequate protection to society or the public.

Illustration (5) shows that where an act so far as it is accomplished is *per se* an innocent act, the mere evil intention with which it was done in a particular case will not make it punishable as an attempt to commit an offence specially where by reason of remoteness between the acts done and the final execution the possibility of repentance is not excluded.

The correctness of illustration (6) is not free from doubt. I am rather inclined to think that it represents a mere stage of preparation and is not distinguishable from the case of a person who purchases a gun or poison to cause the offence of murder nor is it covered by one of those exceptional cases to which I have referred.

Illustration (7) is an instance of a mere evil intent which has not manifested itself in an overt act.

Illustration (8) I have already discussed.

Illustration (9) also shows that the mere impossibility of producing the desired consequence is not enough in cases where the impossibility is not absolute.

Illustration (10) is an instance of absolute inadaptability of means adopted to bring about an evil consequence. I would put it on the ground that such an action will cause no alarm to society.

Illustration (11) is also an instance showing that an attempt may be made out even where

if it had succeeded, the offence charged would not have been committed.

Illustrations (12) and (14) show that the mere absence of the object is not enough to negative an attempt where the act was likely to create alarm and a sense of insecurity.

Illustration (13) I have already discussed.

The other illustrations are based on Indian decisions which I shall discuss in dealing with these cases.

The important Indian cases dealing with the interpretation of Section 511 are—

- (1) *Queen vs. Dayal Bauri.*
- (2) *Queen vs. Ramsaran.*
- (3) *Queen vs. Peterson.*
- (4) *Empress vs. Baldeo Sahay.*
- (5) *Queen vs. Dhundi.*
- (6) *Empress vs. Riasat Ali.*
- (7) *In the matter of the petition of R. MacCrea.*
- (8) *Queen vs. Kalyan Sing.*

1. *Queen vs. Dayal Bauri* (4 B. L. R., A. Cr., p. 55, 1869) was an important case which unfortunately led to a difference of opinion between the two learned Judges who formed the Court of Appeal. The facts found against the accused were that there had been about the time of the occurrence attempts at incendiarism in the locality, the active agent of which was a ball of rag enclosing a piece of burning charcoal. The villagers were suspecting the Bauries. The prisoner himself was a Bauri and defended himself and others of his caste and abused the villagers. The villagers

threatened to take him to the Thana, and whilst they were hustling him about, a ball of rag of the same kind fell from his *Dhoti* which on being opened was found to contain a piece of burning charcoal. Mr. Justice Glover thought that if it were a piece of unlighted charcoal only there would not have been a sufficient commencement of any act tending towards the commission of mischief by fire, and that the prisoner would, in that case, have been in the same position as a person who, intending to murder some other person whether by shooting or poisoning him, buys a gun or poison and keeps the same by him, such act being ambiguous, and not so immediately connected with the offence as to make the parties punishable under Section 511 of the Penal Code. But, since the instrument for causing mischief by fire was completely ready and was not used, only because the party carrying it had no opportunity, it must, thought the learned Judge, be assumed that a person going about at night provided with an apparatus specially fitted for committing mischief by fire intends to commit that mischief and that he has already begun to move towards the execution of his purpose, and that was sufficient to constitute an "attempt." On this view of the case he was for upholding the conviction. Mitter J. dissented from his colleague. He was of opinion that the mere fact of being in possession of a ball, like the one which was found with the prisoner, was by no means sufficient to warrant a conviction for attempting to cause mischief by fire. "In order," said the learned Judge, "to support a conviction for attempting to commit an offence of

the nature described in Section 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." "Suppose," proceeded the learned Judge, "a man goes out of his house into the street with a loaded gun in his possession, and suppose even that there is evidence to show 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 murder 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 as 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 learned Judge relied, in support of his view on a passage in Russell on Crimes, in which it was stated that acts in furtherance of a criminal purpose may be sufficiently proximate to an offence, and may sufficiently show a criminal intent to support an indictment for a misdemeanour, although they may not be sufficiently proximate to the offence to support an indictment for an attempt to commit it; as where a prisoner procures dies for the purpose of making counterfeit foreign coin, or where a person gives poison to another and endeavours to procure that person to administer it.

The decision of Mr. Justice Mitter has been accepted as correct by many writers on Indian Criminal law, notably by Mr. Mayne, and I admit it is conformable to the principles upon which preparations and attempts have been distinguished in many cases. The question, however, is one of great difficulty and one's inclination would, perhaps, be to hold that an offence had been committed and the accused deserved to be punished. Judging by the tests which I have suggested the preparation was in the first place of such a peculiar character that it could not be reasonably supposed to have been meant for an innocent purpose, and the fact that there had been about that time attempts at incendiarism in the village with balls of this description, would preclude the possibility of the ball having been meant for any purpose other than incendiarism. The presumption was violent that the accused intended to commit incendiarism, and that if not caught he would not have desisted from his purpose. What was said by Butler J. of the policeman and the pickpocket would apply with equal force to this case. The decision of Mr. Justice Glover may also be supported on the principle enunciated in Bishop's Book on Crimes that "the act was sufficient both in magnitude and in proximity to the fact intended to be taken cognisance of by law and was near enough to the offence intended, to create apparent danger of its commission."

As a matter of fact nothing remained to be done except the last proximate act, namely, the application of the fire-ball to some property which undoubtedly the accused wanted to destroy.

Mr. Justice Glover's view is also to a certain extent in conformity with the law laid down in the case of *Reg. vs. Taylor* (1 F. F., p. 511, 1859) tried before Chief Baron Pollock where the accused having lighted a lucifer match to set fire to a stack desisted on discovering that he was watched. It was held that the act amounted to an attempt. An argument in favour of Mr. Justice Mitter's view may be based on those cases where preparations have been made specifically punishable. It may be argued that if Mr. Justice Glover's decision were correct there would hardly have been any necessity to provide specifically for a case of possession of instrument for counterfeiting coin as has been done by Section 235 of the Code, as cases of this kind would have fallen under the general provision of attempts under Section 511 of the Code, and that the fact that those cases had to be specially provided for leads to the inference that they would otherwise not have been covered by the general provisions of the law relating to attempts. It may be urged that the accused could not have been charged for mere possession of an instrument for incendiarism as an attempt must always be an act. But it was not a case of mere procuring of means to commit the offence or of possession thereof, but there was a good deal more than that in the case inasmuch as the prisoner had come out of his house at a particular hour of the night, and was moving towards the object or objects which he intended to set fire to when he was interrupted by the villagers. One cannot but regret at the result, but our laws are defined with scientific precision and hedged round by too many general

principles not always elastic. 'Happy is the nation,' says Baccaria, 'whose laws are not a Science.'

The result of the decision was as unfortunate as that in *Reg. vs. Collins*, and indicates that there is something wrong in the generally accepted principles.

2. *Queen vs. Ramsaran* (4, N. W. P. H. C. R., p. 46, 1872) was a case, the material facts of which are given in illustration 15 (page 68). Sir Charles Turner laid down that the word "attempt" indicated the actual taking of those steps which lead immediately to the commission of the offence, although nothing be done or omitted which of itself is a necessary constituent of the offence committed. It is perhaps unsafe to generalise in a matter of this kind. The question, as Sir Fitz James Stephen points out, can only be determined with reference to the facts of each case. In this case the nature of the preparation was such and it had reached a stage when if left to himself, and if not interrupted the accused would have, in all probability, completed the forgery. 'If a word of the document had been written,' said Turner J., 'the offence would have been complete.' The non-completion was the result of interruption and not of remorse. I doubt if there was not in that case a sufficient beginning of the offence charged to make the accused liable. Technically the decision may be right, but it cannot be defended on any intelligible principle.

3. *Queen vs. Peterson* (1 All., p. 316, 1876) was a case of a conviction for attempt to commit bigamy and the attempt consisted of the

publication of the banns of marriage. The learned Judge (Pearson J.) quoted with approval the following passage from Mayne's Indian Penal Code:—

"Preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations have been made."

Accordingly the learned Judge held that the publication of the banns did not constitute an attempt, but only a preparation for such an attempt. 'The publication of the bann,' said the learned Judge, 'may or may not be in cases in which a special license is not obtained, a condition essential to the validity of the marriage, but common sense forbids us to regard either the publication of the banns or the procuring of the license as a part of the marriage ceremony.' The learned Judge also referred to what he described as the rule laid down in America, that an attempt can only be manifested by acts, which would end in the consummation of the offence but for the intervention of circumstances independent of the will of the party, and that in the case under consideration the accused might have willed not to carry out his criminal intention. The last is perhaps the strongest argument in favour of the view taken by the learned Judge if the Code leaves any room for such an argument, a point not wholly free from doubt.

4. In *Empress vs. Baldeo Sahay* (2 All., p. 253, 1879) it was held that to ask for a bribe is an

attempt to obtain one. The learned Judge having regard to the facts elicited in the case observed, "the intention had been conceived, the plans had been matured, and all préparations made, and though no specific sum had been asked for, the transaction had so far advanced that Abbas Ali had thóroughly understood what was being done, and put a stop to what might have been successful, if he had not refused to enter into any arrangement and intimated to him that he would not give anything."

5. In *Queen vs. Dhundi* (8 All., p. 304, 1886), the accused had made a false statement in order to obtain a certificate which would have enabled him to obtain a refund of *octroi* duty. The certificate, however, was not granted and in consequence the attempt failed. It was held by the learned Sessions Judge who referred the case to the High Court that the prisoner had not completed an attempt to cheat, but had only made preparations for it. "Even supposing," said the learned Sessions Judge, "that Dhundi by false representation had succeeded in getting a refund certificate, yet he still had a *locus pœnitentiæ*. He had to get it endorsed at the outpost and had to present it on the following Saturday for encashment before he finally lost all control over it, and could no longer prevent the commission of the offence. Before that time he might have altered his mind even from prudence, if not from penitence and torn up the certificate and no cheating could then have happened." Brodhurst J. agreed with this view and acquitted the prisoner.

6. The next case *Empress vs. Riasat Ali* (7 Cal., p. 352, 1881) was a comparatively important

case—important not only because it laid down a definite principle, but also important because of the reputation of the Judges who decided the case. That was a case in which the prisoner was found to have given orders to a particular press to print 100 forms similar to those formerly used by the Bengal Coal Company, to have corrected one of the proofs and to have suggested further corrections in a second proof in order to assimilate the form to that then being used by the Company. At this stage his activities were interrupted by his arrest by the Police. Sir Richard Garth held in the first place that the printed form without the addition of the seal or signature would not be a false document as that was technically what is meant by the words 'making a document.' It was urged that the printing and correcting of the form which was intended by additions to be a false document was in itself the making of the part of a false document within the meaning of Section 464 and therefore amounted to forgery. The learned Judge was, however, of opinion that this was not so, and if it were the mere printing or writing of a single word upon a piece of paper, however innocent the word might be, would be the making of a part of a false document, when coupled with an intention to add such other words as it would make it eventually a false document. "In my opinion," observed the learned Judge, "this is very far from the meaning of section 464, and I think that such a construction of the section involves a misconception not only of the word 'make,' but also of the sense in which the phrase 'part of a document' is used in the section." In coming to

the conclusion that the act did not amount to an attempt, the learned Judge relied on *Reg. vs. Cheeseman* and also on Macpherson's case which I have already discussed. On the authority of those cases the learned Judges held that the attempt could not be said to be complete until the seal or the signature of the Bengal Coal Company was affixed to the document, and consequently what was done was not an act towards making one of the forms of false document, but if the prisoner had been caught in the act of writing the name of the Company upon the printed forms and had only completed a single letter of the name, then in the words of Lord Blackburn the actual transaction would have commenced which would have ended in the crime of forgery, if not interrupted. Prinsep J. concurred in the dictum of Lord Blackburn quoted by his colleague.

I feel considerable doubt regarding the correctness of this decision. A great deal depends upon the question as to what constitutes the making of a false document or part of a document. Assuming, however, that it is only constituted by the act of signing or sealing a document the point is lost sight of, that the mere signing or sealing cannot constitute a forged document without the writing which the seal or signature is intended to authenticate. The whole of the writing as the result of the signature becomes a part and parcel of the false document. The order in which the forgery is completed is immaterial. Supposing in accordance with the Indian practice of signing at the top a person begins with the signature, would it not be open to him to urge with equal force that the signature was

meaningless without some other writing which the signature would authenticate, and then perhaps we will be told that unless a beginning is made with the writing of the body of the document there is no offence. It may, therefore, be said that as soon as the writing has commenced whether of the body of the deed or of the signature a beginning has been made with the actual transaction which, if not interrupted, would have ended in the crime. To hold that the actual transaction commences only when the signature is begun is taking a very narrow view of the meaning of a forged document and of an attempt to commit forgery. The definition of forgery itself shows that it contemplates the existence of a document to which the forged seal or the signature is attached. Therefore the forged seal or signature alone does not constitute the false document, and as the writing has commenced the actual transaction which would have ended in the offence may be said to have commenced. It has no doubt been held that the mere purchase of a particular kind of paper necessary for forging a document does not amount to an attempt, but the paper is not a material part of the document and the purchase of the paper is clearly a preparation and not an attempt. The definition of an attempt given by Lord Blackburn in *Reg. vs. Cheeseman* or by Cockburn C. J. in *Reg. vs. Macpherson* led to an erroneous decision in *Reg. vs. Collins* which was overruled in *Reg. vs. Ring*, and as I have already pointed out, the provision of the Indian Penal Code has followed the case last mentioned. The actual transaction, it may be remembered, is not the last act proximate to the

offence. This case is also in conflict with the decision I have already referred to that a person who procures dies for the purpose of coining bad money, attempts to coin bad money. The surer tests are the extent of the presumption of evil intent arising from the act and the possibility of a change of intention. Whereas the purchase of a paper or for the matter of that of a stamped paper is fully consistent with an honest intention and cannot give rise to a presumption that an offence was contemplated, the printing of forms and the correcting of proofs in the manner disclosed in this case gave rise to a violent presumption that the accused could not have intended by these acts to serve any honest purpose, and in point of time the beginning with the writing was in such close proximity to the offence attempted that it was very unlikely that after having gone so far the accused would desist from carrying out his purpose. I do not place much stress on the case relating to the purchase of dies for that case is inconsistent with several other cases in England. This case was followed in *Chandi Pershad vs. Abdur Rahaman* (22 Cal., p. 131, 1894), but the correctness of the decision has been challenged in the case of *MacCrea* to which I shall refer later.

7. *In the matter of the petition of R. MacCrea* (15 All., p. 173, 1893) was a case in which the prisoner was charged among others of having attempted to cheat, it being his intention fraudulently to induce delivery of a valuable security. As is usual with Indian reports it is stated that the facts sufficiently appear from the judgment of the Court, but unfortunately they do not. The few facts so far as can

be gathered by piecing together the various parts of the judgment dealing with them appear to be the following :

There was a Government Promissory Note which was the property of one Mahomed Hosain Ali Khan. MacCrea with the intention of getting possession of that note from the Controller General entered into correspondence with his office, and then obtained in favour of one Asad Ali, a letter-of-administration to the estate of his deceased brother in which this particular note was falsely entered as belonging to the deceased. He forwarded this letter-of-administration and a draft notice for publication in the *Calcutta Gazette* with the object of inducing the Controller General to make over the note to Asad Ali Khan, to whom it did not belong. It was argued on behalf of the prisoner that the acts done by him amounted to preparation only and did not reach the stage of an attempt under Section 511 of the Indian Penal Code. Mr. Justice Nox in holding that the conviction was right distinguished *Queen vs. Ramsaran Charbey* and expressed a dissent from *Empress vs. Riasat Ali*. I have already commented on this case and need not repeat what I have said. The learned Judge held —

- (a) that 'attempt' within the meaning of Section 511 of the Indian Penal Code covers a much wider ground than the definition given either by Lord Blackburn in *Reg. vs. Cheeseman* or Chief Justice Cockburn in *Macpherson's case* ;
- (b) that Section 511 was not meant to cover only the penultimate act towards the

completion of an offence and not acts precedent, if these acts are done in the course of the attempt to commit the offence, and are done with intent to commit it, or done towards its commission ;

- (c) that the question is not one of mere proximity in time or place, that the time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be very considerable interval of time ;
- (d) that an attempt once begun and a criminal act done in pursuance of it towards the commission of the act attempted does not cease to be a criminal attempt, because a person committing the offence does or may repent and abstain from completing the attempt. Blair J. generally agreed with these views.

The last observation is important. In England and America at any rate a change of intention even at the last moment would exculpate the offender, provided it was not the result of external compulsion moral or physical. Sir Fitz James Stephen states the English law thus :

‘The offence of attempting to commit a crime may be committed in cases in which the offender *voluntarily* desists from the actual commission of

the crime itself.’ The learned author illustrates his proposition thus : ‘A kneels down in front of a stack of corn and lights a lucifer match intending to set the stack on fire, but observing that he is watched blows it out. A has attempted to set fire to the stack.’ The illustration is based on the case of *Reg. vs. Taylor*, (1859, 1 F. and F. 511). Although the principle of *locus pœnitentiæ* is not expressly recognised in the Indian Penal Code, yet you will observe that it was recognised in the case of *Queen vs. Dhundi*. Whether a general principle like this can be admitted in derogation of the words of the section is extremely doubtful. You will have to strain the words of Section 511 a good deal to squeeze in such a principle into it. It is one thing to say that so long as there is room for the expectation of a change in the intention to commit an offence, the stage of a punishable attempt has not been reached at all, but once that stage is reached punishment cannot be avoided by proof that the accused is penitent.

8. *Queen vs. Kalyan Sing* (16 All., 409, 1894) is the case referred to in illustration 17. Briefly stated the facts are as follows :—

“ One Chaturi calling himself Kheri, the son of Bhopal Kachhi, went to a stamp-vendor accompanied by a man, named Kalyan Sing, and purchased from him in the name of Kheri a stamp paper of the value of four annas. The two men then went to a petition-writer and Chaturi again gave his name as Kheri, they asked the petition-writer to write for them a bond for Rs. 50 payable by Kheri to Kalyan Sing. The petition-writer

commenced to write the bond, but his suspicion being aroused, did not finish it, but took Chaturi and Kalyan Sing to the nearest thana."

It was contended on behalf of the defence that the acts committed by the accused amounted to no more than a preparation for an attempt to commit the offence and did not in themselves constitute an attempt, but Burkitt J. held that the acts alleged and proved amounted to much more than a preparation, and they were acts done towards the commission of an offence within the meaning of Section 511 of the Indian Penal Code. In taking this view reliance was placed on the dictum of Turner J. in *Queen vs. Ramsaran Choubey* which I have already discussed.

Before leaving the subject I wish to repeat what I have already said, that the almost hopeless conflict of decisions both here and in England is conclusive evidence that the test usually adopted in determining the line of demarcation between preparations and attempts have not been infallible, and it is worth while to examine those tests somewhat closely to find out wherein they fail. It is not possible in the variety of human actions to draw the precise line between preparations and attempts. It often happens that in a series of acts culminating in an offence each step is a preparation for the next. In such cases it would be unduly restricting the meaning of the word to say that an attempt must preclude all stages of preparation, and be the last proximate act to that which would complete the offence, or to say that it must be the one immediately preceding that with which the acts constituting the offence begin.

In the absence of a clear dividing line the question must, to a great extent, be decided with reference to the facts of each particular case, and the general nature of the offence attempted. It is seldom that an offence consists of one single act. In every offence the whole series of preliminary acts that lead up to those that complete the offence are not essential parts thereof, a great many are innocent acts, innocent in that they are not harmful either to individual or to society. They are acts from which no evil intent can be inferred, they cause no disturbance to society, and are, therefore, not sufficient in magnitude to attract law's notice. What may appear to be a mere preparation need not necessarily be outside the scope of an attempt or even of a complete offence. But only such preparations as preclude the possibility of innocent intention should, on principle, be singled out for punishment.

LECTURE IV.

INCHOATE CRIMES.

II—ABETMENT.

When several persons are concerned in a criminal act and take different parts in it, it has been considered necessary to make a distinction between them according to the degree of culpability of each. Having regard to the fact that the Judge in most cases has been given great latitude in awarding punishment, the distinction does not appear by any means to be essential and its abolition is not likely to cause any hardship or injustice. The distinction, however, exists both in English and the Indian law, much more in the former than in the latter. Under the English law distinction is made between principals and accessories, between principals of first and second degrees, and between accessories before and after the fact.

principals & accessories.

Whoever actually commits or takes part in the actual commission of a crime is a principal in the first degree.

Whoever aids or abets the actual commission of a crime is a principal in the second degree.

An accessory before the fact is one who directly or indirectly incites, counsels, procures, encourages or commands any person to commit a felony which is committed in consequence thereof. Such a person when present at the actual commission of the crime is a principal in the second degree.

An accessory after the fact to a felony is one who knowing a felony to have been committed by another receives, comforts, or assists him, in order to enable him to escape from punishment.

I have taken these definitions substantially from Stephen's Digest.

The distinction between principals and accessories has reference only to felonies. In treasons and misdemeanours all persons who aid or abet in the commission of a crime are regarded as principals, whether they are present or absent when it is committed. Similarly, an accessory after the fact in treasons is deemed as principal, but in misdemeanours such a person is not guilty of any offence. Here it may be useful to tell you that under the English law crimes are classified under three heads, treasons, felonies and misdemeanours.

Treason, felonies and misdemeanours.

The name treason is given to certain crimes which are more particularly directed against the safety of the Sovereign and the State.

All indictable crimes below the degree of treason are either felonies or misdemeanours.

Felonies are those crimes which are such by common law or have been made such by statute.

All crimes which are not treasons or felonies are misdemeanours either by common law or by statute.

I need not go into further details regarding this classification. The distinctions based on them are more or less arbitrary and have not been followed in this country, and I do not think we have lost anything by doing so. Even in England the distinction is gradually disappearing, and there is now a feeling in favour of abolishing it. One step

in this direction was taken in the year 1861 when the Accessories and Abettors' Act (24 and 25 Vict., C. 94) was passed, which enacted that "accessories before the fact, principals in the second degree and principals in the first degree are each considered as having committed the crime," and may be tried as if they had committed it.

As regards different degrees of criminality between persons taking different parts in the commission of a crime, the Indian Penal Code makes a broad distinction between principals and abettors. The Code does not recognise accessories after the fact, except that it makes a substantive offence of it in a few cases. For instance, a person who 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 (Section 201), a person who conceals an offender with similar intent (Section 212), or a person who harbours a State prisoner or prisoner of war (Section 130), or harbours deserters (Section 136), or harbours offenders who have escaped from custody or whose apprehension has been ordered (Section 216), or harbours robbers or dacoits (Section 216A), is guilty of a substantive offence. It is also a substantive offence to resist the lawful apprehension of a person for an offence or to rescue an offender under arrest or to suffer an offender under custody to escape. I may state in passing that harbouring is explained for purposes of Sections 212, 216, and 216A to include supplying shelter, food, drink, money, clothes, arms, ammunition or means of conveyance or assisting a person in any way to

Accessory
ter the
ct not re-
gnised in
dian Penal
de.

evade apprehension. Even the simple distinction in Indian law between principal and abettor is without a difference in cases in which the punishment for abetment is the same as the punishment for the actual perpetration of the crime.

Under the Indian Penal Code abetment is constituted by instigation, by conspiracy or by aid intentionally rendered. I shall first deal with the more complicated subject of criminal conspiracies.

Three forms
of abetment
in the Indian
Penal Code.

Instigation ordinarily means inciting or urging a person to do a thing.

Conspiracy is generally understood to mean an agreement between two or more persons to do or cause to be done anything illegal or to do a legal act by illegal means. A criminal conspiracy under Section 107 has a more restricted meaning. 'A person is said to abet the doing of a thing by conspiracy if he engages with one or more other person or persons in any conspiracy for the doing of that thing, if an *act or illegal omission takes place in pursuance of that conspiracy*, and in order to the doing of that thing.' The difference between the English and the Indian law was thus explained by Bhashyam Ayyanger J. in *Emperor vs. Tirumal Reddi* (24. Mad. 523).

"Under the English law, the agreement or combination to do an unlawful thing by unlawful means amounts in itself to a criminal offence. The Indian Penal Code follows the English law of conspiracy only in a few exceptional cases which are made punishable under Sections 311 (Thug), 400 (belonging to a gang of dacoits), 401 (belonging to a gang of thieves), 402 (being a member of an assembly of dacoits) and 121A (conspiring to wage

war). In these cases, whether any act is done or not or offence committed in furtherance of the conspiracy, the conspirator is punishable; and he will also be punishable separately for every offence committed in furtherance of the conspiracy. In all other cases, conspiracy is only one species of abetment of an offence, as that expression is defined and explained in Section 108 and stands on the same footing as 'abetment by intentional aiding.' In regard to both these species of abetment, an act or illegal omission, in pursuance of the conspiracy or for the purpose of intentional aiding, is essential. If two or more persons conspire, the gist of the offence of abetment by conspiracy is not only the conspiracy, but the taking place of an act or illegal omission in pursuance of the conspiracy and in order to the doing of the thing abetted."

I shall discuss later on the change effected in this respect by the Criminal Conspiracies Act of 1913.

The third form of abetment consists in intentionally aiding by any act or illegal omission the doing of a thing. I shall deal with these three forms of abetment separately. I shall first deal with the two simpler forms, viz., the first and the third.

INSTIGATION.

Instigation. Instigation, as the word itself implies, is the act of inciting another to do a wrongful act. It stands for the words counselling, procuring or commanding as generally used in English law.

Mere acquiescence or silent assent or words amounting to bare permission would fall short of instigation. *A* tells *B* that he is going to murder *C*. *B* says "You may do as you like and take the consequence." *A* kills *C*. *B* cannot be said to have instigated *A* to murder *C*. In order to constitute instigation it is necessary to show that there was some active proceeding which had the effect of encouragement towards the perpetration of the crime. So where two men having quarrelled agreed to fight with their fists, and each one deposited £1 with the prisoner who held the amount as a stake-holder to be paid to the winner, and it was found that beyond holding the stakes the prisoner had nothing to do with the fight and he was neither present at it, nor had any reason to suppose that the life of either man would be endangered, it was held that the prisoner was not guilty of any offence. Each such case must be decided on its merits. Lord Coleridge observed that to support an indictment there must be an active proceeding on the part of the prisoner. A stakeholder is perfectly passive, all he does is to accept the stakes (*R. vs. Taylor*, 44, L. J. M. C. 67).

Similarly, it has been held that such encouragement and countenance as may be lent by persons of influence who, aware of the object of an unlawful assembly, deliberately absented themselves from the locality to express sympathy with the object of the assembly cannot be said to be abettors—*Etim Ali Majumdar vs. Emp.* (4, C. W. N. 500). A mere request to do a thing may amount to abetment by instigation, e.g., the offer of a bribe to a public servant even when it is refused. A

person who had offered a bribe to a servant to sell his master's goods at less than their value was held guilty of incitement to commit an offence—*Reg. vs. De Kromme* (17 Cox, 492).

It has also been held that the mere receipt of an unstamped instrument does not constitute the offence of abetment of the execution of such an instrument—*Emp. vs. Janki* (7 Bom. 82).

In order to convict a person of abetting the commission of a crime by instigation, there must be proof of direct incitement; it is not enough that a person has taken part in those steps of the transaction which are innocent, but it is absolutely necessary to connect him in some way or other with those steps of the transaction which are criminal—*Queen vs. Nimchand* (20, W. R. Cr. 41).

But silent approval shown in a way that had the effect of inciting and encouraging the offence is abetment. Accordingly it was held that when a woman prepared herself to be a *Sutti* those that followed her to the pyre and stood by her crying 'Ram, Ram,' and thereby actively connived and countenanced the act, were guilty of abetment—*Queen vs. Mohit* (3, N. W. P. 316). An instigation or incitement or aid rendered to an act which is a mere preparation to commit an offence not amounting to a commencement thereof does not constitute either a substantive offence or an attempt or abetment of the same—*Emp. vs. Baku* (24, Bom. 288). 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. (Section 107, Explanation 1). The following example is given to illustrate the case:

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 instigation the apprehension of *C*. This hardly calls for any comment.

AIDING.

It is explained that any one who, either prior Aiding. 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. The explanation shows that the mere intention to facilitate, even coupled with an act calculated to facilitate, is not sufficient to constitute abetment, unless the act which it is intended to facilitate *actually* takes place and is facilitated thereby. It seems pretty clear from Explanation 2, Section 107, that one cannot be held to have aided the doing of a thing when that thing has not been done at all. For instance, if a servant keeps open the gate of his master's house, so that thieves may enter, and thieves do not come, he cannot be held to have abetted the commission of theft. But if such a person, after having opened the door or before it, informs possible thieves that he is going to keep the door open, he encourages them by his conduct to commit theft and is guilty of abetment; or if prior to the opening of the gate he had entered into an agreement with the thieves to keep the

door open he would be guilty of abetment by conspiracy.

Whoever encourages, urges, provokes, tempts, incites or induces another to do a thing is said to instigate it. Whoever prior to or at the time of the commission of an act does anything in order to facilitate the doing of it is said to aid it.—Explanation (2), Section 107. For instance, if a person incites another to commit an assault by saying *maro maro* he only instigates the assault, but the man, who puts a *lathi* into the hands of another with the object of that other committing an assault with it, aids in the commission of the assault. Both abet the offence, one by instigation and the other by aid rendered.

Aid may be rendered by act as well as by illegal omission. Where a head-constable, who knew that certain persons were likely to be tortured for the purpose of extorting confession, purposely kept out of the way, it was held that he was guilty of abetment within the meaning of Explanation 2—*Queen vs. Kali Churn* (21 W. R. Cr. 11). But in such cases it is necessary to show that the accused intentionally aided the commission of the offence by his non-interference—*Khaja Noorul Hossein vs. Fabre-Tonnere* (24 W. R. Cr. 26). An omission to give information that a crime has been committed does not amount to aiding, unless such omission involves a breach of a legal obligation.—*Queen vs. Khadim* (4 B. L. R. A. Cr. 7). When the law imposes on a person a duty to discharge, his illegal omission to act renders him liable to punishment—*Emp. vs. Latif Khan* (20 Bom. 394). This case follows *Queen vs. Kali Churn*

(21 W. R. Cr. 11). But the mere fact, however, of a village chowkidar being present when an extortion was being committed without eliciting any disapproval on his part, will not render him liable as an abettor of the offence—*Gopal vs. Foolmani* (8 Cal. 728). Such conduct neither amounted to incitement nor to aid, as it was not his legal duty to interfere or report such a case. A zemindar who lent a house to a police officer who was investigating a case, knowing that the house would be used for torturing a suspected thief, is guilty of abetment—*Emp. vs. Faiyaz Hossain* (16 A. W. N. 194).

In a recent *Sutti* case (*Emp. vs. Ram Lal*, 36 All. 26) persons were held guilty of abetment, who had done their best to dissuade the woman from becoming a *Sutti* and had even given information to the nearest police station, but finding it impossible to dissuade her complied with her wishes and helped her in effecting her object. In a somewhat similar case in England, where a pregnant woman anxious to procure abortion took a dose of corrosive sublimate and died, and it was found that this was procured at her desire by the prisoner who knew the purpose for which it was to be used, but did not administer the poison or cause it to be taken, but had only procured it at her instigation and under a threat by her of self-destruction, and the facts were consistent with the supposition that he hoped and expected that she would change her mind and not resort to it, the prisoner was held not guilty of being an accessory before the fact (*R. vs. Fretwell*, L. & C. 161).

The facility given must, however, be such as is essential for the commission of the crime. The mere act of allowing an illegal marriage to take place at one's house does not amount to abetment—*Queen vs. Kudum* (W. R. 1864, 13); so also mere consent to be present at an illegal marriage or actual presence in it, or the grant of accommodation in a house for the marriage, does not necessarily constitute abetment of such marriage; but the priest who officiates and solemnizes such illegal marriage is guilty of abetting an offence under Section 494—*Emp. vs. Umi* (6 Bom. 126).

CRIMINAL CONSPIRACY.

Conspiracy. Questions relating to conspiracy have, in recent years, assumed very great importance in this country, specially in Bengal, by reason of the prevalence of what are known as anarchical crimes, and there have been numerous cases dealing with the subject, and I propose to dwell on it at some length.

A conspiracy under the English law, and also under the Indian law as it now stands, is the agreement of two or more persons to do an illegal act or to do a legal act by illegal means. Before the passing of the Criminal Law Amendment Act of 1913 a conspiracy to do an illegal act was punishable only when such act amounted to an offence. It was also essential in the words of Section 107 of the Indian Penal Code, 'that an act or illegal omission should have taken place in pursuance of the conspiracy and in order to the doing of the act which was the object of the conspiracy.' The Criminal Law Amendment Act has, however, introduced two rather drastic changes in this

respect. By Section 120B punishment is provided for criminal conspiracies of all kinds, whether, according to the requirement of Section 107, an overt act has or has not taken place in pursuance of such conspiracy, or whether, as required by Sections 109, 115 or 116, the object of the conspiracy is or is not the commission of an offence. Section 120A defines a criminal conspiracy thus:—

When two or more persons agree to do or cause to be done an illegal act or an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.

It also provides that no agreement, except an agreement to commit an offence, shall amount to a criminal conspiracy, unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

The first part of the definition brings the English and the Indian law on a line, in so far as they differed regarding the nature of the act with reference to which the conspiracy was formed, the Indian law confining conspiracies to agreements to commit punishable wrongs, the English law only insisting on such wrongs being merely illegal. The second is a compromise between the Indian law and the English law. The Indian law insisted on some overt act, the English law did not. But now an overt act is necessary only where the object of the conspiracy is the commission of an illegal act not amounting to an offence. I may, however, observe that even under the English law an overt act is necessary in an action of tort for conspiracy (*Moghul Steam Ship Co. vs. McGregor*, L. R. 21, Q. B. D. 549).

The position now is this. Conspiracies now fall into two classes not wholly exclusive of one another—

A. Conspiracies falling within the definition of abetment in Section 107 of the Indian Penal Code.

B. Conspiracies outside the definition of abetment, but falling within the words of Section 120A.

All conspiracies falling under class A and also such conspiracies under class B as are for the commission of offences punishable with death, transportation or rigorous imprisonment for a term of two years or more are governed by the law relating to abetment as contained in Chapter V, Section 120B, sub-section (1). With reference to cases of the latter class the distinction is maintained but without any difference. In Chapter V a distinction is made between abetments which are followed by the act abetted and as the result of such abetment and abetments which are not so followed. These, for the sake of brevity, I shall distinguish as successful and unsuccessful abetments. A successful abetment in the absence of any special provision to the contrary is punishable in the same way as the offence which it abets or is intended to abet (Section 109).

Unsuccessful abetments may be divided into three classes according to the nature of the offence abetted :—

(a) Where the offence abetted is punishable by death or transportation for life ;

(b) Where it is punishable by imprisonment ;
(c) Where it is not punishable by death or transportation for life or by imprisonment.

In the case of (a) the punishment may extend to seven years or fine (Section 115).

In the case of (b) the punishment may extend to one-fourth of the longest term provided for the offence abetted, or with the fine provided for that offence or with both (Section 116).

In the case of (c) the law provides no punishment at all.

There remain conspiracies which may or may not fall within the meaning of abetment defined in Section 107 but which fall within the scope of Section 120A, but are not punishable with death, transportation or rigorous imprisonment for two years or more. These are punishable with imprisonment of either description for a term not exceeding six months or with fine or with both. Section 120B, sub-section (2). In these cases no distinction is made between successful and unsuccessful conspiracies, and none of the provisions of Chapter V will apply.

Although, you will observe, the amendment does not expressly affect conspiracies falling within Section 107, its effect is to do away with the limitations provided in that section, in all cases falling under Section 120B, sub-section (1). One result of maintaining the distinction without maintaining the difference is this: That with reference to offences punishable with death or transportation or rigorous imprisonment for two years the wider definition of a conspiracy in Section

120A practically replaces the more limited definition in Section 107. But as regards offences not so punishable the following effect seems to follow :—

- (a) Where an offence is punishable with imprisonment of less than two years or with simple imprisonment only a punishment of six months replaces the punishment provided under Section 116.
- (b) In case of offences punishable with fine only they are for the first time made punishable when the conspiracy is an unsuccessful one and irrespective of the question whether the conspiracy is one under class A or class B.
- (c) A conspiracy to commit a mere illegal act not amounting to an offence which was outside the scope of Chapter V has been for the first time made punishable, the punishment provided being six months or fine or both.

The anomalies that the new method of treatment involves are that in cases falling within Section 120A and not falling under Section 107 and not punishable under Section 120B, sub-section (1), the provisions of Chapter V are inapplicable, and some of the matters specially provided for in Chapter V will have to be dealt with on general principles without reference to those specific provisions, and the argument based on their not being made expressly applicable will have considerable force, and it is difficult to say how Courts will decide them. The inconvenience arising from the necessity of introducing doctrines of English common law in the

interpretation of laws carefully and exhaustively codified is obvious, and this inconvenience was recognised when a decision of Sir Barnes Peacock on the interpretation of Section 34 was followed somewhat rapidly by amending the section so as to incorporate that principle.

In the statement of objects and reasons for the Criminal Law Amendment Act, VIII of 1913, the necessity for the amendment has been thus explained :

“ Under Section 107 abetment includes the engaging with one or more person or persons in any conspiracy for the doing of a thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing. In other words, except in respect of the offences particularized in Section 121A, conspiracy *per se* is not an offence under the Indian Penal Code.

“ On the other hand by the common law of England if two or more persons agree together to do anything contrary to law, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons who so agree commit the offence of conspiracy. In other words conspiracy in England may be defined as an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means, and the parties to such a conspiracy are liable to indictment.

“ Experience has shown that dangerous conspiracies are entered into in India which have for their object aims other than the commission of the offences specified in Section 121A of the Indian Penal Code, and that the existing law is inadequate

to deal with modern conditions. The present Bill is designed to assimilate the provisions of the Indian Penal Code to those of the English law with the additional safeguard that in the case of a conspiracy other than a conspiracy to commit an offence some overt act is necessary to bring the conspiracy within the purview of the criminal law. The Bill makes criminal conspiracy a substantive offence, and when such a conspiracy is to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, and no express provision is made in the Code, provides a punishment of the same nature as that which might be awarded for the abetment of such an offence. In all other cases of criminal conspiracy the punishment contemplated is imprisonment of either description for a term not exceeding six months or with fine or with both."

The Indian Penal Code contained no definition of a conspiracy up to the year 1913. The definition given for the first time by the amending Act, as pointed out in the statement of objects and reasons, assimilated the provisions of the Indian Penal Code to those of the English law with one small difference.

It would be useful to refer to the exposition of the law of criminal conspiracy by eminent Judges in England. In *Reg. vs. Gill*, 2B. & Ald. 204, Lord Holroyd said that conspiracy was itself the offence, and it was quite sufficient to state only the act of conspiracy and the object of the conspiracy in the indictment. He pointed out that a conspiracy to cheat, for instance, was indictable even when the parties had not settled the means to be employed.

In *Mulchay vs. Reg.* (3 L. R. H. L. R. 306) Willes J. guarded against the common belief, of which I have found expression in some Indian cases also, that conspiracy is an exception to the general principle that criminal law takes no notice of an evil intent so long as it has not manifested itself in an overt act. 'A conspiracy,' observed the learned Judge, 'consists not merely in the *intention* of two or more but in the *agreement* of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself and the act of each of the parties promise against promise, *actus contra actum* capable of being enforced if lawful, punishable if for a criminal object or for the use of criminal means. The number and the compact give weight and cause danger.' In the same case Lord Chelmsford explained that agreement was an act in advancement of the intention which each person has conceived in his mind. The definition given by Willes J. was accepted by the House of Lords in subsequent cases and was quoted as an authority in *Barindra Kumar Ghose vs. Emperor*, more commonly known as the Alipore Conspiracy Case, 14 C. W. N., 1114. 'To establish the charge of conspiracy,' said Jenkins, C.J., 'there must be agreement, there need not be proof of direct meeting or combination nor need the parties be brought into each other's presence; the agreement may be inferred from circumstances raising a presumption of a common plan to carry out the unlawful design. As was pointed out in *Pulin Behary Das vs. Emperor*,

Agreement
is the gist
of the of-
fence.

16, C. W. N. 1105, on the authority of *Reg. vs. Gill*, 2 B. and Ald. 204, combination is the gist of the offence, there is nothing in the word conspiracy, it is the agreement which is the gist of the offence.

Passive
cognizance of
conspiracy
no offence.

It is well established that mere passive cognizance of a conspiracy is not sufficient, there must be active co-operation; in other words, joint evil intent is necessary to constitute the offence. This is implied in the meaning of the term conspiracy itself (Wharton, Vol. II, Art. 1341*a*). In *Pulin Behary's* case it appeared that certain members of a society found to be revolutionary were not acquainted with the real object of the society, not having been admitted to its secrets, and it was held that it would not be proper to convict such members of the charge of conspiracy. In such cases there is no agreement of two minds and not even mental participation in each other's designs.

The difficult question, however, as pointed out by Russell, is to find out when a particular combination becomes unlawful. We get very little assistance on this point from the reported decisions. An agreement implies the meeting of two minds with reference to a particular matter, and so long as matters are discussed and views are interchanged, but the plan of action has not been settled by the concurrence of any two or more of the conspirators, the stage of criminal conspiracy would not be considered to have been reached. I have already told you more than once that a mere criminal intention formed in a man's mind and never getting beyond that stage is never criminally cognisable. The forum of conscience alone can

take notice of such cases, but municipal law can only deal with matters and not merely with mind save as manifested by action. So long as the design to do a wrongful act rests in intention only it is not criminal, but as soon as two or more agree to carry it into effect the agreement goes beyond mere mental conception of a design and is an offence. You have, however, seen that in the case of an attempt not only is intention insufficient, but intention even, where coupled with an act which merely discloses the *mens rea*, but goes no further to carry it out or in other words merely amounts to a preparation and is not a link in the chain of circumstances that would immediately lead to the crime, would not constitute an attempt. Consistency, therefore, required that a mere conspiracy should be considered a substantive offence, only when the object of the conspiracy is so serious as the waging of war against the sovereign and other acts of equally grave nature, and that other cases of conspiracy should be deemed an offence, only when they fall within the definition of abetment, *i.e.*, when the agreement has led to some overt act which does more than merely disclose the *mens rea*, or to use the words of Section 107 'if an act or illegal omission takes place in pursuance of the conspiracy and in order to the doing of that thing, *i.e.*, the thing which is the object of the conspiracy.' Not only has consistency secured by the original framers of the Code now been sacrificed, but the peculiarities of the English law have been reproduced at a time when feeling in other countries is veering just the other way.

Special
features of
the law of
conspiracy.

Although a conspiracy is not confined to the mind only, there are still circumstances which make the law of conspiracy something apart from the general principles of criminal law. You have seen that the law does not punish a mere preparation to commit an offence. You will also observe that for an assembly to be unlawful you require at least five persons sharing in one common object. In conspiracies, however, you require only two to complete the offence and yet you punish before even the stage of preparation is reached. Take, for instance, the case of five persons agreeing to commit a theft. If they assemble with that common object and are caught they would only be held guilty of an unlawful assembly and would be punishable with not more than six months' imprisonment. Even if they had proceeded to the stage of preparation to commit theft they could not be punished for an attempt to commit that offence, but if they were caught when they had just entered into the agreement they are punishable as conspirators and would be exposed to more severe punishment than that for being member of an unlawfully assembly. One of the grounds upon which a preparation is not punished is that it causes no alarm to society, and also because ordinarily it does not disclose the existence of a criminal intent. Similarly a conspiracy, though it may itself technically be an overt act, has not the publicity of an overt act and does not produce the same disturbing effect on society as an ordinary overt act towards the commission of a crime. Conspirators often work in secret, and it is seldom that a conspiracy is revealed until something is done in pursuance

of it. That this is so ordinarily will appear from the facts of the various cases relating to conspiracy that have recently come before the courts here. There probably would have been no danger and no inconvenience if the law in India were left exactly where it was before the Conspiracy Act was passed. But although the law is changed in practice it can make very little difference, for even though you declare a conspiracy to be complete without an overt act, you cannot prove a conspiracy without it. Again I may refer to what I have already told you that it is not the policy of law to create offences that cannot ordinarily be proved. It is also an inconsistency that whereas any individual attempting to commit an offence is given a *locus penitentiae*, the conspirator has none. The conspiracy is complete as soon as the agreement or combination is formed. No repentance, no desire to withdraw protects him. As observed by Brett J. the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once or at some future time, certain things. It is not necessary in order to complete the offence that any one thing should be done beyond the agreement; the conspirators may repent and stop, or may have no opportunity, or may be prevented, or may fail; nevertheless, the crime is complete; it was completed when they agreed. You have seen that in cases of attempts the adoption of means absolutely unadapted to the end excuses the criminal, for instance, a person who attempts to kill his enemy by witchcraft is not punishable, but it seems that once an agreement is entered into to

commit murder, even if the means agreed upon is absolutely insufficient, that is no excuse.

The peculiar doctrine about conspiracies has been defended on the ground, that the combination of two or more persons to commit an illegal act gives a momentum to the act which justifies its punishment at the earliest possible stage. Bowen J. in *Moghul Steam Ship Company vs. McGregor Gow & Co.*, 23 Q. B. D. 598, observed as follows:—"Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise and the very fact of the combination may show that the object is simply to do harm to the exercise of one's just right." This may be sound with reference, for instance, to the offence of rioting and other offences relating to the disturbance of public peace, but has very little weight in relation to an offence like forgery, and still less so in relation to acts which are merely illegal. The true justification for punishment of all kinds of inchoate crimes will be found in the following passage from Bentham: "The more these preparatory acts are distinguished, for the purpose of prohibiting them, the greater the chance of preventing the execution of the principal crime itself. If the criminal be not stopped at the first step of his career, he may at the second, or the third. It is thus that a prudent legislator, like a skilful general, reconnoitres all the external

posts of the enemy with the intention of stopping his enterprises. He places in all the defiles, in all the windings of his route, a chain of works, diversified according to circumstances, but connected among themselves, in such manner that the enemy finds in each, new dangers and new obstacles."

If this policy had been consistently followed the deplorable result that might have followed the decision of Mitter J. in *Doyal Bauri's* case would be avoided.

It has also been suggested that the secrecy with which conspirators generally act is another ground for departing from ordinary principles in dealing with the few that are caught. But whatever may be the value of the explanation or attempt at explanation, one finds it difficult to be convinced that there is any justification for treating as an offence, the agreement to commit an act, that is merely illegal and not an offence when done by a single individual. "The application of this theory," says Russell, "has caused much controversy, especially as to combinations with reference to trade or of employers against workmen or workmen against employers." The point is fully discussed by Wharton, and it is stated by him that conspiracy as a distinct offence has been stricken from the revised codes of Prussia, Oldenburg, Wurtemberg, Bavaria, Austria and North Germany. I do not think this will give rise to any inconvenience, for the law relating to attempts, if freed from some of those meaningless technical limitations, which have no better basis than unbroken tradition, will fully serve the purpose of punishing offences at their inception. Those who were responsible

for the Indian Penal Code must have realised how difficult it was to defend the law of conspiracy as it then existed, and had the courage to alter the law, in order that it may conform to reason and common sense and be consistent with its other provisions, and with all respect for those who are responsible for the legislation of 1913 I must say that it is difficult to see the justification for the change.

The late Chief Justice Cockburn made the following suggestions for the amendment and consolidation of the law of conspiracy, in which he justified the punishment of persons conspiring to do an act which if committed by a single individual would have amounted merely to a mere civil injury:—

“Conspiracy may be divided into three classes—

First, where the end to be accomplished would be a crime in each of the conspiring parties, a class which offers no difficulty. Secondly, where the purpose of the conspiracy is lawful, but the means to be resorted to are criminal, as when the conspiracy is to support a cause believed to be just, by perjured evidence. Here the proximate or immediate intention of the parties being to commit a crime the conspiracy is to do something criminal; and here again the case is consequently free from difficulty. The third and last case is where with a malicious design to do an injury the purpose is to effect a wrong, though not such a wrong as, when perpetrated by a single individual, would amount to an offence under a criminal law. Thus an attempt to destroy a man's credit, and effect his ruin by spreading reports of his insolvency, would be a wrongful act, which would entitle the party

Three
classes of
conspiracies
according to
Cockburn,
C. J.

whose credit was thus attacked to bring an action for a civil wrong, but it would not be an indictable offence.....The law has wisely and justly established that a combination of persons to commit a wrongful act with a view to injure another shall be an offence, though the act, if done by one, would amount to no more than a civil wrong.” (Wharton, Vol. 2, p. 177.)

This peculiarity in the treatment of criminal conspiracies and the departure from some of the ordinary principles of criminal law have led to various other peculiarities which I shall briefly discuss. Of these the most important are the special rules of evidence which have been exhaustively discussed in some of the recent cases in Bengal.

One of the peculiar features of the rules of evidence relating to conspiracies is that anything said or done by any one of the conspirators, having reference to their common intention, is under certain circumstances evidence against the others. The reason of the law is that, within the scope of the conspiracy, the position of the conspirators is analogous to that of partners, one being considered the agent of the other. Russell states the law on the subject thus: “when several persons are proved to have combined together for the same illegal purpose, any act done by one of the party in pursuance of the original concerted plan, and with reference to their common object, is in the contemplation of law the act of the whole party and therefore the proof of such act would be evidence against any of the others who were engaged in the same conspiracy; and declarations made by one

Special
rules of evi-
dence in
trials for
conspiracy.

Act or
declaration
of one con-
spirator
when and
how far
evidence
against
others.

of the party at the time of doing such illegal act seem not only to be evidence against himself as tending to determine the quality of the act, but against the rest of the party who are as much responsible as if they had themselves done the act.”

Existence
of conspiracy
must be
proved first.

But before you can give in evidence the acts of one conspirator against another, you must prove the existence of the conspiracy, viz., that the parties were members of the same conspiracy and that the act in question was done in furtherance of the common design. The prosecutor may, however, either prove the conspiracy which renders the acts of the conspirators admissible in evidence or he may prove the acts of the different parties and so prove the conspiracy (Archbold, p. 307, 1288). You will notice that in a case of conspiracy it is open to the prosecutor to go into general evidence of the nature of the conspiracy before he gives evidence to connect the defendant with it. This is a course which is not ordinarily permissible in a criminal trial, but the peculiar nature of the indictment of conspiracy necessitates this departure.

In Hardy's trial, 24 How St. Tr. 451, for high treason, letters written by one conspirator to another were held to be evidence against the prisoner after his complicity in the conspiracy had been established.

You must bear in mind, however, that although on a charge of conspiracy statements made by any conspirator for the purpose of carrying the conspiracy into effect are admissible in evidence against the others, statements by one not made in furtherance of the conspiracy are not so admissible.

nor are statements made after the conspiracy has been abandoned or its object attained. In *R. vs. Blake*, 6 Q. B. 137, the prisoner was tried for conspiracy with one Tye to defraud the Customs. Tye was an agent to pass goods through the Customs and pay the proper duties. Blake was an official of the Customs called a “landing waiter.” Passing goods through the Customs was effected as follows:—Tye made a list of the goods he wished passed. This was copied into the official Customs House record and the original given to Blake to check the goods by as they came ashore. Blake tallied the goods with the list, and if the list was accurate his duty was to write “correct” across it and add his initials. The duty payable was then calculated according to the list thus checked and paid. Tye made a false list which Blake certified as correct. Blake was caught; Tye absconded. To prove the conspiracy Tye's day book was tendered in evidence showing that the list Blake certified as correct could not have tallied with the goods actually put ashore and received, also Tye's cheque book, the counterfoil of which showed the amount of which the Crown had been defrauded by the conspiracy. Both documents were admitted, but on an application for a new trial, on the ground of improper reception of evidence, it was held that the day book was properly admitted, but that the counterfoil of the cheque book was inadmissible and should have been rejected, as no declaration of Tye could be received in evidence against Blake which was made in Blake's absence and did not relate to the furtherance of the common object.

Blake's
case.

Hardy's
case.

In Hardy's case, referred to above, evidence was tendered by the prosecution of a letter written by one of the conspirators Thelwall, not then on trial, to his wife who was not a party to the conspiracy, in which he simply detailed the part he had taken in the crime. Eyre, C.J., refused to admit the evidence and summed up the whole matter thus :—

“ I doubt whether we ought to consider this private letter as anything more than Mr. Thelwall's declaration, and Mr. Thelwall's declaration ought not to be evidence of anything, which though remotely connected with this plot, yet still does not amount to any transaction done in the course of the plot for the furtherance of the plot, but is a mere recital of his, a sort of confession of his, of some part he had taken. It appears to me that that is not like the evidence of a fact which is a part of the transaction itself.”

Husband
and wife if
can be con-
spirators.

It may be mentioned in passing that in English law a man and his wife cannot be indicted for conspiring together alone, because legally they are deemed to be one person, but such an indictment will not be barred in this country.

Section 10,
Indian Evi-
dence Act.

The Indian law regarding evidence to prove conspiracy is practically the same and Section 10 of the Indian Evidence Act provides as follows :—

‘ Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence, or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained

by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well as for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

The following is the illustration given to show the meaning and scope of the section :—

‘ Reasonable ground exists for believing that *A* has joined in a conspiracy to wage war against the Queen. The facts that *B* procured arms in Europe for the purpose of the conspiracy, *C* collected money in Calcutta for a like object, *D* persuaded persons to join the conspiracy in Bombay, *E* published writings advocating the object in view at Agra, and *F* transmitted from Delhi to *G* at Cabul the money which *C* had collected at Calcutta, and the contents of a letter written by *H* giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove *A*'s complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy, or after he left it.’

This section is intended to make evidence, communications between different conspirators, while the conspiracy is going on with reference to the carrying out of the conspiracy. The section is perhaps wider than the English law as to evidence

Scope of
the section.

in cases of conspiracy; but it is not intended to be in the confession of a co-accused and put it on the same footing as a communication passing between conspirators or between the conspirators and other persons with reference to the conspiracy— (*Emp. v. Abani Bhushan*, 15 C. W. N. 25). You will notice that what is to be established under the section to make documents found in the possession of one of several persons accused of conspiracy admissible against the others is that there is reasonable ground to believe in the existence of a conspiracy amongst such persons. It is not necessary for this purpose to establish by independent evidence that they were conspirators— (*Pulin Behary Dass vs. Emp.*, 16 C. W. N., 1107). In an earlier case (*Kalil Munda vs. King Emp.*, 28 Cal. 797), Ghosh and Brett JJ. laid down that where it is shown that there is reasonable ground to believe that two or more persons have conspired together to commit an offence anything said done or written by any one of such persons in reference to the common intention may be proved both for the purpose of proving the existence of the conspiracy as also for showing that any such person was a party to it. *In re Chedambaran Pillai*, 32, Mad. 3, it was held that if C engaged with S in a conspiracy to excite disaffection towards the Government and if in pursuance of such conspiracy and in order to the exciting of disaffection an overt act took place, then C would be guilty of having abetted the excitement of disaffection and the speeches of C would be admissible in evidence to prove the object of the conspiracy. In *Pulin Behary Dass vs. Emperor* it was held that if the facts proved are

such that the Jury as reasonable men can say that there was a common design and the prisoners were acting in concert to do what is wrong, that is evidence from which the Jury may suppose that a conspiracy was actually formed. In the same case the learned Judges pointed out that once reasonable grounds are made out for belief in the existence of the conspiracy amongst the accused, the acts of each conspirator in furtherance of the common object are evidence against each of the others, and this whether such acts were done before or after his entry into the combination, in his presence or in his absence. Acts done prior to the entry of a particular person into the combination are evidence to show the nature of the concert to which he becomes a party, whilst subsequent acts of the other members would indicate further the character of the common design in which all are presumed to be equally concerned. In this case the discovery of certain arms made after the arrest of the accused was held to be admissible, in view of the case made by the prosecution that the arms belonged to the association of the conspirators and were deposited in the place where they were found many months earlier when the activities of the association were in full operation. The same case is an authority for the proposition that it is not necessary that all the conspirators should have joined the scheme from the first; those who come in at a later stage are equally guilty provided the agreement is proved. In *Barindra Kumar Ghosh vs. Emperor* (14 C. W. N. 1114) evidence of the association of an individual accused with the place of conspiracy and correspondence with or

relating to the members of the conspiracy, as also connection with newspapers and pamphlets published in furtherance of the object of the conspiracy, was held to be admissible.

Evidence
conspiracy
se general-
circum-
stantial.

The evidence in support of an indictment for conspiracy is generally circumstantial; and it is not necessary to prove any direct concert or even any meeting of the conspirators (Russell, Vol. I, p. 191). The existence of a conspiracy is in most cases a matter of inference, deduced from criminal or unlawful acts done in pursuance of a common criminal purpose. The agreement which is the gist of the offence may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design; direct evidence, which is almost impossible in such cases, is not necessary. In *R. vs. Duffield* (5 Cox 404) Earle J. told the Jury that 'it does not happen once in a thousand times when the offence of conspiracy is tried that any body comes before the Jury to say that he was present at the time when the parties conspired together, and when they agreed to carry out their unlawful purposes; but the unlawful conspiracy is to be inferred from the conduct of the parties, and if several men are seen taking several steps, all tending towards one obvious purpose, and they are seen through a continued portion of time taking steps that lead to one end, it is for the Jury to say whether those persons had not combined together to bring about that end which their conduct appears so obviously adapted to effectuate.' In another case (*R. vs. Cope*, 1 Str. 144) a husband and wife and their servants were indicted for conspiring to ruin the

trade of the King's card maker. The evidence against them was, that they had at several times given money to his apprentices to put grease into the paste which had spoiled the cards; but there was no account given that more than one at a time was ever present, though it was proved that they had all given money in their turns; it was objected that this could not be a conspiracy on the ground that several persons might do the same thing without having any previous communication with each other. But it was ruled that the defendants being all of a family and concerned in making of cards, it would amount to evidence of a conspiracy.

Whatever these peculiarities may be regarding evidence of conspiracy, there is, and there can be no relaxation of, the fundamental principle of criminal jurisprudence that the onus of proving an indictment is entirely on the prosecution, and a man must be presumed to be innocent until he is proved to be legally guilty beyond doubt, and if there is any doubt at all he must be given the benefit of it and acquitted, although the greatest suspicion may exist against him. The responsibility and difficulty of Courts of Law in admitting and weighing the evidence adduced in support of a conspiracy are thus greater than in any other case owing to the wide scope and nature of the evidence permissible to be brought before the Court. I may here aptly quote the words of Jenkins, C.J., in *Barindro Kumar Ghosh vs. Emperor*—“There is always the danger in a case like the present that conjecture or suspicion may take the place of legal proof, and therefore it is right to recall the warning addressed by Baron Alderson to the Jury

in *Reg. vs. Hodges*, 2 Lewis C. C. 227 (1838), when he said 'the mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to do some parts of one connected whole ; and the more ingenious the mind of the individual, the more likely was it, in considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.' "

One alone
cannot
conspire.

It follows from the very nature of the offence of conspiracy that there must be at least two to complete the offence. So where two persons are indicted for conspiring together (no other parties being alleged) if one is convicted and the Jury is for the acquitting of the other, the conviction of the one cannot stand. In *Reg. vs. Manning* (42 Q. B. 241) defendant Manning and a person named Hannam were indicted at the Winchester Summer Sessions for conspiring together to cheat and defraud. Lord Coleridge, C.J., tried the case and directed the Jury that they might find one prisoner guilty and acquit the other. This was afterwards held to have been a misdirection and the principle was clearly laid down. "The rule appears to be this," said Mathew J., "in a charge for conspiracy in a case like this when there are two defendants the issue raised is whether or not both the men are guilty, and if the Jury are not satisfied as to the guilt of either then both must be acquitted." This rule has been carried so far that when three were charged jointly with conspiring together and one pleaded guilty, but the other two

were tried and acquitted, even then it was held that the conviction of the confessing accused could not stand—*R. vs. Plummer* (1902, 2 K. B. 397).

It has been held that where several persons are indicted for a conspiracy it is a legal impossibility that any verdict should be found which implies that some were guilty of one conspiracy and some of another (per Stephen J. in *R. vs. Manning*). See also *Emperor vs. Noni Gopal Gupto*, 15 C. W. N. 593.

In one case some cannot be found guilty of one and some of another conspiracy.

As a matter of procedure it would seem that if A be indicted and tried alone for conspiring with others he could be lawfully convicted, though the others referred to or indicted in the indictment had not appeared or pleaded or were dead before or after the indictment was preferred or before pleading not guilty or were subsequently and separately tried. But it is not settled whether in cases of separate trials of the conspirators the acquittal of those tried later would avoid the conviction of an earlier trial and for the same conspiracy (Russell, Vol. I, 147, 148). In consequence of the nature of the crime, it has been held, when an indictment for conspiracy was tried in the Court of King's Bench a new trial granted as to one of several, convicted of conspiracy, operated as a grant of a new trial as to the others convicted, although the grounds for the grant of the new trial applied only to the one. But where of those indicted for conspiracy some were convicted and some acquitted, the grant of a new trial in favour of those convicted did not affect the verdict of acquittal. A new trial can no longer be granted in England on conviction of any criminal offence (7 Edw. VII, c. 23, S. 20).

Effect of the acquittal of some on other conspirators.

but the principles noticed above may have to be considered in the event of an appeal by one conspirator where several have been convicted.

It has been held that a judgment of not guilty against an accused person fully establishes his innocence and the incident in respect of which the charge was brought cannot be used against the acquitted person in a subsequent trial for conspiracy (*Emp. vs. Nonigopal*, 15 C. W. N. 593). But the fact that proceedings for participation in a dacoity against certain individuals were dropped owing to insufficiency of evidence does not preclude a charge of conspiracy in respect of such dacoity being brought against the same persons and others, for the criminality of a conspiracy is distinct from and independent of the act which the conspiracy was intended to promote (*Pulin Behary vs. Emp.*, 15 C. W. N. 1107).

Although a conspiracy has been generally made punishable under Section 121A there are other cases where specific acts, which can only be regarded as a conspiracy to commit an offence, have been made punishable, as pointed out by Bhashyam Ayyangar J. in *Emp. vs. Tirumal Reddi*, 24 Mad. 523. For instance, Section 310 read with Section 311 makes it punishable for any person to be habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with murder. Similarly Section 400 says "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, etc." Section 402 is also of the same nature. These cases, however,

stances
of con-
spiracy
shall be
punish-
able
under
the
Code.

strictly speaking are not punished as conspiracies, but as cases of association for habitual commitment of offences, i.e., the association being of such a character as to lead to irresistible presumption of antecedent guilt. You will note that in all those sections the object of the association is the habitual committing of some offence. Habitual association for the purpose of committing an offence implies a great deal more than a mere agreement. These sections will operate only after several such offences have already been committed. An unlawful assembly may be looked upon as one particular phase of a criminal conspiracy. But there is the distinction that an assembly is a good deal more than a mere criminal agreement. It does not amount to an attempt, it is at any rate one of those preparations which the law has expressly made punishable.

I would, before leaving the subject of conspiracies, refer shortly to its application to trade combinations for the purpose either of creating monopolies and thereby to raise prices or to combinations of workmen in order to raise wages. The law of conspiracy has been invoked in aid of what are termed free trade principles which, as Sir Fitz James Stephen has pointed out, have meant different things at different times. At a certain stage of commercial development in England, free trade ideas have led to the enactment of laws which had the effect of keeping down wages by penalising combinations among workmen and artisans. A statute enacted in 1349 laid down "that every man and woman of what condition he be, free or bond, able in body, and within the age of

Trade
combinations
and combina-
tions of
workmen.

three-score years and not having means of his own, if he in convenient service (his state considered) be required to serve, he shall be bounden to serve him which so shall him require." By a similar statute passed next year the wages of the most important classes of mechanics were fixed. Things have now greatly changed. The struggle between labour and capital has brought out the strength of both sides and the workman is no longer under the heels of the capitalist. Public conscience in America has been aroused against the mischievous effect of the gigantic combinations of capitalists which have enabled them to dominate the market by killing all competition and thereby to place the public entirely at their mercy. The struggle will inevitably lead to a readjustment of the claims of labour and capital in a way that would be fair to both. How far combinations, either of labour or of capital, are legal have been discussed both in England and in America. These cases are important even here, for our workmen have not been slow to imitate the methods of workmen in other parts of the world. We have had very recently strikes among butchers, strikes among ghariwalas and the solution even here cannot be long deferred. It was said by Earle J. in *R. vs. Rowlands* (17 Q. B. 671 and 871) of workmen and of masters: "The intention of the law is, at present, to allow either of them to follow the dictates of their own will with respect to their own actions and their own property, and either, I believe, has a right to study to promote his own advantage or to combine with others to promote their mutual advantage." The general question of the legality of trade combinations was

also discussed in the case of *Moghul Steam Ship Company vs. McGregor Gow & Co.* to which I have already referred. That was a case in which an associated body of traders had combined to create in their favour a practical monopoly of a certain trade, by offering very favourable terms to their customers, with the object of killing competition. The competition was held to be not indictable. Lord Justice Bowen cautioned against pressing the doctrine of illegal conspiracy 'beyond that which is necessary for the protection of individuals or of the public.' "The truth is," said the learned Judge, "that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one with a view to harm him as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause, is evidence (to use the technical expression) of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade Would it be an indictable conspiracy to agree to drink up all the water from a common spring in a time of draught; to buy up by preconcerted action all the provisions in a market or district in times of scarcity (see *R. vs. Waddington*, 1 East 143); to combine to purchase all the stores of a company against a coming settling day, or to agree to give

away articles of trade gratis in order to withdraw custom from a trade? May two itinerant match-vendors combine to sell matches below their value in order by competition to drive a third match-vendor from the street? The question must be decided by the application of the test I have indicated. Assume that what is done is intentional and that it is calculated to do harm to others. Then comes the question. Was it done without just cause or excuse? If it was *bona fide* done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not less because what was done might seem to others to be selfish or unreasonable (see *R. vs. Rowlands*, 17 Q. B. 671). But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyse the circumstances, and to discover on which side of the line each case fell." This decision was approved of by the House of Lords on appeal (1892, A. C. 25) and was followed in *Allen vs. Flood* (1898, A. C. 1) and *Quinn vs. Leathem* (1901, A. C. 495). In *South Wales Miners Federation vs. Glamorgan Coal Co.* (1905, A. C. 239) Lord Lindley said:—"It is useless to try and conceal the fact that an organised body of men working together can produce results very different from those which can be produced by an individual without assistance. Moreover laws adapted to individuals, not acting in concert with others, require modification and extension, if they are to be applied with effect

to large bodies of persons acting in concert. The English law of conspiracy is based on this undeniable truth." Admitting that this is so, the constitution of a conspiracy by a combination of two persons can hardly be said to fall within the reason of the law. That large conspiracies by the very fact of the combination produce consequences of a grave nature may be true. From this point of view the penalisation of large combinations on strikes, be they of the gharriwalas or railway employees or any other class of workmen or even of capitalists may perhaps be defended. But it would be ridiculous to punish two gharriwalas because they agree to go upon a strike. It might interest you to know that a combination between Military Officers of the East India Company to resign their Commissions in order to coerce the Company into granting them certain allowances was held punishable. In an American case Judge Agnew held that a combination between miners in a particular market controlling the coal in that market to hold up the price of coal is indictable at common law. "When competition is left free," said he, "individual error or folly will generally find a correction in the conduct of others. But here is a combination of all the companies operating in the Blossburg and Barclay mining regions and controlling their entire productions. They have combined together to govern the supply and the price of coal in all the markets from the Hudson to the Mississippi rivers and from Pennsylvania to the lakes. This combination has a power in its confederated form which no individual action can confer.....The influence of a lack of supply or the

rise in the price of an article of such prime necessity, cannot be measured. This permeates the whole mass of the community and leaves few of its members untouched by its withering blight. Such a combination is more than a contract; it is an offence." *Morris Run Coal Co. vs. Barclay Coal Co.*, 68 Pa. 173. It has, however, been urged that if there is no fraud or no intimidation, in the means adopted, rulings making penal agreements between particular owners to keep up prices are open to the objections (a) that they would be futile, as combinations may be made without formal agreement by a tacit understanding; (b) that if effective, such rulings would cover every combination to obtain remunerative prices; (c) that they put a prerogative which can be best exercised by individuals, as the exigencies of the time prompt, into the hands of the State; (d) that they establish a standard which is fixed and therefore often harsh and oppressive, in place of one which is elastic, yielding to the necessities of the market. I have discussed this question at some length, not because it is of any importance, so far as the Indian Criminal Law is concerned, but of its possible importance in the future.

Indictment
of conspiracy
how to be
framed.

As regards the form of indictment in a trial for conspiracy, you must remember that in a criminal trial an indictment is the basis of the prosecution; it should enable the prisoner to know what is the charge against him. The Code of Criminal Procedure provides that the charge shall contain such particulars as to the time and place of the alleged offence and the persons, if any, against whom or the thing, if any, in respect of which it was committed

as are reasonably sufficient to give the accused notice of the matter with which he is charged (Section 222), and if the nature of the case is such that those particulars do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose (Section 223).

It has been held that an indictment for conspiracy may be framed in a general form (*R. vs. Gill*, 2 B. and Ald. 204), but there are numerous instances in which the Court has made an order for particulars being furnished to the accused.

Although in stating the object of a conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed, the charge of conspiracy must not be indefinite. The counts must state the illegal purpose and design of the agreement entered into between the defendants with such proper and sufficient certainty as to lead to the necessary conclusion that it was an agreement to do an act in violation of the law (*Amritalal Hazra vs. Emperor*, 19 C. W. N. 676). In *Jogjiban Ghosh vs. Emperor*, 13 C. W. N. 861, the charge was to the effect that the accused on or between certain dates mentioned in the charge, unlawfully and maliciously conspired to cause by an explosive substance, viz., a bomb, an explosion in British India, etc., and Jenkins, C.J., and Mookerji J. held that the charge should have specified with what other persons the accused had conspired. In *Emperor vs. Lalit Mohan*

Chakravarti, 15 C. W. N. 98, the accused were charged with conspiracy with persons known and unknown and it was held that the charge could not be maintained without the persons who were known being definitely named.

I, now return to the general question of abetments. It is inferable from Section 107, clause *thirdly*, as well as from Explanation 2 of that section, that abetment constituted by intentional aiding presupposes that the act aided has been consummated or at any rate commenced. In the other two forms of abetment, *viz.*, abetment by instigation and abetment by conspiracy, the abetment is complete as soon as the instigation or conspiracy has taken place and is quite independent of such consummation or commencement. In this connection it will be useful to consider the provisions of Section 34 and to determine the relative culpability of those who merely abet and those whose case falls within that section. Section 34 provides that '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 it were done by him alone.' Section 114, on the other hand, provides that one 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. It is obvious that both Sections 34 and 114 contemplate cases where an offence has been consummated. The effect of Section 114 seems to be to confine the punishment for abetment, as provided in Sections

Abetment when complete.

Difference between abetment and cases under Section 34.

Sections 34 and 114 distinguished.

109, 115 and 116, to persons who abet an offence and are absent when the offence abetted takes place, those who are present being deemed as principals. Cases under Section 114 must fall under Section 107 and have the additional element of presence at the commission of the crime. Cases falling under Section 34 are, however, distinct from cases of abetment, for otherwise the section would apparently serve no useful purpose.

No illustration is given to Section 34, but apparently it incorporates the principle laid down in 1838 in the case of *Reg. vs. Cruse* (8 C. and P. 541), which, in Stephen's Digest, Article 39, has been reproduced almost in the words of Section 34 and illustrated thus:—

"A constable and his assistants go to arrest *A* at a house in which are many persons. *B, C, D,* and others come from the house, drive the constable and his assistants off, and one of the assistants is killed, either by *B, C, D,* or one of their party. Each of their party is equally responsible for the blow whether he actually struck it or not." From the general accuracy of the Indian Penal Code and the care taken in defining offences to keep in view all their distinct phases, we may presume that Sections 34 and 114 were not intended to overlap.

The definition of abetment shows that two distinct acts are contemplated, the act abetted and the act constituting the abetment; the one is detached from the other with a clear line of demarcation between them. The idea of joint action which is an essential element in a case under Section 34 is

Act of abetment distinct from act abetted.

excluded by the very definition of abetment. In a case under Section 34 there is no question of abetment. It clearly excludes the case in which one commits an offence and another merely instigates or aids. In the illustration I have given all come out together to effect a common purpose. It is uncertain who actually caused the death of the constable, and even where this could be ascertained it is immaterial, for it was a mere matter of accident what part each played in the transaction. All were prepared to commit the offence and take such part in it as circumstances required. Take again the case of several persons going out to commit a theft, some of whom actually move the articles, some stand by ready to help, whilst others wait some way off to give alarm if any one comes, every one has committed theft and there are no grounds for any differentiation between them. So also in a case of murder there is no reason to differentiate between persons of whom one holds the victim by the legs, another by the head, whilst the third applies the knife to the victim's throat. In such a case the knife with which the throat was cut might have been as well in the hand of *A* as in that of *B*, and Section 34 applies to all of them. Although under the English law, in the case of theft, the actual mover of the articles would be the principal in the first degree and the others would be principals in the second degree, the distinction even under that law is without a difference. Under Section 34 all of them will be considered *participes criminis* to the same extent and in the same degree, and no distinction between abettors and principals would arise in such cases.

Where, however, some are prepared only to facilitate the commission of the crime and to stop there and to take no further part in the actual commission of the crime they are only abettors. If present they will be dealt with under Section 114 and if absent under Sections 109, 115 or 116, as the case may be.

Mr. Justice Stephen of the Calcutta High Court, in discussing the question of the necessity and utility of Section 34 in a letter published in the *Calcutta Weekly Notes*, Vol. 18, page 222N, takes a case somewhat of a different nature. He thinks that where *A*, *B* and *C* all fire at *D* and kill him, and it is found that *B* and *C* missed, and it was the shot fired by *A* that caused death, the case does not fall under Section 34. If it does not fall under Section 34 it can hardly be said to fall under Section 107 or under Section 114. In such a case as in the illustrative cases I have discussed, all go out to effect a common purpose, and it is purely a matter of accident that death is actually caused by one rather than the other. In most cases it would be impossible to find out whose shot proved fatal. The Court in such a case may very well decline to consider who is actually responsible for the consequence. It may, however, be urged that if in the illustration given the criminal act mentioned in Section 34 is the causing of death, it was caused by *A* alone, and it cannot be said that the criminal act was done by all the three. From this point of view the case may not be covered by Section 34, but if so, the case of those who missed would not come under any of the three forms of abetment in Section 107 and would go unpunished. It may

Necessity
of Section 34
discussed.

in some cases afford evidence of a conspiracy and thereby the case may be brought under abetment, but that is a different matter altogether. If there is any force in the argument against the application of Section 34 those that missed may be held guilty of an attempt to commit murder, and the case would then fall under Section 307 of the Code. But even as against this it may be urged that there is no reason why those who missed should receive the lesser punishment. But this argument may be urged with equal force against the whole policy of Section 307. The inclination of my mind is to treat the whole firing as one act and to hold every one jointly liable for the consequence in which case Section 34 would apply. It would, as I have already said, be idle in such a case to require evidence to show who aimed correctly and who did not. The participants in the crimes would in most cases not know it themselves.

In *Nibaran Chandra Ray and others vs. King-Emperor* (11 C. W. N. 1085), their Lordships Mitra and Fletcher JJ. observed :—

“If, however, two persons are found under circumstances as assumed in the hypothetical case with gun in their hands, and they have been acting in concert, or that each was an assenting party to the action of the other, the criminal act done by one must be presumed to have been done in furtherance of the common intention, and Section 34 of the Indian Penal Code may be invoked to impose penal liability on any one of the persons in the same manner as if the act was by him alone.”

In the opinion I have expressed that Section 34 relates to joint acts directed towards a

common purpose and forming as it were, a single transaction and thereby excluding cases of abetment, I am also fortified by the observations of Holmwood and Sharfuddin JJ. in the case of *Manindra Chandra Ghose vs. King-Emperor* (18 C. W. N. 580). Their Lordships observed : “Section 34 does not involve abetment and therefore does not imply any conspiracy and does not require proof that any particular accused was responsible for the commission of the actual offence.” The same view was held in *Keshwar Lal Shaha vs. Girish Chandra Dutt* (29 Cal. 496). A servant had received money for *ganja* sold by his master in contravention of the terms of his license, both being present at the sale. Prinsep and Stephen JJ. held that Section 114 did not apply and that the servant was guilty of the offence of selling *ganja* without a license by the operation of Section 34.

As I understand Section 114, it only means that if a man abets an act and is present at the commission of the act abetted, he is punishable as principal, but if he is absent he is only punishable as an abettor. The words in Section 114, “*who, if absent, would be liable to be punished as an abettor,*” have been differently interpreted, and it has been said that there must be an antecedent abetment, and a subsequent presence at the commission of the act which had been previously abetted. This was apparently the view taken in the case of *Ram Ranjan Ray vs. King-Emperor* (19 C. W. N. 28). Before coming to this case I should like to draw your attention to several earlier cases on the applicability of Section 114.

Queen vs. Mussamat Niruni and Moniruddin (7 W. R. 49) is an important case on the interpretation of this section. Moniruddin was convicted of having abetted the murder of one Bulai, he being present when the murder was committed. After rejecting a confession of Moniruddin the learned Judges (Jackson and Glover JJ.) were of opinion that all that was left to prove Moniruddin's complicity were—

- (a) The fact of his intrigue with the wife of the deceased;
- (b) The statement of a witness who says he saw Moniruddin running away from the spot.

Upon these facts they held that a case under Section 114 had not been made out. The learned Judges observed:

“The Court of Sessions has not convicted the prisoner of the murder, but of abetment and being present at the commission of the murder so as to make him liable (under Section 114, Indian Penal Code) to be deemed to have committed the murder. It is clear that to bring the prisoner within this section it is necessary first to make out the circumstances which constitute abetment, so that ‘if absent’ he would have been ‘liable to be punished as an abettor,’ and then to show that he was present when the offence was committed.

“Now we find no evidence of any fact or facts which would amount to abetment of either kind. The only fact really in evidence against the prisoner would support a case of suspicion, not of the strongest kind, against the prisoner Moniruddin,

that he had himself committed the murder, if we had not the admission of Niruni herself that the deed was her own.

“The whole case for the prosecution appears to point to Moniruddin as a principal offender and not a mere abettor, but he has not been convicted or even charged as such, and whatever may be the inclination of our minds as a matter of private opinion, we cannot now direct the prisoner to be tried on that charge.”

In this case there was no evidence as to any act constituting abetment and mere presence of Moniruddin at the occurrence, without some evidence as to his attitude towards the crime and the effect of his presence on the actual perpetrator of the crime, was rightly held to be insufficient to constitute abetment.

If, however, there were evidence that Moniruddin and the woman Niruni had gone together to commit the murder and that Moniruddin's presence had the effect of encouraging the woman or to facilitate the commission of the murder, he would have been clearly an abettor. On the other hand if it could be shown that Moniruddin and the woman went together to commit the murder and Moniruddin took any part in its actual commission, he would have been liable under Section 34.

This case was followed in *Abhi Missir vs. Lachmi Narayan* (27, Cal. 566). That was a case in which grievous hurt was caused to a police officer by Abhi Misser and a number of other persons. The finding of the Sessions Judge was that if the accused all joined together to beat the Inspector, so as to cause him grievous hurt, all

would by the provision of Section 114 of the Indian Penal Code be guilty of an offence under Section 325. The learned Judges (Prinsep and Stanley JJ.) observed :

“ We think that the law has been properly expressed in the case of *Queen vs. Mussamat Niruni and another*, in which it was held that to bring a prisoner within Section 114 of the Penal Code, it is necessary first to make out the circumstances which constitute abetment, so that ‘ if absent ’ he would have been liable to be punished as an abettor ; and then to show that he was also present when the offence was committed. Under such circumstances we think that the conviction and sentence passed by the Magistrate and confirmed by the Sessions Judge should be set aside.”

The facts of this case are the same as those in the illustration to Article 39 in Stephen’s Digest taken from *Reg. vs. Cruse*, to which I have already referred.

The decision is right so far as it holds that the accused having all joined in the assault on the Sub-Inspector there was no question of abetment or of the applicability of Section 114. In explaining, however, a previous case (*Queen-Empress vs. Chhatardhari*, 2, C. W. N. 49), the learned Judges say that it was not intended in that case to lay down, that mere *presence as an abettor of any person would under the terms of Section 114 render him liable for the offence committed*, and that it was found in that case that the *abetment had been committed before the actual presence of the accused at the commission of the offence abetted*. From a reference to the facts of that case it will appear that the mere presence of one of the accused had the effect of

facilitating the commission of the crime and constituted such encouragement as rendered the act at least one of abetment, even if it fell short of the requirements of Section 34, and the decision was quite correct and consistent with the case law both here and in England. That case required no explanation in this case, but the learned Judges in trying unnecessarily to differentiate it, made the observations I have quoted which are not warranted by the words of Section 114. Although these observations do not seem to have been expressly relied on in Ram Ranjan’s case, it is not unlikely that the ball set rolling by Prinsep and Stanley JJ. was taken up by Jenkins, C.J., and his colleague.

In *Hansa Pathak vs. Banshi Lal Dass* (8, C. W. N. 519) the accused was found to have been a member of an unlawful assembly which went armed with *lathies* and axes and looted the house of the complainant. The accused himself did not remove any property nor did he make any preparation for committing any theft or aiding any one in the commission of the theft. He was convicted under Sections 114 and 379 of the Indian Penal Code. The learned Judges Bannerji and Harrington JJ. held that on these facts the accused if he had been absent would not have been punishable as an abettor. His connection with the offence of theft arose from his being a member of the unlawful assembly, the common object of which was to commit theft and some members of which assembly actually committed theft. That being his only connection with the case, Section 114 did not apply.

If this reasoning is correct, then if there were not more than five in the assembly, and the accused who is said to have been the leader of the party had, with three others, gone out armed to loot the complainant's house and the house were looted, the accused standing aside and taking no part, he could not be convicted of any offence at all. There being no unlawful assembly, Section 149 would not apply, and in the absence of a joint action in furtherance of the common intention of the others, Section 34 also would not be applicable. I do not think the view of law taken in this case is correct. There may be circumstances under which mere presence may amount to abetment. The accused, it was found, shared the common intention of his party and was their leader. He was with them. His presence alone, whilst he approved what was going on, was sufficient to constitute him an abettor.

I have the authority of Wharton, Article 211, in support of this view. The learned author says :

“Although a man be present while a felony is committed, yet if he take no part in it, and do not act in concert with those who commit it, he will not be a principal in the second degree, merely because he does not endeavour to prevent the felony or apprehend the felon. Something must be shown in the conduct of the bystander which indicates a design to encourage, incite, or in some manner afford, aid or consent to the particular act; though when the bystander is a friend of the perpetrator, and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an

encouragement. When presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is *prima facie* not accidental, it is evidence, but no more than evidence, for the jury. It is not necessary, therefore, to prove that the party actually aided in the commission of the offence; if he watched for his companions in order to prevent surprize, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law he was aiding and abetting.”

I now come to the case of *Ram Ranjan Ray vs. King-Emperor* (19, C. W. N., 28) to which I have referred more than once. The zemindar Ram Ranjan had sent for one of his tenants and had assaulted him by one of his servants for not agreeing to pay an enhanced rent; while this was going on, the uncle of the tenant came and protested whereupon the zemindar gave order to the servant saying ‘*maro sala ko,*’ and the latter wounded the tenant by kicking him first and then striking him with a *lathi* on the head with the result that he died. The zemindar was convicted under Section 302 read with Section 114, Indian Penal Code, but it was held by Jenkins, C.J., and N. R. Chatterjee J. that the conviction could not stand for this single reason that ‘the only abetment charged necessarily required the presence of the accused, while to come under Section 114 the abetment must be complete apart from the presence of the abettor.’

I confess I fail to appreciate the force of the learned Judges' reasonings in this case. Here was a man who had ordered his servant to beat the deceased (*maro sala ko*). The servant on the command of his master assaulted the deceased and caused his death. If it were found that he did not mean that the deceased should be killed outright or that the death of the deceased was not a probable consequence of the order, the master might have been held guilty of a lesser offence, but there seems to be no ground for holding that the case did not fall under Section 114, because the only abetment charged "necessarily required the presence of Ram Ranjan while to come within Section 114 the abetment must be complete apart from the presence of the abettor." The conclusion seems to be wholly unwarranted. Why the words "*maro sala ko*," which constitutes the most common form of incitement in this country, should have required the presence of the abettor is not intelligible, and it is equally unintelligible why it should be necessary in order to bring a case under Section 114 to prove a previous abetment away from the scene of occurrence and a subsequent presence at the occurrence itself. I do not see anything in the words of Section 114 to justify such a view.

In *Emperor vs. Amrita Govinda* (10, Bom. H. C. R., 497) it was held that if the abettor of an offence is on account of his presence at its commission to be charged under Section 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.

In *Queen vs. Shub Chandra Mundal* (8, W. R. Cr. 59) it was held that when a number of armed men came and carried off a crop they must, even if they took no part in the actual taking, be considered guilty of the substantive offence under Section 378. Leaving aside the question of interpretation, it may be useful to enquire whether, if the view taken by Jenkins, C.J., is correct, there is any reason for separately dealing with the case of a person who having abetted an offence is subsequently present at its commission. Such a person either takes an active part in the commission of the offence or does not. If he does, he comes within the scope of Section 34 and is dealt with as a principal. If he does not and his presence amounts to encouragement or aid, he is an abettor and his case would fall under Section 109, and here also he receives exactly the same punishment. But if he is present and his case does not fall under Section 34 or 114, his presence may be disregarded, and he will still be liable under Section 109 by reason of the antecedent abetment. It is clear that in a case falling under Section 114 the provisions of sections 115 and 116 can have no application, for there can be no presence at the commission of a crime in a case where the crime is not committed at all. For these reasons the necessity of Section 114 even on the interpretation placed on it by Jenkins, C.J., is not clear. This, however, is a difficulty which is not removed even if the other interpretation which I have suggested is accepted, and

it seems to me that upon any view of the interpretation of Section 114 its utility cannot be clearly demonstrated. Why make separate provision for an abettor present at the commission of a crime when even if he were absent his punishment would have been the same under Section 109. It may perhaps be suggested that Section 114 is not subject to any special provision in the Code relating to the punishment of an abettor, whereas Section 109 is. The explanation seems plausible at the first sight, but an examination of these special provisions show that in no case there is any separate provision for the punishment of abetment where the offence abetted is itself punishable by the Code. The only special cases, it would be observed, are those in which the original offence is dealt with under other laws, or is not by its very nature punishable at all. The special provisions are, so far as I can gather, the following, *viz.*, those relating to the abetment of offences against the State and His Majesty's Army and Navy (in Chapters VI and VII of the Code) and abetment of suicide (Sections 305, 306).

Taking the case of suicide first, neither Section 114 nor Section 109 can have any application for suicide cannot and is not punishable as a substantive offence except where it is a mere attempt to commit it (Section 309). To that Section 109 will apply and so will Section 114. In the other cases Section 109 will not be applicable by reason of the special provisions, and Section 114 will be equally inapplicable for there is no punishment prescribed in the Code for the substantive offence, those being offences under military laws

and the provisions of Section 5 show that the Code does not affect any of the provisions of any act for punishing mutiny and desertion of officers and soldiers in the service of His Majesty, these being exactly the offences for the abetment of which there are special provisions in the Code. Although I have expressed a doubt as to the correctness of the view expressed non-judicially by Stephen J. regarding the scope of Section 34, I think, the conclusion arrived at by him, that Section 114 is a surplusage is correct and the explanation which he has suggested seems extremely probable. The only difference between Sections 109 and 114, as pointed out by the learned Judge, is that in one case the accused is punished as if he had done a thing and in the other as being deemed to have done it.

Section 34 has also to be differentiated from Section 149. One patent difference is, no doubt, the necessity for five persons or more to constitute an unlawful assembly, in order to bring into play the provisions of Section 149. There are, however, other more important and less obvious differences. In the case of Section 149 there need be neither joint action nor abetment, but all that is required is a common object to render liable one member of an unlawful assembly for an act done by another in prosecution of such common object. Here also joint action tending to one particular consequence is excluded. In *Riazuddin vs. King-Emperor* (16, C. W. N., 1077) five accused were in ambush and attacked the complainant simultaneously. Reaz caught hold of the complainant's neck and threw him down on the ground. Reaz, Khoaz and Tamiz beat him and Khoaz broke his 8th rib,

Section 34
distinguish-
ed from
Section 149.

The other two were standing close by with *lathies* in their hands. The accused were originally charged under Sections 147 and 325 read with 149, Indian Penal Code. The Sessions Judge on appeal convicted the accused under Section 325 only. The conviction was set aside and Holmwood and Imam JJ. observed as follows:—

“ When a Court draws up a charge under Section 325 read with Section 149, it clearly intimates to the accused persons that they did not cause grievous hurt to anybody themselves, but that they are guilty, by implication, of such offence, inasmuch as somebody else in prosecution of the common object of the riot in which they were engaged did cause such grievous hurt.

“ *Section 34 can only come into operation where there is a substantive charge of causing grievous hurt.* The considerations which govern Section 34 are entirely different and in many respects the opposite of those which govern Section 149, and it is now settled law that when a person is charged by implication under Section 149, he cannot be convicted of the substantive offence.”

You may note that in Section 34 as it was originally framed the words ‘in furtherance of the common intention of all’ did not occur. Sir Barnes Peacock in *Queen vs. Gora Chand Gopi* (5, W. R. Cr. 45) held that mere presence of persons at the scene of an offence is not *ipso facto* sufficient to render them liable to any rule such as Section 34 enunciates, and that ‘the furtherance of a common design’ was an essential condition before such a rule applied to the case of an individual person.

The law was accordingly amended by Act XXVII

of 1870 and the words referred to were added.

It is noticeable that whilst Section 34 speaks of acts in furtherance of the common intention of all, Section 149 speaks of acts in prosecution of the common object of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of that object. Mahmood J. in the case of *Dharam Rai* (7, A. W. N., 237) differentiated the two sections thus:—

“ While Section 34 limits itself to the furtherance of the common intention Section 149 goes further, inasmuch as it renders every member of an unlawful assembly guilty of the offence when it is likely that such an offence might have been committed in prosecution of the common object. I have referred to this section to show that it is more strongly worded than Section 34, and even upon this section a Full Bench of the Calcutta High Court in *Queen vs. Sabed Ali* (11, B. L. R., 347, F. B.) held that any sudden and unpremeditated act done by a member of an unlawful assembly would not render all the other members liable therefor, unless it was shown that the assembly did understand and realize either that such offence would be committed or was likely to be necessary for the common object.”

In the case of *Nibaran Chandra Ray* (11 C. W. N. 1085) Mitra and Fletcher JJ. expressed the opinion that ‘Section 149 of the Indian Penal Code lays down the same principle as Section 34, with this difference that Section 149 refers to an assembly of five or more persons, while Section 34 has no limitation as

to the number of persons who may have been acting in pursuance of a common intention.' With all respect for the learned Judges, it seems to me, that this is only a part and the least important part of the difference between the two sections. As I have pointed out, Section 34 deals with joint action in the furtherance of a common intention, and Section 149 only insists on a common object and an act done by one in prosecution of the common object of all. It does not insist on any act at all by those members of the assembly who are to be dealt with under it. In fact where there is joint action or any participation by any one in the actual commission of the offence, Section 149 as pointed out by Holmwood and Imam JJ. would cease to apply.

What constitutes presence.

What constitutes presence is a matter of some difficulty. Presence is not a question of mere proximity in point of time or space. Suppose *A* incites *B* to assault *C* by crying 'maro maro' when *C* is passing by. *B* pursues *C* and overtakes him at a distance of 500 yards from the place of instigation and causes hurt to *C*. Is *A* present or absent within the meaning of Section 114? The true test seems to be whether *A* was so situated with reference to *B* or *C* at the time of the assault that he could effectively help *B* or take part in the assault on *C*. If the answer is in the affirmative, *A* is present. If in the negative, he is absent. The law is thus stated by Russell (p. 108, vol. I)—

"The presence need not be a strict actual immediate presence, such a presence as would make him (the abettor) an eye-witness or ear-witness of what passes, but may be a constructive presence.

So that if several persons set out together or in small parties upon one common design, felonious or unlawful in itself, and each takes the part assigned to him; some to commit the fact, others to watch at proper distances and at stations to prevent surprise, or to favour, if need be, the escape of those more immediately engaged; they are all, provided the fact be committed, in the eye of the law, present at it; for it was made a common cause with them; each man operated in his station at one end and the same instant, towards the same common end, and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to ensure the success of their common enterprise."

The point was considered in several English cases. *R. vs. William Stewart and Ann Dicken* (Russell and Ryan, 363) was a case in which prisoners *S* and *D* had agreed to sell forged Bank notes to one *P* and had met him several times and negotiated with him. Ultimately by arrangement *D* went to a place with the forged notes and *S* took the purchaser near her and pointing her out from a distance of about 100 yards said 'you see *D* there, she will deliver you the goods and I wish you good luck' and left. The purchaser and *D* then walked together a short distance and *D* brought out the forged notes from her reticule and made them over to the purchaser. The interval between the time when *D* was pointed out by *S* and the time of delivery was about three minutes. It was not shown whether the prisoners were or were not in sight of each other when *D* delivered the notes to the purchaser, nor which way he had

gone. It was held that *S* was only an accessory before the fact and not being present could not be treated as principal. The case is perhaps open to doubt.

The case, *Regina vs. Howell* (9 C. and P., 437), is authority for the proposition that those who are present when a felony is committed and abet the doing of it are principals in the felony. Where persons combine to stand by one another in a breach of the peace with a general resolution to resist all opposers and in the execution of their design a murder is committed, all of the company are equally principals in the murder, though at the time of the fact some of them were at such a distance as to be out of view. The facts were these :

A mob of 2,000 or 3,000 persons met at Hollowayhead. The prisoner Wilkes addressed the mob in violent language. He said : " Too much time has been lost in speaking. The time was now come to act, they must act now decisively ; there were 200,000 men completely armed ready to march and join them at Birmingham at a moment's notice." Wilkes led the mob, who were armed with sticks, iron rods, etc., in a direction towards a police office, some of the mob from time to time leaving and others joining. The mob then went and attacked the house of Messrs. Bourne, wholesale and retail grocers, where they broke the shop shutters, destroyed the windows, got into the warehouse, brought out the goods and burnt them, and then set fire to the house.

There was no evidence to show that the prisoner Wilkes was present at the attack on Messrs. Bourne's house though it was proved that when

with the mob at an earlier period he had pointed to the house. On an indictment for feloniously demolishing the house of Messrs. Bourne, it was held that on the state of facts Wilkes ought not to be convicted of the demolition, as it did not sufficiently appear what the original design of the mob at *H* was, nor whether any of the mob who were at *H* were the persons who demolished *B*'s house. In coming to this decision Littledale J. relied on the passage from Russell already quoted and on the following passage from Hawkin's Pleas of the Crown :

" I take it to be settled at this day, that all those who assemble themselves together with a felonious intent, the execution whereof causes either the felony intended or any other to be committed, or with an intent to commit a trespass, the execution whereof causes a felony to be committed, and continuing together, abetting one another, till they have actually put their design in execution ; and also all those who are present when a felony is committed, and abet the doing of it, as by holding the party while another strikes him ; or by delivering a weapon to him that strikes, or by moving him to strike, are principals in the highest degree, in respect of such abetment, as much as the person who does the act, which in judgment of law is as much the act of them all, as if they had all actually done it."

When a person acts through a material agent, such as poison, which does not require the presence of a guilty director, he is constructively present ; nor is it necessary to constitute presence that the party should be actually present, an ear or eye

Persons acting through a material agent.

witness, in order to make him principal in the second degree.—(Wharton).

If a person aiding and abetting with the intention of giving assistance, is near enough to afford it, should the occasion arise, he is constructively deemed to be present. Such constructive presence is sufficient to make an accessory liable as principal in the second degree.

Actual presence is not necessary if there is direct connection between the actor and the crime, thus a confederate, who aids the commission of a robbery by a signal on a distant hill notifying approach of the parties to be attacked, is a principal in the robbery.

The question as to what constitutes presence is interesting, but having regard to the fact that the punishment of an abettor is ordinarily the same as that of the actual perpetrator of the crime, this question as well as questions relating respectively to the applicability of Section 109 or 114 is more or less of an academic interest.

I shall now deal with some other phases of the law of abetment. It is not necessary that the person abetted should be capable of committing an offence. It is expressly stated in Section 108, Explanation 3, that it is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge, as that of the abettor, or any guilty intention or knowledge at all. One may employ a child or a lunatic to commit an offence and he cannot escape liability by pleading that the person he has abetted is not punishable, not being capable of committing a crime—*Reg. vs. Manley*

(1 Cox 104). In such a case the innocent agent is only the instrument with which the abettor effects his illegal act. If we look to the reason of the thing, the so-called abettor is in reality a principal. The position is exactly the same as if a person were to let loose a wild animal on another. If this is not abetment, why should the other be? Nor is it different from the case of a man who pushes and throws another over a third person and causes hurt to the latter. In such a case there is a double offence, one against the man pushed and the other against the man on whom he is pushed. The man pushed is only the instrument used for the purpose of causing hurt.

Apart from incapacity to commit a crime an agent may be innocent by reason of the want of *mens rea*. The case of a nurse who is asked by a physician to administer poison to a patient telling her that it was medicine is an instance in point.

The person abetted may do the act with an intention or knowledge different from the intention or knowledge of the abettor, and in such a case each will be dealt with from the point of view of his intention or knowledge and the intention or knowledge of one will not be imputed to the other. *A* orders *B* to beat *C* with a *lathi*; *B* uses the *lathi* and causes hurt. The *lathi* had an iron knob of which *A* was not aware. *A* cannot be held guilty of the offence of causing hurt with a dangerous weapon under Section 324, although *B* would be guilty of an offence under that section.

The act done under the influence of the abetment may be different from the act contemplated by the abettor; in that case, the abettor is only

Liability for probable consequence of abetment.

liable for the act which he intended to abet and not for the act actually done, unless the latter is a probable consequence of the act abetted (Sections 111 and 113). Where *A* instigates *B* to murder *C*, but *B* by mistake murders *C*'s twin-brother, *A* is liable, for the mistake was natural and might have been anticipated, but there would have been no liability if *B* had killed *C* intentionally and without any mistake regarding his identity.

But the fact that a crime has been committed in a manner different from the mode which the abettor had advised or instigated, will not preclude liability. Where there is compliance in substance with the instigation of the accessory, but the variation is only in circumstances of time or place or in the manner of execution, the accessory will be involved in his guilt. If *A* commands *B* to murder *C* by poison and *B* does it by shooting him, *A* is accessory to the murder. For the murder of *C* was the object principally in contemplation and that is effected. It is not necessary that the specific material or machinery contributed or counselled by the abettor should be used by the principal. Although there is no liability where an entirely different offence is committed, there is liability if the act committed was a probable consequence of the abetment. Section 111 of the Code provides:—

“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

Act abetted different from act committed.

the influence of the instigation, or with the aid or in pursuance of the conspiracy which constituted the abetment.”

The following instances may be quoted as illustrations:—

If *A* advises *B* to rob *C* and in robbing him *B* kills him either upon resistance made or to conceal the fact or upon any other motive operating at the time of the robbery, in such a case *A* is accessory to the murder as well as to the robbery.

If *A* solicits *B* to burn the house of *C* and *B* does it accordingly, and the flames taking hold of the house of *D*, that likewise is burnt, *A* is accessory to *B* in the burning of the houses both of *C* and of *D*. This is based upon sound reason for a man must be held responsible not only for his acts, but also for the consequences which he knows to be likely to ensue from them. A person is said to cause an effect voluntarily when he causes it by means whereby he intended to cause or by means which at the time of employing those means he knew or had reason to believe to be likely to cause it (Section 39, Indian Penal Code).

More difficult questions, says Russell, arise when the principal by mistake commits a different crime from that to which he was solicited by the accessory. If *A* orders *B* to kill *C* and he by mistake kills *D*, will *A* be accessory to the murder? Applying the test in Saunders' case (Plowd 475) it may be doubtful whether he will be. Saunders with the intention of killing his wife by the instigation of one Archer had given her a poisoned apple to eat. The wife having eaten a small part of it gave the remainder to their child. Saunders

(making a faint attempt to save the child whom he loved and would not have killed) stood by and saw it eat the poison of which it soon afterwards died. It was held that though Saunders was clearly guilty of the murder of the child, yet Archer was not accessory to that murder.

“*B* is a stranger to the person of *C*; *A* therefore takes upon him to describe him by his stature, dress, age, complexion, etc., and acquaints *B* when and where he may probably be met with. *B* is punctual at the time and place, and *D*, a person possibly in the opinion of *B* answering the description, unhappily comes by and is murdered, upon a strong belief on the part of *B* that this is the man marked out for destruction. Here is a lamentable mistake—but who is answerable for it? *B* undoubtedly is; the malice on his part *egreditur personam*. And may not the same be said on the part of *A*? The pit which he with a murderous intention dug for *C*, *D* through his guilt fell into and perished. For *B* not knowing the person of *C* had no other guide to lead him to his prey than the description *A* gave of him. *B* in following this guide fell into a mistake, which it is great odds any man in his circumstances might have fallen into.” *A* was therefore held answerable for the consequence of the flagitious orders he gave, since that consequence in the ordinary course of things was highly probable. (Fost, pp. 370, 371).

The case of *Queen vs. Mathura Das* (6 All. 491) is important on the question of the liability of the abettor when one act is abetted and a different act is committed and generally on the interpretation of Section 111.

One Hira Sing accompanied by his servant was carrying a lot of money with him. On their way they were murdered by three men. It appears that the accused Mathura Dass and Chattarjit knew of the design of these men to rob Hira Sing, that one of them gave information of the departure of the deceased with the money, and that after the murder was committed by the three men, they took a share of the money robbed from the deceased. Mathura Das and Chattarjit were convicted by the Sessions Judge of abetment of murder. The judgment of Straight J. is worth quoting *in extenso* :—

“With respect to Mathura Das and Chattarjit it is not easy to arrive at a conclusion. The question that I have to ask myself with respect to these two accused is ‘Can I properly adopt the Judge’s view that both these persons must be held guilty of abetment of murder since the murder was a probable consequence of the intention known and abetted?’ I do not think I can and I will explain why. It seems to me that the Judge has scarcely appreciated how close and strict are the tests that should be applied to the interpretation of a penal statute, and specially of a section such as section 111 of the Penal Code, for construed loosely, it is difficult to see to what limits it might be stretched. Now, it is clear law, that if one man instigates another to perpetrate a particular crime, and that other, in pursuance of such instigation, not only perpetrates that crime, but in the course of doing so commits another crime in furtherance of it, the former is criminally responsible as an abettor in respect of such last mentioned crime, if it is one which, as a reasonable man, he must, at the time of

the instigation, have known, would, in the ordinary course of things, probably have to be committed in order to carry out the original crime. For example, if *A* says to *B* 'You waylay *C* on such and such a road and rob him, and if he resists, use this sword, but not more than is absolutely necessary,' and *B* kills *C*. *A* is responsible as an abettor of the killing, for it was a probable consequence of the abetment. To put in plain terms the law virtually says to a man 'If you choose to run the risk of putting another in motion to do an unlawful act, he, for the time being, represents you as much as he does himself; and if in order to effect the accomplishment of that act, he does another which you may fairly, from the circumstances, be presumed to have foreseen would be a probable consequence of your instigation, you are as much responsible for abetting the latter act as the former.' In short, the test in these cases must always be whether, having regard to the immediate object of the instigation or conspiracy, the act done by the principal is one which, according to ordinary experience and common sense, the abettor must have foreseen as probable. The determination of this question as to the state of a man's mind at a particular moment must necessarily always be a matter of serious difficulty, and conclusions should not be formed without the most anxious and careful scrutiny of all the facts." His Lordship altered the convictions of the two accused to abetment of robbery.

If *A* commands *B* to burn *C*'s house and he in so doing commits a robbery, *A*, though accessory to the burning, is not accessory to the robbery, for the

robbery was a distinct act and not a probable consequence of the burning. And if *A* counsels *B* to steal goods of *C* on the road and *B* breaks into *C*'s house and steals them, then *A* is not accessory to the house-breaking but is accessory to the stealing.

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 (Section 108, Explanation 2.) But under the Code such abetment is punishable only in the graver offences referred to in Sections 115 and 116. The offence is complete with the instigation, notwithstanding that the person abetted refuses to do the thing or doing it, the expected result does not follow. It is also immaterial that the means which are intended to be employed are such that it is physically impossible that the effect requisite to constitute the offence should take place.

Advice, before it operates in any way, if countermanded, excludes responsibility, but if after starting the ball the abettor changes his mind and tries when too late to stop the act his responsibility does not cease. To exculpate himself he must have acted in time and done everything practicable to prevent the consummation; and then even if it takes place and is imputable to some independent cause he is not liable.

If an abettor changes his mind after having gone as far as an attempt, he is indictable for the attempt.

Unlike attempts the entire inadaptability of the means is no defence. For instance, if *A* incites *B* to cause the death of *C* by invoking on him the

Offence is complete with the instigation.

Countermanded advice.

Abettor changing his mind.

course of God, he is guilty as an abettor. The proposition perhaps requires qualification and it may largely depend on the question whether the instigation had reference directly to the means to be adopted or to the consequence to be aimed at. What I mean is this. If *A* goes to a witch an old woman and tells her to kill *B* by incantation knowing full well that the witch can take no other means, I doubt if *A* can be held guilty of abetment of murder. But suppose *A* goes to *B*, a *lathial*, and tells him 'I want you to kill *B* and you may do so by invoking the curse of God on him.' The instigation is really an instigation to commit murder and the means proposed is only a suggestion, and *B* may effect the purpose by adopting a different means. In such case *A* ought to be held criminally liable. On the analogy of attempts a distinction between partial and absolute inadequacy of means would make the law more consistent.

When the act abetted has taken place the causal connection between the abetment and the act abetted must be shown. Section 109 insists that the act abetted should take place in consequence of the abetment. It is explained that 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. Where the causal connection is established, it is immaterial how long a time or how great a space intervenes between the instigation and the consummation, provided there is an immediate causal connection between the instigation and the act.

Causal connection between abetment and act committed.

In order to constitute abetment it is not necessary that there should be any direct communication between the abettor and the principal. It is an incontrovertible principle of law, says Russell, that he who procures the commission of a felony is a felon, and when he procures its commission by the intervention of a third person, he is an accessory before the fact; for there is nothing in the act of commanding, hiring, counselling, aiding or abetting which may not be effected by the intervention of a third person without any direct immediate connection between the first mover and the actor. Thus in the case of the Earl of Sommerset (2 St. Tr. 951) who was indicted as an accessory before the fact to the murder of Sir Thomas Overbury, the evidence showed that he had contributed to the murder by the intervention of his Lady and of two other persons who were themselves no more than accessories without any sort of proof that he had ever conversed with the person who was the only principal in the murder or had corresponded with him directly by letter or message. The accused was found guilty.

Direct communication not necessary.

The publication of obscene literature is a crime and a newspaper publishing an advertisement for the sale of obscene books is guilty of abetment as the advertisement is likely to encourage their sale. An article or letter to a newspaper may be incitement of murder within the meaning of the Offences against the Person Act (24 and 25 Vict., C. 100, S. 4), though no particular person be named, if the incitation be directed against the members of a particular class, *R. V. Most* (7, Q. B. D. 244).

Counselling
must be
special.

The view has prevailed in America that counselling must be special. Free love publications will not constitute abetment of sexual offences which the publications may have stimulated.

Communication containing incitement must be proved to have reached the person intended to be incited but it is not necessary to prove that his mind was affected by it. (R. V. Fox, 19 W.-R. (Eng.) 109; R. V. Krause 1902, 66 J. P. 121; per Lord Alverstone, C. J.).

If communication cannot be proved it may constitute an attempt to commit the crime (R. V. Krause).

A letter of incitement which did not reach the person (R. V. Banks, 12 Cox 393) or which he did not read (R. V. Ransford, 13 Cox 9) were held to be attempts to an indictable misdemeanour.

Abetment
of abetment.

Abetment of an abetment of an offence is itself an offence, and to illustrate, the following example is given:—

A instigates *B* to instigate *C* to murder *Z*. *B* accordingly instigates *C* to murder *Z* and *C* commits the offence in consequence of *B*'s instigation, *B* is liable to be punished for his offence with the punishment for murder, and as *A* instigated *B* to commit the offence, *A* is also liable to the same punishment (Section 108, Expl. 4).

In *Emp. vs. Trylokhnath Chowdhury*, 4 Cal. 366, it was held that abetment may be complete without the offence abetted being committed, so it is not necessary to an indictment for the abetment of an abetment of an offence to show that such offence was actually committed.

Section 113 makes an abettor liable for the effect caused by the act abetted, although it is different from that which was intended by the abettor. It provides—

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

In these sections dealing with abetments the sort of conduct which constitutes abetment is explained, but no rule is or could be laid down to indicate the degree of incitement or the force of the persuasion used which would suffice to make a person an abettor.

The provisions of this chapter of the Penal Code must be read with the chapters of general explanations and general exceptions. Construed with reference to the latter chapter, it is clear that those who cannot commit offences cannot be abettors of offences; therefore infants, insane persons and others excepted from criminal liability cannot be abettors.

THE TRIAL.—Principals and accessories may be tried together both in England and in this country. In England the procedure is regulated by the Accessories and Abettors Act, 1861, and in this country by the Code of Criminal Procedure, Section 239 of which expressly provides for the

joint or separate trial of principals and abettors as the Court thinks proper.

Abetment itself being a substantive offence under the Penal Code, the conviction of the abettor is in no way dependent on the conviction of the principal and the acquittal of the principal does not necessarily involve the acquittal of his abettors.—(*Q. vs. Dada Maruti*, 1 Bomb., 15).

Where the principal and accessory are tried separately, the conviction of the principal is *prima facie* evidence of his guilt on the trial of the accessory, but may be collaterally disputed when the issue is the guilt of the accessory.

PUNISHMENT.—Abetment of petty offences not punishable with imprisonment is by itself not punishable, unless the act abetted actually takes place (see Sections 109, 115, 116). In other cases in the absence of any special provision the punishment of the abettor is the same as that of the principal if the act abetted has taken place (Section 109). But if it has not, the punishment for abetment is lighter than the punishment for the offence itself (Sections 115, 116). The explanation 2 of Section 108 must, therefore, be read as applying only to the graver offences mentioned in Sections 115 and 116. The explanation may be misleading, and so also explanation 4 which lays down that abetment being a substantive offence, the abetment of an abetment is also an offence. Abetment of offences punishable with death or transportation for life or with imprisonment is punishable in different degrees of severity (Sections 115, 116 of the Code), even if the act abetted be not committed in consequence of the abetment. So

that if one abets such an offence and the person abetted refuses to act the abettor is punishable, but if he acts and it can be shown that the person abetted did not act in consequence of the abetment, he is not. The position seems to be rather anomalous. To explain more clearly, suppose *A* instigates *B* to murder *C*. If *B* refuses to act, *A* is punishable (Section 115). But if *B* acts and murders *C*, and it can be shown that *B* was not influenced by the instigation, *A* is not guilty at all (Section 109). I am not aware that the anomaly has ever been noticed.

LECTURE V.

"MENS REA."

Mens rea.

Mens rea or criminal intent is an essential element in every crime. There must be a mind at fault to constitute a criminal act. It is the combination of an act and an evil intent that distinguishes civil from criminal liability. There is generally nothing wrong in a mere act by which I mean a conscious movement of the body. For instance, there is nothing wrong in the mere movements that constitute an act of shooting. There is nothing wrong in shooting a rabbit or a bird. But if you shoot with the intent to kill a human being under circumstances that afford no legal justification for the act, you are guilty of murder. If you shoot a man mistaking him for a log of wood or in self-defence or if you amputate a man to save his life, there is no evil intent and no crime. The Chapter of General Exceptions in the Indian Penal Code mainly deals with matters the existence of which negative the existence of such an intent. Besides that the definition of offences generally contains reference to an evil intent so as to exclude all acts where such an intent is not present. Even where the definition is silent regarding intent, it has been held that on general principles an evil intent must be imported into the definition of all strictly criminal offences. In India the matter is above controversy by reason of the provisions of Chapter IV, which govern all offences under the Code and also offences under special and local laws. *Actus non facit reum nisi mens sit rea*, "the act itself does not make a man guilty unless his intention

were so," is a doctrine as old as criminal law itself. It is not an artificial principle grafted on any particular system of laws, but is a doctrine of universal application based on man's moral sense. Take a case of exception on the ground of compulsion. A strong man pushes a weaker man from behind and throws him on you, you feel resentment against the stronger man but not against the weaker man; the weaker man in such a case is a mere instrument in the hands of the other. It is a natural feeling which has found expression in the doctrine *actus me invito factus non est meus actus*, "an act done by me against my will is not my act." From this point of view the irresponsibility in such a case is independent of the doctrine of *mens rea* which may be said to proceed on the assumption of a voluntary act. For logically you cannot affirm or disaffirm the existence of an evil intent with reference to an act in which intention plays no part. What is true of acts done under compulsion is also true of other acts such as those of a sleeping man or a somnambulist. The cases which present any difficulty and round which discussions regarding the application of the doctrine have centred are cases of voluntary acts, where the evil intent, or malice as it is technically called, is negated by reason of any mistake regarding the actual state of facts or other grounds of a like nature. A man shoots a jackal, you are behind a bush concealed from his view and you are hit by accident. You may be angry at first, but in your cooler moments you will not think of retribution. You may have such a feeling, though in a smaller degree, if you believe

the act was done rashly or negligently. Your feelings would be very different against the man who shoots at you deliberately. The act is the same, the consequence is the same, the only difference lies in the intention. Similarly you feel no resentment against the surgeon who amputates your legs to cure you of a disease. If an insane person or a child abuses you, you are amused, but if an adult person in his proper senses does it, you feel inclined to knock him down. If a Judge in the discharge of his duties sends one to jail, no reasonable man will feel any resentment against him personally. These and a hundred other cases of the same kind would go to show that the nature of the man of average intelligence does not cry for retributive justice against unintentional acts and after all what are laws, but the expression of man's moral nature. What is an evil intent for one kind of offence is not an evil intent for another. For instance, the evil intent in offences against property is wholly different from what it is in offences against the human body. There is, however, one common factor in every case, and that is an intent to injure.

Every movement is a weariness of the flesh. We do not move unless we *will* it, and we do not will a movement unless we have a *motive* for willing it. Intermediate between the motive and the will is the intention to cause a particular consequence by a particular act. The motive is either near or remote. Motive does not play the same important part in the determination of criminal liability as intention does, for a motive may be perfectly innocent, and yet one may adopt improper means for

Volition,
Will, Inten-
tion, Motive.

its attainment. Besides, though motive like intention is confined to the mind and is often difficult to discover, intention is more easily disclosed by the act itself. Sometimes the act and the evil consequence combined are not sufficient to constitute an offence and both may appear innocent in themselves, and what makes them harmful is the relation of certain other facts with the consequence intended or caused. In these cases the knowledge of those facts is essential and the existence of such knowledge makes harmful the intent which may otherwise be harmless. Cases of bigamy and receiving stolen property will explain what I mean. Before going further into these details, it will be helpful to have a clear conception of the meaning of some of the words which are used in the Code to indicate the different kinds of evil intent necessary to constitute a particular offence. We have first to understand the meaning of the words Will, Volition, Intention and Motive.

If we examine the mental condition that precedes a conscious act, we find that the bodily motions which constitute the act, are preceded by a desire for those motions. This desire working through the nervous system produces the motions. This desire may be called the volition, and when such desire for motion is not produced by fear or compulsion the act desired is called a voluntary act. The word 'voluntary' is, however, used in the Penal Code in a somewhat different sense which I shall notice hereafter.

Volition.

The desire itself is in most cases preceded by a longing for the attainment of some object

towards which the motions themselves are directed and related as means to an end. In adopting the motions as means, we rely upon universal experience and knowledge, which raise in the mind the expectation that the motion or the series of related motions, will be followed by the objects which we long to attain. This desire for the motions, as I have said, constitutes the volition. The longing for the object which sets the volition in motion is the motive, the expectation present in the mind that the desired motions will lead to certain consequences is the intention. Thus intention is not a desire, whilst motive is. Motive has a 'dynamical' whilst intention has a 'telescopic aspect.' The one impels the act, the other sees beyond it. Motive according to Bentham is anything which by influencing the will of a sensitive being is supposed to serve as a means of determining him to act upon any occasion. Thus where a person wishing to strike another brings his hand or a stick that is in his hand into contact with this other's body, he does the act voluntarily. If, on the other hand, another person compels him, by force or through fear, to do a similar act, he cannot be said to have acted voluntarily. The word 'voluntary' has, therefore, reference to the will that directs the motion. Most conscious and voluntary acts are directed towards a particular result or consequence, and when you act to produce a particular consequence you are said to do the act with that intention, that is, you do it intentionally. If the consequence, however, is not looked for, the act may be voluntary but not intentional. You *will* the act, but *intend* the

Intention,
distinct from
motive.

consequence. Intention is sometimes loosely used as synonymous with motive, but motive is different from intention. As I have said, we intend a certain consequence, by which I mean the result necessarily flowing from a particular act. But the desire for the consequence may be due to some further and more ulterior object. That is what we call a *motive*. Intention has relation to the immediate and motive to the distant object of our acts.

According to Austin "bodily movements obey wills. They move when we *will* they should. The wish is volition and the consequent movements are acts. Besides the volition and act, it is supposed there is a will which is the author of both. The desire is called an act of the will. When I will a movement I wish it, and when I conceive the wish I expect that the movement wished will follow. The wishes followed by the act wished, are only wishes which attain their ends without external means. Our desires of acts, which immediately follow our desires of them, are volitions. The act I will, the consequence I intend. This imaginary will is determined to action by motives."

According to Holland the only immediate result of a volition is a muscular movement on the part of the person willing, but certain further results are always present to his mind as likely to follow the muscular movement which alone he can directly control. Those among them to the attainment of which the act is directed are said to be "intended."

"Will," says Sir Fitz-James Stephen, "is often used as being synonymous with the act of

will.

volition, as the proper name of the internal crisis which precedes or accompanies voluntary action. This meaning of the word is narrow and special. A more important and commoner way of using the word "will" is to use it as if it denoted a man, so to speak, within the man, being capable of freedom or restraint, virtue and vice, independent action or inactivity on its own account and apart from other mental and bodily functions. This way of thinking and speaking appears to me radically false. When I speak of "will," I mean by the word either the particular act of volition which I have already described, and which is a stage in voluntary action; or a permanent judgment of the reason that some particular course of conduct is desirable, coupled with an intention to pursue it, which issues from time to time in a greater or less number of particular volitions."

Intention.

"Intention," says the same learned author, "is the result of deliberation upon motives, and is the object aimed at by the action caused or accompanied by the act of volition."

"Intention is an operation of the will directing an overt act; motive is the feeling which prompts the operation of the will, the ulterior object of the person willing, *e.g.*, if a person kills another, the intention directs the act which causes death, the motive is the object which the person had in view, *e.g.*, the satisfaction of some desire, such as revenge, etc." (See Stephen's History of the Criminal Law, Vol. II.)

Motive.

I have explained to you that the motive is the desire for the object we long to attain for its own sake. The ultimate motive which is at the

back of all our desires is to secure our own happiness. That is the distant goal towards which all human activities are directed. Paradoxical as it may appear the ascetic who foregoes all worldly pleasures seeks his happiness in his apparent disregard and contempt for it. Ordinarily we seek pleasure or happiness—

- (1) by causing pain to our enemies,
- (2) by increasing such of our earthly possessions as are calculated to bring us comfort,
- (3) by satisfying our natural desires.

An analysis of the various offences would show that a desire to secure happiness in a manner that is opposed to the well being of society and is inconsistent with the rights of others is at the root of all of them. There are certain limits within which we are allowed to interfere with the happiness of others or to secure our own. But if we go beyond those limits, then the intent to harm others or the knowledge of it or the desire to secure gain for ourselves constitutes an evil intent. We inflict suffering on our enemies by causing them either physical or mental pain. The desire to cause physical pain leads us to the commission of offences against the human body. The desire to cause mental pain prompts us to harm our enemies in respect of their property, their reputation or with regard to their domestic relations.

Origin of offences.

Often more than one desire combine to constitute the motive for a particular crime. More frequently the direct motive for a crime is not the desire to harm an enemy, but a desire to secure

ease and comfort for ourselves. Our happiness largely depends on our earthly possessions, on accumulation of wealth and property generally. The right of property which at the beginning was only a right of possession is now jealously guarded by law. No one is allowed to deprive a man of his property, which is often the fruit of his labours, except by his consent. To acquire property in any of these ways often entails a great deal of trouble, and even with trouble it is sometimes difficult to attain. A desire for a short cut to happiness often induces us to adopt illegal means for acquiring property. Theft and other offences against property owe their origin to this desire. As I have said, sometimes both the motives, *viz.*, the desire to harm others and the desire to do good to oneself combine and supply the incentive for committing an offence. Except in the case of those suffering from mental aberration, seldom is an offence committed for which there is no motive. But proof of the existence of a motive is not necessary for a conviction for any offence. But where the motive is proved it is evidence of the evil intent and is also relevant to show that the person who had the motive to commit a crime actually committed it, although such evidence alone would not ordinarily be sufficient. Under Section 8 of the Evidence Act any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. Although in all strictly criminal prosecutions innocence of intention is a defence, innocence of motive is no defence. An act which is unlawful cannot in law be defended on the ground that

Section 8,
Evidence
Act.

Innocence
of motive no
defence.

it was committed from a good and laudable motive. A man who kills his children to save them from starvation cannot escape punishment for murder. Men also seek pleasure in the satisfaction of natural lust. This furnishes the motive for adultery, rape and other offences of the same kind. It will be seen that though the remote motive for all criminal acts is perhaps the same, the nearer, the immediate motives for different offences vary widely. These motives for the commission of crimes create and bring into being the intention which constitutes the *mens rea* for most of the offences. Intention is a mere mental condition and is often difficult of direct proof. We infer the intention often from the act itself.

“In all the graver class of crimes a particular intent or state of mind is a necessary ingredient of the offence, and must be averred in the indictment and proved by the prosecution.

“When an act which is of itself indifferent becomes criminal if done with a particular intent, the intent must be proved. But when the act is unequivocal, the proof that it was done may of itself be evidence of the intention which the nature of the act conveys. In such case there is a presumption of law that the person accused intended the probable consequences of his act.” (Hals. Laws of England, Vol. 9, Art. 504).

The knowledge that a certain consequence would follow a particular act is distinct from the intention to cause it. This knowledge, where it exists, is sufficient to supply the place of intention. A man knows that his servant has an enlarged spleen. He knows also that a kick is likely to

rupture the spleen and that such rupture may cause death. With all this knowledge if he causes the death of his servant by kicking him, he cannot escape liability for murder, by showing that it was not his intention to cause death. If you refer to the definition of culpable homicide, you will find that it not only covers acts done with the intention of causing death, but also covers acts done with the knowledge that death is likely to be caused by such act, and so also the definition of hurt.

The general doctrine of *mens rea* is not of very great importance where, as in India, the law is codified and offences are carefully defined so as to include the *mens rea* in the definition itself. The definitions in the Indian Penal Code along with the Chapter of General Exceptions are perhaps sufficient to exclude all cases to which a *mens rea* cannot be attributed. Where neither the definition nor the Chapter of General Exceptions exclude a case of this kind—I doubt if such a case exists—the general doctrine would be, I presume, of no great help. The Indian Penal Code defines offences with great care and precision and the Chapter of General Exceptions is very comprehensive. However, even where the law is codified, the application of the doctrine may sometimes be found useful in remedying defective and incomplete definitions or at any rate in interpreting them.

In speaking of *mens rea* as the essential ingredient of a crime, I only speak of crimes properly so called. I do not include in the term, offences against municipal or fiscal laws which are

Definitions
of offences in
the Indian
Penal Code.

sometimes punished without reference to any intention or knowledge.

The question as to whether a criminal intent must be imported into every crime defined in the Statute, even where it is not expressly mentioned as an ingredient has been very fully discussed in two English cases—*Reg. v. Prince* and *Queen v. Tolson*. They are important as elucidating an important question of principle.

In *Reg. v. Prince* (L. R. 2 C. C. R. 154) Henry Prince was tried upon the charge framed under S. 55 of 24 and 25 Vict., C. 100, which makes it an offence unlawfully to take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her.

*Reg. v.
Prince.*

All the facts necessary to support a conviction existed, except that the girl Annie Phillips, though proved by her father to be fourteen years old, looked very much older than sixteen, and the jury found upon evidence that before the defendant took her away she had told him that she was eighteen, and that the defendant *bona fide* believed that statement, and that such belief was reasonable. It was contended that although the Statute did not insist on the knowledge on the part of the prisoner that the girl was under sixteen as necessary to constitute the offence, the common law doctrine of *mens rea* should nevertheless be applied, and that there could be no conviction in the absence of a criminal mind. It was, however, held that the prisoner's belief that the girl was eighteen years old was no defence.

A distinction was drawn between acts that were in themselves innocent but made punishable by Statute (*malum prohibitum*) and acts that were intrinsically wrong or immoral (*malum in se*). In the former a belief, a reasonable belief, in the existence of facts which, if true, would take the case out of the mischief of the Statute, would be a good defence, but in the latter case such a belief was immaterial unless of course the law made it otherwise. The man who acted under such erroneous belief took the risk and should suffer the consequence. The distinction between the two classes of cases would appear from the following observations of Bramwell J.—

“The same principle applies in other cases. A man was held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer. Why? because the act was wrong in itself. So, also, in the case of burglary, could a person charged claim an acquittal on the ground that he believed it was past six when he entered, or in house-breaking, that he did not know the place broken into was a house? Take, also, the case of libel, published when the publisher thought the occasion privileged, or that he had a defence under Lord Campbell’s Act, but was wrong; he could not be entitled to acquittal, because there was no *mens rea*. Why? because the act of publishing written defamation is wrong where there is no lawful cause.

“As to the case of the marine stores, it was held properly that there was no *mens rea* where the person charged with the possession of naval stores with the Admiralty mark did not know

the stores he had bore the mark: (*Reg. vs. Sleep*); because there is nothing *prima facie* wrong or immoral in having naval stores unless they are so marked. But suppose his servant had told him that there was a mark, and he had said he would chance whether or not it was the Admiralty mark? So in the case of the carrier with game in his possession; unless he knows he had it, there would be nothing done or permitted by him, no intentional act or omission. So of the vitriol senders; there was nothing wrong in sending such packages as were sent unless they contained vitriol.”

In the later case of *Reg. vs. Tolson* (23 Q. B. D. 168) a similar question arose, but this time in connection with an act which by itself was neither wrongful nor immoral. Under the Statute 24 and 25 Vict., C. 100, Section 57, “whoever being married, shall marry any other person during the life of the former husband or wife shall be guilty of felony, etc., etc.” Upon the words of the Statute it is apparently immaterial whether the parties or either of them knew or did not know that the former wife or husband, as the case may be, was or was not alive. The question arose whether a *mens rea* did by implication form part of the definition. If the case had arisen under the Indian Penal Code the difficulty would not have arisen for Section 79 would have given protection to the prisoner. Considering, however, the important principles discussed in that case, I should like to read to you certain passages from the very instructive judgment of Mr. Justice Wills. It will help you to a thorough understanding of the

*Reg. vs.
Tolson.*

doctrine of *mens rea*, and will also enable you to see clearly how the doctrine has been kept in view in the definition of offences under the Indian Penal Code.

“Although *prima facie* and as a general rule there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a Statute may relate to such a subject-matter and may be so framed as to make an act criminal whether there has been any intention to break the law, or otherwise to do wrong or not. There is a large body of municipal law in the present day which is so conceived. Bye-laws are constantly made regulating the width of thoroughfares, the height of buildings, the thickness of walls, and a variety of other matters necessary for the general welfare, health or convenience, and such bye-laws are enforced by the sanction of penalties, and the breach of them constitutes an offence and is a criminal matter. In such cases it would, generally speaking, be no answer to proceedings for infringement of the bye-law, that the person committing it had *bona fide* made an accidental miscalculation or an erroneous measurement. The acts are properly construed as imposing the penalty when the act is done, no matter how innocently, and in such a case the substance of the enactment is that a man shall take care that the statutory direction is obeyed, and that if he fails to do so he does it at his peril. Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the

subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable.”

* * * * *

“Assistance must be sought *aliunde*, and all circumstances must be taken into consideration which tend to show that the one construction or the other is reasonable, and amongst such circumstances it is impossible to discard the consequences. This is a consideration entitled to little weight, if the words be incapable of more than one construction; but I think I have abundantly shown that there is nothing in the mere form of words used in the enactment now under consideration, to prevent the application of what is certainly normal rule of construction in the case of a Statute constituting an offence entailing severe and degrading punishment. If the words are not conclusive in themselves, the reasonableness or otherwise of the construction contended for, has always been recognised as a matter fairly to be taken into account.”

After referring to the case of a woman indicted for having in her possession, without a proper certificate, Government stores, in which it was contended that having regard to the terms of the Statute, the possession of the certificate was the sole justification that could be pleaded—a contention which was overruled by Foster J.—Mr. Justice Wills continued:—

“*Prima facie* the Statute was satisfied when the case was brought within its terms, and it then lay upon the defendant to prove that the violation of the law, which had taken place, had been

committed accidentally or innocently, so far as he was concerned. Suppose a man had taken up by mistake one of two baskets exactly alike and of similar weight, one of which contained innocent articles belonging to himself, and the other marked 'Government stores,' and was caught with the wrong basket in his hand, he would, by his own act, have brought himself within the very words of the Statute. Who would think of convicting him? And yet what defence could there be except that his mind was innocent, and that he had not intended to do the thing forbidden by the Statute?"

Referring again to the case before him His Lordship proceeded:—"It seems to me to be a case to which it would not be improper to apply the language of Lord Kenyon, when dealing with a Statute which liberally interpreted led to what he considered an equally preposterous result, 'I would adopt any construction of the Statute that the words will bear in order to avoid such monstrous consequences.' Again the nature and extent of the penalty attached to the offence may reasonably be considered. There is nothing that need shock any mind in the payment of a small pecuniary penalty by a person who has unwittingly done something detrimental to the public interest. To subject him, when, what he has done, has been nothing, but what any well-disposed man would have been very likely to do under the circumstances, to the forfeiture of all his goods and chattels, which would have been one consequence of a conviction at the date of the Act of 24 and 25 Viet., to the loss of civil rights, to imprisonment with hard labour, or

even to penal servitude, is a very different matter; and such a fate seems properly reserved for those who have transgressed morally, as well as unintentionally done something prohibited by law."

In an American case (*The Commonwealth vs. Presby*, 14 Gray 65), this doctrine was fully recognised and read into the Statute, although upon the definition of the offence no question of an evil intent at all arose. The defendant, a police officer, had arrested one Harford for being found intoxicated in a public place. He was indicted for the wrongful arrest. The Statute gave the power of arrest in respect of intoxicated persons only, and it was argued that if the man arrested was not intoxicated, a mere belief, however well founded, that the man was intoxicated could not be pleaded as a defence to the indictment. Hoar J. disallowed the contention. After stating the general doctrine that where there is no will to commit an offence there can be no transgression, and the hardship that any other interpretation would involve, concluded as follows:—

"Now the fact of intoxication, though usually easy to ascertain, is not in most cases a fact capable of demonstration with absolute certainty. Suppose a watchman to find a man in the gutter stupified and smelling very strongly of spirituous liquors. The man may have fallen in a fit; and some person may have tried to relieve him by the application of a stimulant, and then have left in search of assistance. Or, in another case, the person arrested may, for purposes of amusement or mischief, have been simulating the appearance and conduct of drunkenness. Is the officer to be held criminal,

Commonwealth vs. Presby.

if, using his best judgment and discretion and all the means of information in his power, in a case where he is called upon to act, he makes a mistake of fact and comes to a wrong conclusion? It would be singular, indeed, if a man, deficient in reason, should be protected from criminal responsibility, but another, who was obliged to decide upon the evidence before him, and used in good faith all the reason and faculties which he had, should be held guilty. We, therefore, feel bound to decide that if the defendant acted in good faith, upon reasonable and probable cause of belief, without rashness or negligence, he is not to be regarded as a criminal because he is found to have been mistaken."

Doctrine of
mens rea in
relation
to Municipal
laws.

I have told you that *mens rea* is essential in all strictly criminal offences. As pointed out by Mr. Justice Wills, there is a large body of Municipal law so framed as to make an act criminal whether there is any intention to break the law or not. Cases of this kind are generally of a civil nature, but for special reasons have been included in the category of offences. That they are not criminal offences in the strict sense of the term may also be gathered from the fact that the punishment for these offences is generally a fine. Instances of such cases will be found in Halsbury's Laws of England, Vol. 9, page 235.

In cases of this kind the ordinary doctrine of criminal law, that a master or principal cannot be held liable for the act of his servant or agent, because the condition of mind of such servant or agent cannot be imputed to him does not apply. These are instances which go to show that though technically offences, they are not really so, and are

not governed by the general principles applicable to really criminal cases. I may observe that the Chapter of General Exceptions would apply to all such cases by reason of the definition of an offence contained in Section 40, whereby it is made to include offences under any special or local law as defined in Sections 41 and 42 of the Act for the purposes of the application of that Chapter.

The doctrine laid down in *Reg. vs. Prince* cannot be pushed so far as to make a child or a lunatic personally responsible for an infringement, even though the offence may be complete without a *mens rea*, the act being a *malum in se*. I am sure, if the prisoner in that case had been a lunatic there would have been no conviction.

The distinction between an act that is *malum in se* and an act that is *malum prohibitum* has been fully recognised in America where Crimes have been divided according to their nature into crimes *malum in se* and crimes *malum prohibita*, the former class comprising those acts which are immoral or wrong in themselves, such as murder, rape, arson, burglary and larceny, breach of the peace, forgery, and the like, the latter class comprising those acts to which, in the absence of Statute, no moral turpitude attaches, and which are crimes only because they have been prohibited by Statute.

The distinction, though in many ways convenient and even just, is open to the objection that there is no clear line of demarcation between the two classes of acts and it is not always easy to say whether a particular act, lies on one side of the line or the other. Our ideas of right and

wrong are often the result of early training and environments. Acts are often singled out for punishment on mere considerations of policy which may vary in different countries and at different times. The Spartans anxious to rear up a race of heroes, the old Rajputs with their peculiar notions about caste and purity of blood saw nothing wrong even in infanticide. Compare again the wide gulf that separates the Christians from the Mahomedans and the Hindu Kulins in respect of their views relating to polygamy. It has been truly said that there is nothing absolutely good and nothing absolutely bad in this world.

ANALYSIS OF OFFENCES AS DEFINED IN THE CODE.

I have already told you that the Indian Penal Code gives full effect to the doctrine of *mens rea*, and that it does so in two ways. In the first place the Chapter of General Exceptions which controls all the offences defined in the Code as well as all offences under special and local laws, deals with the general conditions which negative *mens rea*, and thereby exclude criminal responsibility. Under Section 6, "throughout this Code every definition of an offence, every penal provision and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the chapter entitled 'General Exceptions,' though those exceptions are not repeated in such definition, penal provision or illustration."

A large number of cases having thus been excluded from the category of crimes, every offence is carefully defined so as to include in the definition

the precise evil intent which is the essence of a particular offence, as well as the other necessary elements of it. If these definitions are analysed they generally comprise the following principal elements:—

Analysis of definitions in the Indian Penal Code.

- (a) A human being.
- (b) An intention on the part of such a human being to cause a certain consequence considered injurious to individuals or to society, and which for the sake of brevity we call an evil intent.
- (c) The act willed.
- (d) The resultant evil consequence.

In cases where the intended consequence is not injurious by itself, but is injurious in conjunction with certain other facts, a further element is added, viz.—

- (e) A knowledge of the existence of such facts.

As to (a)—a human being—it is indicated by the use of the word 'whoever' with which the definition of every offence begins.

Human being.

As to (b)—the evil intent—it is indicated generally by the use of such words as intentionally—voluntarily—fraudulently—dishonestly—maliciously—wantonly—maliciously, etc. I have already told you that intention has reference to consequences of acts rather than to acts themselves. You will naturally ask, how is it then that these words denoting different intentions are generally used as adverbs qualifying verbs which are supposed to indicate acts. We read of intentionally joining an unlawful assembly (Section 142),

Evil intent.

Words used in the definitions to denote evil intent.

intentionally preventing service of summons (Section 173), intentionally omitting to attend in obedience to summons (Section 174), intentionally omitting to produce a document (Section 175), intentionally obstructing sale of property (Section 184), intentionally omitting to assist a public servant (Section 187), intentionally giving false evidence (Section 193), intentionally omitting to give information of an offence (Section 202), intentionally omitting to apprehend an offender (Sections 221 and 222), intentionally offering resistance to lawful apprehension (Sections 224, 225, 225A and 225B), intentionally offering insult (Section 228), intentionally causing to be returned as a juryman (Section 229). This mode of expression at first creates the impression that 'intentionally,' 'dishonestly' and other words of the same class have not been used as they ought to be, to refer to consequences of acts. This impression is mainly due to the fact that we are accustomed to regard verbs as indicating merely acts. But most verbs whilst indicating acts also indicate the consequences of those acts. Transitive verbs from their very nature cannot be confined to mere acts, for they are defined to be verbs expressing actions which pass from the agent to an object. To explain what I have said: obstructing sale of property, intentionally offering insult, is equivalent to doing an act with the intention of causing the consequence indicated by the words 'obstruction' or 'insult.' Intentionally causing hurt is to do an act, the effect of which is to cause hurt. Intentionally to kill a person is to do an act, the effect of which is to cause death. Death is, therefore,

the consequence of that act. It is hardly necessary to multiply these instances. Intentionally joining an unlawful assembly, intentionally omitting to attend in obedience to summons, intentionally omitting to assist a public servant, intentionally giving false evidence are all susceptible of the same explanation.

There are a few cases where words indicating intention are not used in defining an offence. But these are either cases where the acts with their consequences are so hurtful to the State or to society that it has been deemed just and expedient to punish them irrespective of any intention to cause those consequences, or cases where the acts themselves are of such a character that they raise a violent presumption that whoever willed the act must have intended the consequences. Waging war against the Queen (Section 121), sedition (Section 124A), kidnapping and abduction (Sections 359—363) are examples of the former, counterfeiting Queen's coin (Section 232) is an example of the latter.

There is, I have told you, between the intention and the act a will which determines the movements that constitute the act. It is a subconscious mental process assumed in every definition, and in most cases a necessary inference from the act itself. The inference is only negatived where the act is shown to be caused by force, compulsion or accident, or under other circumstances indicating the absence of this will and these special cases are among others excluded by the provisions of the Chapter of General Exceptions, and are consequently not repeated in the definition,

Offences
sometimes
defined with-
out any
reference to
intention.

The act
willed.

As to (c)—the act willed—it is an essential element in every offence even where it is an incomplete offence such as an attempt. It is with the commencement of the act that the offence emerges from mind to matter. If the act willed has not taken place completely or partially there is no offence, for, as I have already told you, the law does not punish a mere evil intent so long as it has not led to some overt act. Whilst it is an offence to hurt a person or to forge a document, it is not an offence merely to intend to cause hurt or to commit forgery. There are, however, some offences which do not seem to contemplate any particular acts but merely punish an existing state of things, but these are special cases, and if closely examined are not exceptions to the general rule. The existing state of things in such cases only indicates an antecedent criminal act where we reason from effect to cause, *e.g.*, possession of an instrument for counterfeiting coin or possession of stolen articles all indicate an antecedent criminal act.

The conse-
quence.

As to (d)—the resultant consequence—it is not always necessary that the intended consequence should take place. Sections 216A, 217 and 263 are instances in point. The man who harbours a robber or dacoit with the intention of facilitating the commission of a robbery or dacoity (Section 216A) cannot plead in defence, that as a matter of fact, no robbery or dacoity took place or that his action did not facilitate such robbery or dacoity. Where, however, the happening of the intended consequence is an essence of an offence, the non-happening of it would reduce the offence to a

mere attempt to commit it. This matter I have already discussed under another head.

The intended consequence is sometimes innocent by itself and becomes nocent only by reason of the existence of other circumstances. Sometimes the existence of these other circumstances only aggravates the offence. In these cases the definition after describing the act adds 'knowing or having reason to believe, etc.' These special cases bring in the element I have referred to under (e).

Sometimes the immediate consequence of an act is either not harmful or is less harmful than the remote consequence, and the happening of the latter is either a necessary condition of an offence or is only an aggravation.

I have tried, in this chapter, to give you a general analysis of the definition of crimes in the Indian Penal Code. I do not pretend that the analysis is applicable to all the definitions in the Code, but I believe it will be found correct in a very large number of them, and will help you to a better appreciation of all their component parts.

LECTURE VI.

WORDS USED IN THE CODE TO DENOTE *MENS REA*.

I shall now proceed to explain to you the meaning of the various words used in the Code to denote the *mens rea*. I have already referred to these words in a general way.

VOLUNTARILY.

'Voluntarily,' as used in the Indian Penal Code.

Ordinarily a voluntary act is opposed to a compulsory act and means an act done in the exercise of volition or an act done willingly without being influenced or compelled. It is also opposed to an act done accidentally or negligently. This, however, is not the sense in which the word has been used in the Code. 'Voluntarily' has been used with reference to the consequence of acts for which 'intentionally' would perhaps have been the more appropriate word, but 'voluntarily,' as defined in Section 39 of the Code, has a more extended meaning than 'intentionally.' 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. The illustration to Section 39 makes the matter clear.

'A sets fire, by night, to an inhabited house in a large town, for the purpose of facilitating 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.'

A person is said to have reason to believe a thing if he has sufficient cause to believe that thing but not otherwise (Section 26). Belief is somewhat weaker than knowledge, but a well grounded belief that a certain consequence will follow a certain act is ordinarily as good as knowledge. 'Knowledge,' says Locke, 'is the highest degree of the speculative faculties and consists in the perception of the truth of affirmative or negative propositions.' To know a thing is to have mental cognition of it. To believe a thing is to assent to a proposition or affirmation, or to accept a fact as real, or certain, without immediate personal knowledge. A man whom you know to be poor, brings to you for sale a valuable gold ornament and offers it to you for one-tenth of its real price. He comes to you at night under suspicious circumstances, you may not know that the article is stolen, but you have good reason to believe that it is so. In the illustration to Section 39 the man setting fire to the house might not have the knowledge that the house was inhabited, but if he had grounds for belief that the house was inhabited, this belief is sufficient without the knowledge or the intention. There are, however, cases where the mere belief is considered insufficient. The word 'voluntarily,' as explained in Sections 321 and 322, however, do not seem to cover cases of mere reasonable belief, but seem to insist on intention or knowledge. It is, however, not clear to me why reasonable grounds of belief should be excluded in these cases. Though generally where a knowledge of facts is considered

Belief and knowledge.

essential, a reasonable ground of belief is given the same effect, and the words 'knows or has reason to believe' are often used together, in some cases mere belief has not been considered to be sufficient but culpable and actual knowledge has been insisted on as an essential element to constitute a crime. Take, for instance, an offence under Section 181. A false statement on oath is an offence when the statement is false, and which the offender either knows to be false or believes to be false or does not believe to be true. Section 188, however, insists on higher certainty and makes it penal for any one to disobey the order of a public servant only when he knows that the order has been promulgated by such a person.

There are very good reasons why knowledge or reasonable grounds of belief should in most cases supply the place of intention. Intention is purely an operation of the mind and is often difficult to prove. The act itself generally furnishes the evidence of intention, for it is a self-evident proposition that every man is supposed to intend the natural consequences of his own act. What is the natural consequence of an act depends in some cases on knowledge and in others on mere belief both based on past experience. Where by personal experience you find that an act invariably leads to a particular consequence it is a matter of knowledge, but in many matters we have no personal experience but have to rely on the knowledge or experience of others. In cases of personal knowledge, the degree of certainty is much greater than where we act upon the experience or knowledge of others. In such cases we act on mere

belief. There are also cases in which a particular act invariably leads to a particular consequence and cases where a consequence generally follows but not invariably. Thus, inferences are sometimes based on certainty and sometimes on different degrees of probability. Where an inference is more or less certain it is knowledge, where it is only probable it is belief. In many cases a reasonable ground of belief is for all practical purposes as good as knowledge.

There are also cases where a knowledge of consequence insisted upon is in no way inferable from the act itself, and in those cases knowledge has to be positively proved and has to be insisted on as part of the definition. Every sane person, for instance, knows that shooting a man causes death, and if a man shoots another, it is presumed that he intended to kill him. In such cases knowledge of a consequence is enough to prove the intention to produce such a consequence, and the definition is complete if it makes only the knowledge a necessary ingredient in the crime and omits any reference to intention.

I have already told you that 'voluntarily' is a compendious term which covers intention, knowledge and reasonable grounds of belief.

Although there is, as I have explained, a distinction between doing a thing intentionally and doing it voluntarily, sometimes it is difficult to discover the reason for choosing one word rather than the other. Take, for instance, Sections 184 and 186. The first makes it penal for any one to intentionally obstruct the sale of property offered for sale by the lawful authority of any public servant as such, the

'Intentionally' and
'Voluntarily.'

second makes it penal to voluntarily obstruct a public servant in the discharge of his public functions. The only apparent difference is that the first refers to obstruction to an act and the second to obstruction to an individual. But this is only an apparent difference. Where we speak of obstructing a person, we really mean obstructing some act by such a person.

FRAUDULENTLY—DISHONESTLY.

'Fraudulently' and 'dishonestly' are two words of most common occurrence in the Code.

Dishonestly.

'Dishonestly' has been very clearly defined in the Code. "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person is said to do that thing dishonestly" (Section 24). Wrongful gain is defined to be gain by unlawful means of property to which the person gaining it is not legally entitled. Wrongful loss, on the other hand, is loss by unlawful means of property to which the person losing it is legally entitled.

Wrongful gain includes wrongful retention as well as wrongful acquisition and wrongful loss includes wrongfully keeping out any person of any property as well as wrongfully depriving him of it (Section 23).

Fraudulently.

The word 'fraudulently' has also been defined, but the definition is vague and has been a fruitful source of conflicting decisions. A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise (Section 25). The definition or rather the explanation is not very helpful. What is an intention to

defraud? To defraud is to commit fraud. Fraud has not been defined, and eminent Judges have refused to commit themselves to any definition, by reason of the fact that vicious human ingenuity contrives to give such different complexions to fraud that an exhaustive definition likely to cover all cases has been considered well nigh impossible. Every fraud involves deception but is every deception a fraud? It is essential that in order to amount to legal fraud, besides deception, there must be an intention to cause injury or an infraction of a legal right. Deception like falsehood is merely a moral wrong. The law does not ordinarily punish a falsehood unless it is calculated to injure some one else. In the same way a mere deception is not punishable unless it has a similar effect. The world, one might think, would be happier if a falsehood or a deception were made punishable, irrespective of consequences, but punishment has not always helped in hastening the millennium and experience has shown that it is not always conducive to the well being of society to create offences of mere moral wrongs, by which I mean wrongs which do not tend directly to the injury of others. Take the case of a person who brings a present to his wife and magnifies its value. There is undoubted deception, but the wife is none the worse for it and is perhaps happier for the falsehood, and the act is not an offence. In the same way you often tell a patient, pronounced hopeless by the doctor, that he is going to recover soon. This is deception but not fraud. "An intent to deceive the public or particular persons," says Sir Fitz James Stephen

in his Digest of Criminal Law, "but not to commit a particular fraud or specific wrong upon any particular person, is not an intent to defraud within the meaning of this Article" (*i.e.*, Article 384 which defines forgery). So far as I can see there is no section in the Code which makes a mere act of deception punishable irrespective of an intention to injure. Although wherever the word 'fraudulently' is used in defining an offence an intention to cause injury is implied by the word itself, the framers of the Code however were not content to rely on the implication alone and in many cases they have expressly insisted on the presence of an intention to cause a particular injury as a necessary ingredient of the offence. For instance, Section 206 which makes fraudulent removal or concealment of property an offence insists that besides the fraudulent removal, there must be an intention to prevent the property from being taken in execution of a decree or other intention of the same nature. Similar intention to injure rights of others will be found present in the definition of most other offences concerned with fraudulent acts, but where such specific intention does not expressly form part of the definition, the nature of the act itself is such that it has been considered essential as a matter of public policy to punish it, without reference to any specific intention to injure, the act itself being of such a character as to give rise to a violent presumption that something more than mere deception must have been contemplated. As an instance you may refer to Section 208 which makes it punishable to cause or suffer

a decree to be passed for a sum not due or for a larger sum than is due. It is clear that anyone who does such an act not only intends to deceive, but also contemplates some material injury to others, and it is also a part of public policy not to allow any abuse of the processes of Courts of Justice. This question has arisen more pointedly in connection with the definition of forgery, and the question has been asked whether fraudulent execution of a document by a person with the intention of causing it to be believed that such document was executed by another person who in fact did not execute it involves necessarily an intention to cause injury to some body. You will observe that the making of a false document with intent to commit fraud amounts to forgery (Section 463). Leaving aside the clumsiness of the definition and the tautology that is involved in speaking of fraudulent execution of a document with intent to commit fraud, for that is what it comes to referentially, the definition makes no mention of any intention to injure, and this is to be read into the definition by holding that 'fraudulently' or 'intent to commit fraud' includes, besides deception, an intention to injure. This view is supported by the fact that in England an intention to injure is an essential part of forgery which is a common law offence. For an authority it would be enough for me to point out that it was distinctly laid down in *Reg. vs. Hodgson* (D & B 3, 1856) that a person who forged a diploma of the College of Surgeons with the object of inducing a belief that the document was genuine and that he was a member of the College of Surgeons, and then showed it to two

Forgery
involves
injury.

persons with intent to induce that belief in them did not intend to defraud, though he intended to deceive. The correctness of the decision was not questioned, and it led to the passing of the Medical Act which made the act punishable for the first time. Blackstone defined forgery as the fraudulent making or altering of a writing *to the prejudice of another's right*. In 1865, however, Cockburn C.J. declared that forgery by universal acceptance is understood to mean 'the making or altering a writing so as to make the alteration purport to be the act of some other person which it is not' (*In re Windsor*, 10 Cox C. C. 118). If this was correct mere intention to deceive would have sufficed for a conviction. The definition, as pointed out by Wharton, was soon found too scant, and Kelly C.B., with the concurrence of his colleagues, laid down, four years later (*R. vs. Ritson*, L.R., 1 C. C. 200), that the offence consists in the fraudulent making of an instrument, in words purporting to be what they are not, to the *prejudice of another's right*, thus going back to the definition given by Blackstone. I may lastly quote the definition in Stephen's Digest which may be taken as crystallising the decisions of the English Courts on the subject. "Forgery is making a false document as defined in Article 385 with intent to defraud." The learned author then proceeds to explain what fraud means: "Whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime two elements at least are essential to the commission of the crime, namely first, deceit or an intention to deceive or in some cases, mere secrecy; and, secondly, either actual

injury or possible injury or an intent to expose some person either to actual injury, or to a risk of possible injury, by means of that deceit or secrecy. A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this: Did the author of the deceit derive any advantage from it which he could not have had if the truth had been known? If so, it is hardly possible that that advantage should not have had an equivalent in loss, or risk of loss, to some one else; and if so, there was fraud. In practice, people hardly ever intentionally deceive each other in matters of business for a purpose which is not fraudulent." As an illustration the learned author refers to the case of *Reg. vs. Hodgson* to which I have already drawn your attention. It is fairly certain that forgery, as defined in the Code, was not intended to be different from forgery as understood in England. This view of the case is strengthened by a reference to the illustrations under Section 464, where the intention to defraud is apparently intended to cover not only an intention to deceive, but also an intention to cause injury. Illustration (a) runs as follows:—

"A has a letter of credit upon B for Rs. 10,000 written by Z. A in order to defraud B, adds a cipher to 10,000, and makes the sum 1,00,000, intending that it may be believed by B that Z so wrote the letter. A has committed forgery."

If then 'fraudulently' in Sections 463 and 464 includes an intention to injure, you are forced by the operation of Section 7 to hold that wherever

'fraudulently' is used, it not only involves the idea of deception, but also the idea of injury to others. This view finds support from the decisions of the Indian High Courts, where it has been held, for instance, that a person who fabricated a document merely to obtain payment of money, justly due to him, which was being illegally withheld, was not guilty of forgery (*Queen-Empress vs. Syed Hussain*, 7 All. 403). The decision is perhaps open to criticism that one may cause injury to another even if he only wants to get what is his own. However that need not be considered here. It may be said that the intention to cause an injury being an essential part of the meaning of the word 'fraud,' the distinction between a fraudulent and a dishonest act practically disappears. But this is not so, and there still remains a clear distinction between the meaning of the two words. The points of difference between the two may be stated thus:—

Distinction
between
fraud and
dishonesty.

- (a) 'Fraud' necessarily involves deception, 'dishonesty' does not. This is clear and requires no further explanation.
- (b) 'Dishonesty' necessarily involves the idea of injury to *property*, 'fraud' covers injury to property as well as injury of every other kind. Although 'dishonesty' includes wrongful gain as well as wrongful loss of property, there can hardly be a wrongful gain without a corresponding loss to somebody else. The illustrations to Section 464 may, at first, create the impression that the injury involved in

forgery is injury to property only, but this is not so. In *Reg. vs. Harris* (1 Moody 393, 1833) it was held to be forgery to forge an order from a Magistrate for the discharge of a prisoner, and it has been generally accepted from the earliest days of English Common Law that the forgery of any matter of judicial or executive record is indictable.

- (c) A dishonest intention is intention to cause loss of specified property, actually belonging to a definite individual, known or unknown and it must be property actually belonging to an individual at the time of the act described as dishonest. This is fairly clear from the words of Section 24. 'Fraudulently,' on the other hand, even where it implies injury to property, may refer to injury in respect of unspecified property, to unknown and unascertained individuals.

The observations of Norris and Beverley JJ. in Haradhan's case (19 Cal. 380) that in construing Sections 24 and 25, Indian Penal Code, the primary and not the more remote intention must be looked at is perhaps correct as regards Section 24, but is perhaps not correct in their application to Section 25. The distinction I have suggested is to a great extent borne out by the following provision of the New York Code, which lays down that where an intention to defraud constitutes a part of the crime it is not necessary to aver or to prove an

intent to defraud any particular person. It has, for instance, been held to be an offence, to forge—

- (a) a certificate of character to induce the Trinity House to enable a seaman to act as Master—*R. vs. Toshack* (1 Den. 492, S. C. 4 Cox 38, 1849).
- (b) testimonials whereby the offender obtained an appointment as a Police Constable—*R. vs. Moah* (D. and B. 550, 1856).
- (c) the like with intent to obtain the office of a Parish School Master—*R. vs. Sharman* (Dears, C.C. 285, 1854).
- (d) a certificate that a liberated convict was gaining his living honestly, to obtain an allowance—*R. vs. Mitchell*, 2 F. & F., 44, 1860).

With reference to these cases it may be contended that they do not show any tendency to prejudice the right of others. But, as Wharton points out, in most cases of forged writs, the officer issuing the writ, if it were genuine, would be liable for misconduct in an action on the case and in cases of forgery of records, there is usually a party to be injured by the falsification, and that in any view the prejudice to others is enough, even if it be contingent and remote. As regards the case of forgery of the writ for the discharge of a prisoner, I would justify it on the ground that it is an injury to the State. In the other cases an injury to some one else in respect of property is the ultimate consequence. For instance, obtaining employment or permission to sit for an examination by means of forged certificates has the effect of excluding

others from employment, and, as such, involves injury to property to the persons so excluded.

The views, I have expressed, are perhaps somewhat inconsistent with the statement in Stephen's Digest that an intent to deceive the public or particular persons, but not to commit a particular fraud or specific wrong upon any particular person, is not an intent to defraud. It is, however, not clear to what class of cases the learned author refers. The illustrations to Article 384 of his Digest do not make the matter clear.

Before leaving this subject I should like to draw your attention to a few Indian cases, in which the meaning of the two terms 'fraudulently' and 'dishonestly' has been discussed and differentiated.

Judicial decisions explaining 'fraudulently.'

In *Lolit Mohan Sen vs. Queen-Empress* (22 Cal. 313) it was contended that a person who had altered certain *chalans* with the intention of concealing past acts of fraud and dishonesty could not be said to have done so dishonestly or fraudulently within the meaning of Section 464, inasmuch as there was no intention to cause any wrongful gain or wrongful loss in future. In overruling this plea the learned Judges observed: "We think the word 'fraudulently' must mean something different from 'dishonestly.' It must be taken to mean, as defined in Section 25 of the Code, 'with intent to defraud,' and this was the view taken by the Bombay High Court in the case of *Queen-Empress vs. Vithal Narain Joshi* (13 Bom. 515, note)." The intention to defraud in the above passage apparently means an intention to deceive to the prejudice of somebody. In support of this view the Judges cited the case of *Queen-Empress*

vs. *Sabapati* (11 Mad. 411) and declined to follow two earlier cases—*Empress of India vs. Jivanand* (5 All. 221) and *Queen-Empress vs. Girdharilal* (8 All. 653). In a later case *Queen-Empress vs. Abbas Ali* (25 Cal. 512) a Full Bench of the Calcutta High Court took the same view of the difference between 'fraudulently' and 'dishonestly.' That was a case where a man had forged a certificate in order to qualify himself as a candidate for the examination of engine driver under Act 7 of 1884. The decision of the Full Bench was that 'dishonestly' and 'fraudulently' do not cover the same ground and that an intention to defraud does not necessarily involve deprivation of property actual or intended. The learned Judges supported this view by a reference to *Reg. vs. Toshack* (4 Cox 38) and overruled *Queen-Empress vs. Haradhan* (19 Cal. 380). In the latter case Norris and Beverley JJ. had held that the fabrication of a false certificate in order to get permission to sit for an examination was not fraudulent. This is in conflict with the English cases I have cited and the distinction I have tried to draw between fraudulent and dishonest acts. Abbas Ali's case has subsequently been followed in *Kedar Nath Chatterji vs. King-Emperor* (5 C. W. N. 897).

What constitutes an intention to defraud was discussed in *Babu Ray vs. The Emperor* (9 C. W. N. 807). In this case the Collector was withholding payment of money which Babu Ray was entitled to draw and was subsequently induced to make the payment on the basis of false receipts alleged to have been signed by two others on whose signature the Collector was unnecessarily insisting,

apparently under a wrong view of the law. It was held that the trick by which the Collector was induced to deliver up property which he was erroneously retaining, did not constitute fraud, and was, therefore, not an offence under Section 415 of the Code. Reference was made to the case of *Reg. vs. Duthibeva* (2 B. L. R., Cr. 1, 25) where one Kumari after having executed a conveyance had sent another person to register the document by personating her. It was held that there had been no offence under Section 415 of the Code, as the false personation did not disclose an intention either to defraud or to cause injury to anyone. In the first of these cases there is also reference to a Madras case (*Reg. vs. Longhurst*) which however was decided before the Penal Code came into force and is not therefore a direct authority on the question. In this case a person was indicted for obtaining a carriage from the prosecutor by a false pretence. The defence was that the prosecutor owed him money and he got the carriage in order to compel payment. In charging the jury for an acquittal Bittleston J. said: "If you think the accused did not obtain the carriage with the intention of keeping it, but of putting a screw upon the prosecutor then I think he is not guilty of the offence." These cases, specially the first two, leave the law in a very unsatisfactory condition although regarding the particular question arising in the second case the defect has been remedied by legislation (Section 82 of the Registration Act).

I now turn to some of the more important cases in which the meaning of the word 'dishonestly' has been discussed.

In the case of *Emperor vs. Nabi Bukhsh* (25 Cal. 416) where the accused had removed his master's box to a cowshed and kept it concealed there in order, as he said, to give a lesson to his master, it was held that this did not amount to wrongful loss. "Of course," said the Judges, "when the owner is kept out of possession with the object of depriving him of the benefit arising from the possession even temporarily, the case will come within the definition. But where the owner is kept out of possession temporarily, not with any such intention, but only with the object of causing him trouble, in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, it is difficult to say that the detention amounts to causing wrongful loss in any sense. In the case of *Prasanna Kumar Patra vs. Udaysant* (22 Cal. 660) it was held that gaining possession of property for a temporary purpose by a creditor in order to coerce the debtor to pay his debt was not taking dishonestly. The cases for and against this view will be found fully discussed in the judgment of the learned Judges (Petheram C.J. and Beverley J.) which show considerable divergence in the decisions of the various Courts in India. This case came up for discussion in the case of *Sree Churn Changa* (22 Cal. 1017), and was overruled. Reliance was placed on the words of Section 23 and the learned Judges quoted with approval the following passage in Mayne's Penal Code:—

"It is sufficient to show an intention to take dishonestly the property out of any person's possession without his consent, and that it was

moved for that purpose. If the dishonest intention, the absence of consent, and the moving, are established, the offence will be complete however temporary may have been the proposed retention."

You will observe that a mere intention to defraud without any intention to cause wrongful gain to one person or wrongful loss to another is sufficient for offences under Sections 206, 207, 208, 210, 239, 240, 242, 243, 250, 251, 252, 253, 261, 262, 263, 264, 265, 482 and 488, but the latter intention is essential to constitute the offence of theft, extortion, criminal misappropriation, criminal breach of trust, receiving stolen property and other similar offences, and either intention would suffice to constitute offences under Sections 209, 246, 247, 415, 421, 422, 423, 424 and 477. An examination of these sections would further elucidate the difference between the two terms.

CORRUPTLY—MALIGNANTLY—WANTONLY.

'Corruptly' occurs in Sections 219 and 220 only and requires no explanation. Corruptly.

'Malignantly' occurs only in Sections 153 and 270. It is synonymous with 'maliciously' which occurs in Sections 219, 220 and 270. A thing is done maliciously if it is done wickedly, or in a depraved, perverse or malignant spirit or in a spirit regardless of social duty and deliberately bent on mischief. Any formed design of doing mischief may be called malice. This is the explanation given of the word by Russell. Sir Fitz James Stephen calls it a vague general term introduced into the law without much perception of its vagueness and gradually Malignantly.

reduced to a greater or less degree of certainty in reference to particular offences by a series of judicial decisions. The judicial decisions are, however, wanting in India as the word is not used more than about three times in the Code. 'Malice' in its ordinary non-technical sense means any wicked or mischievous intention of the mind, a depraved inclination to mischief, a wanton disregard of the rights or safety of others. In the absence of any definition we may take it that the word has been used in its plain dictionary meaning. The word is apparently very comprehensive in its nature and would cover all wicked mischievous or perverse acts.

Wantonly.

'Wantonly' occurs in Section 153 and means doing a thing recklessly, that is, without regard to consequences.

RASHLY—NEGLIGENTLY.

Rashly,
Negligently.

The words 'rashly' and 'negligently' have not been explained in the Code. They are used in the definition of offences not to denote a positive evil intent, but to denote that want of care with which reasonable people are expected to act and the want of which is considered culpable. These words were explained by Mr. Justice Holway in the case of *Nidamarti Nagabhushanam* (7 Mad. H. C. R. 119) and was quoted with approval in the case of *Empress vs. Kitabdi Mandal* (I. L. R., 4 Cal. 764). Mr. Justice Holway says: "Culpable rashness is acting with the consciousness that mischievous and illegal consequences may follow, 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 imputability arises from acting despite of the consciousness.

"Culpable negligence is acting without the consciousness that illegal or mischievous effects will 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 the consciousness.

"The imputability arises from the neglect of the civic duty of circumspection.

"It is manifest that personal injury, consciously and intentionally caused, cannot fall within either of these categories, which are wholly inapplicable to the case of an act or series of acts, themselves intended, which are the producers of death."

The English law on the subject of culpable negligence is thus stated in Stephen's Digest of Criminal Law, Art. 232:—

"Everyone upon whom the law imposes any duty, or who has by contract or by any wrongful act taken upon himself any duty, tending to the preservation of life, and who neglects to perform that duty, and thereby causes the death of any person, commits the same offence as if he had caused the same effect by an act done in the state of mind, as to intent or otherwise, which accompanied the neglect of duty:

"Provided, that no one is deemed to have committed a crime only because he has caused the death of or bodily injury to another by negligence which is not culpable. What amount of negligence can

be called culpable is a question of degree for the jury, depending on the circumstances of each particular case. An intentional omission to discharge legal duty always constitutes culpable negligence.

“Provided also that no one is deemed to have committed a crime by reason of the negligence of any servant or agent employed by him.

“Provided also that it must be shown that death not only follows but is also caused by the neglect of duty.”

The following illustrations given by the same learned author based on the decisions of English Courts will help to elucidate the statement of law quoted above :—

“(1) It is *A*'s duty, by contract, as the banksmen of a colliery shaft, to put a stage on the mouth of the shaft in order to prevent loaded trucks from falling down it. *A* omits to do so, either carelessly or intentionally. A truck falls down the shaft and kills *B*. *A* is in the same position as if he had pushed the truck down the shaft carelessly or intentionally.

“(2) *A*, acting as a surgeon, physician, or midwife, causes the death of a patient by improper treatment, arising from ignorance or inattention. *A* is not criminally responsible, unless his ignorance, or inattention, or rashness is of such a nature that the jury regard it as culpable under all the circumstances of the case. It makes no difference

whether *A* is or is not a properly qualified practitioner.”

The expression ‘gross negligence’ has not been used in the Code. It, however, makes no difference for, as has been observed by an eminent Judge, it is the same thing as negligence with the addition of a vituperative epithet. Rash and negligent acts have been made penal where they affect the safety of the public such as rash driving or riding on a public way (Section 279), rash navigation of vessels (Section 280), negligently conveying for hire any person by water in a vessel (Section 282), negligent conduct with respect to—

- (a) poisonous substances, Section 284,
- (b) fire or any combustible matter, Section 285,
- (c) any explosive substance, Section 286,
- (d) machinery, Section 287,
- (e) animals, Section 289,

and generally rash and negligent acts endangering life or personal safety of others. It has also been made penal by rash or negligent act to cause hurt (Section 337), to cause grievous hurt (Section 333), to cause death (Section 304A).

HEEDLESSLY.

‘Heedlessly’ has not been used in the Code, but has nearly the same meaning. It means the doing of a thing without due regard to consequences.

Gross
negligence.

Heedlessly.